CONTRACTUALIST JUSTIFICATION AND THE DIRECTION OF A DUTY[1]

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ABSTRACT

To whom is a duty owed? Contractualism answers with an interest theory of direction. As such, it faces three challenges. The Conceptual Challenge requires acknowledgment that a duty is conceptually distinct from an interest. The Extensional Challenge requires an account of cases in which one who is owed a duty does not take an interest in the duty, or does not take as much of an interest as someone who is not owed the duty. The Positivist Challenge requires explanation of the great flexibility of law and other social practices in positing duties that do not reflect the landscape of moral interests. Contractualism can be shown to meet these challenges once we acknowledge the centrality of the idea of a generic interest. Focusing on generic interests also illuminates the distinctive form of respect involved in directedness.

If I promise Stephanie that I will help her move apartment, then, in ordinary circumstances, I ought to help her move. What is more, I owe it *to Stephanie* to do what I have promised. It almost goes without saying that I owe it to Stephanie to keep my promise and not to Talya, to whom I made no such promise. Talya may stand to benefit from my keeping the promise I made to Stephanie. Indeed, if I have led Talya to rely on the fact that I will do what I have promised, knowing that she will suffer a great burden if I do not, then I may well owe it to her to do what I have promised. But that is a different obligation. My promissory obligation is owed to the promisee.

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Given that I owe a promissory obligation, why do I owe it to *the promisee*? That has something to do with the fact that I promised *her*. But a wide variety of moral duties are directed, not just those arising in cases of promising or other interactions, and not just those arising in the context of relationships. I owe it to my partner to tell the truth about our joint finances, but I also owe it to the pedestrian crossing the street to drive more carefully. And I owe it to each individual whom I have not yet encountered to refrain from insulting them on account of their religious beliefs, and to take reasonable measures to limit the harmful effects of my activities on their health. In each of these cases we can ask a similar question: why do I owe it to *that* person (or those people), rather than others? It could be that one thing is to be said about why promissory obligations are owed to promisees, and another thing is to be said about why duties of care are owed to pedestrians. But that would be a discovery. The tug of explanatory unity is as strong in morality as elsewhere. It is worth considering whether all these cases of owing it to another share some principle upon which we pick out that other.

I argue that the common principle is that the *addressee* of the duty (i.e. someone like Stephanie) has an interest of a special kind. This **Interest Theory**, crudely stated as it is, must overcome certain hurdles. (i) *The Conceptual Challenge.* The Interest Theory could not be an account of what a directed duty is, since having an interest is conceptually distinct from being owed a duty. So we should clarify what aspect of directed duties the Interest Theory aspires to explain. I set out the explanatory task in Section I, and show that the Interest Theory can meet it in Section II. (ii) *The Extensional Challenge.* The addressee of a directed duty does not always take an interest in the fulfillment of the duty; and even when she does, there may be third parties who take a greater interest. When I promise Stephanie that I will help her move, she may fail to

care much about the assurance that I will help her; she may even hope that I don't. And even if Stephanie does care, her sister Nathalie may care even more, since that will let her off the hook. I consider these two kinds of counter-example in Section III. (iii) *The Positivist Challenge.* Directed duties appear not only in morality, but also in artificial normative practices like law, etiquette, and the rules of sports. These practices seem capable of positing all sorts of duties, grounded either in the public interest, or in the apparent public interest, or in nothing at all. Can a theory that connects directed duties to real interests really make sense of the extension of directed duties beyond morality? I suggest an answer to this question in Section IV.

I said that the Interest Theory is a first approximation of an answer to our question. A more precise answer is the **Generic Interest Theory**: a directed duty is owed to the person whose *generic interest* grounds the duty; where S has a generic interest in x if it is reasonably foreseeable and reasonable that a representative person in S's position take an interest in x. Generic interests are not statistical representations of what people do take an interest in, or of the the expected strength of their interest-taking. The question whether some S has a generic interest is instead a normative one—though not a question-begging one, since it is not a function of whether S is owed a duty. According to Scanlon's Contractualist account of justification, a duty is grounded in the generic interest which is pairwise dominant in a comparison of the generic interests that favor alternative principles.[1] This suggests a **Contractualist Generic Interest Theory** (I'll abbreviate this to '**Generic Contractualism**'): the person to whom a directed duty is owed is the person whose generic interest is pairwise dominant in a comparison of the generic interests that favor alternative principles. I defend this theory on the bases that it identifies the right ad-

[1] T. M. SCANLON, WHAT WE OWE TO EACH OTHER (1998) [hereafter SCANLON (1998)], at 189–247.

dressees of directed duties, and that it is a plausible way to derive directed duties from generic interests.

Generic Contractualism is a plausible but surprising account of directed duties. First, if Contractualism is fertile ground for directed duties, then it may well also be fertile ground for correlative claim-rights, and that will come as a surprise to some. Second, Generic Contractualism tells us that the apparently intimate relation of owing it to another to do something is grounded in impersonal features of that other person, that is, the interests that a representative person in their position would reasonably care about. Thus Generic Contractualism is a two-level theory. At one level, we ask what duty an agent owes by considering representative persons and their reasonable interest-takings. That is a question about the justification of a duty. At the second level, we ask to whom that duty is owed by considering who stands in for the representative person whose reasonable interest-taking grounds the duty. That is a question about the accountability of the duty-bearer. The question for such a theory is whether these two levels are in harmony with each other. Suppose that I owe it to Stephanie to keep my promise, and that this is due to two facts: (i) she occupies the position of promisee and (ii) promissory duties are justified by the fact that the representative promisee reasonably takes an interest in assurance and this interest is more important than the interests that favor alternative arrangements of duty. Now we may ask why Stephanie should benefit from a fact that may have little to do with her, namely fact (ii), which is a fact about representative persons in her position and not about her. To ask this is to ask no less than why generic interests play the role that they do in our moral deliberation. The answer I give in Section IV is that to treat another with sensitivity toward their generic interests is a form of

respect, since it gives them room to take an interest in their world in all the ways that it is reasonable for them to do so.

I.

We want to know why a duty owed to Stephanie is owed to Stephanie rather than to another. That is just one aspect of understanding its *directedness*. Something similar to directedness is evoked when one says that Stephanie has a right to my keeping the promise, or that she has a claim against me to do what I have said, or that by breaking my promise I not only do wrong but wrong her. These locutions ('having a right against another,' 'having a claim against another,' 'wronging another') all make use of relational normative concepts; that is, concepts that essentially involve argument places for more than one person.[2]

An account of directed duties seeks to explain what is special about their directedness; what directedness 'adds' to the concept of duty. In one sense, we already know what it adds: the thought that the duty is owed to someone. So what exactly needs explanation? There are three distinct questions that we might ask:

> **Direction.** When is a directed duty owed to S rather than T?

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[2] This is a narrower category than that of concepts having more than one argument place that may refer to a person. The agentive *ought* of 'Amir ought to practice scales' involves at least two argument places, one for the agent Amir and one for the action of practicing scales, but it may also include further implicit argument places, such as for context and contrast class. And the names of persons may appear in several of these argument places, as in 'Amir ought to learn Bird's solos, given that he wants to play like Bird.' But only the agent argument place of *ought* must refer to a person, whereas the first two argument places of *J owes it to S to phi* must refer to persons. Which entities count as persons? Can I owe it to my dog to take it to the vet? And can I owe it to T-Mobile to pay my phone bill? These are questions to be considered elsewhere.

> **Practical Difference.** What difference does it make to what we appropriately do that a duty is directed rather than not?

> **Importance.** What is lost by a moral community that fails to acknowledge the directedness of directed duties?

A newcomer to our moral community who understood the concept of *duty* but not of *directed duty* would need answers to the first two questions in order to find their way around our community. And a member of our moral community might ask the third question when deciding whether to abandon some of what we do. (We stand some chance of giving such a person a sensible answer, though I think it less intelligible that we might explain to a member of a different moral community what they would 'gain' by doing things our way.) Being able to answer these questions, we are able to make sense of what we do and why we do it.

Another way to put this is that the three questions prompt a normative-functionalist explanation of the target phenomenon. Normative-functionalist explanation differs from causal-functionalist explanation in that the inputs and outputs that make up a thing's functional role are not causal relations but normative statuses. Consider a game of chess in which I am playing white. When the game begins, I may move my knight on b1 to either a3 or c3, and I need not move it anywhere. That describes the normative status of my knight. If I do move it to a3 I thereby change its normative status: on my next move I may move it to any empty square among b1, c3, c4, and b5. By occupying a3, I may change the normative statuses of other pieces. For example,

if your king is on b5, then you must move your king away from b5, and you may not move any other piece unless by doing so you eliminate my knight on a3. In this way the rules of chess could be reformulated as a (very large) game tree of possible changes in the normative statuses of chess pieces, and each chess piece could be described in terms of a (very large) table taking normative status inputs (or normative circumstances) to normative status outputs (or normative consequences).[3]

We should take a similar approach to the central concepts involved in our moral practices. Compare what would be involved in explaining to a legal tourist what our notion of *judge* amounts to. We would say what makes it appropriate to count someone as a judge (perhaps: they have certain qualifications and have been through a certain nomination and confirmation process), and also what counting someone as a judge makes it appropriate for them to do (perhaps: determine the outcome of certain cases, sign certain orders and warrants, and so on). At this point it is natural to ask a further question, one that does not so much describe the judicial role as ask about its importance: why does our legal practice make place for a role like that? (Perhaps: a system that aims to settle disputes and maintain civil peace must identify individuals who carry sufficient effective authority to serve as relatively final arbiters.) These three parts of an account of the judicial role correspond to the three questions that I ask about the directedness of a duty. That is, we may ask what makes it appropriate to think that one's duty is owed to a particular person. That is the question of Direction. We may also ask what impact the directedness of a duty has on the statuses of participants in our moral practice: what does it make it appropri-

[3] Taking a similar approach toward speech acts in general is suggested by J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (2nd ed., 1962); and toward assertion, as well as its content, by ROBERT B. BRANDOM, MAKING IT EXPLICIT (1994), at 141–98.

ate or inappropriate for anyone to do? That is the question of Practical Difference. Finally, we may ask why it is important that our moral practice include such distinctively directed duties. That is the question of Importance. It is not obvious that there is any additional metaphysical question about directedness that we would need to answer for this sort of practical orientation.[4]

Our question is Direction. It is one aspect of a question we could ask about directed duties more generally, and which we might call '**Incidence**': when does J owe a duty to S to phi? In answering Direction I will necessarily say something about the Incidence of a duty, but Direction is our target. It is also the greater challenge for an Interest Theory. It is one thing to say that J owes a duty to S to phi because someone has a special interest which is best protected by imposing a duty on J to phi. We are very likely able to locate some interest or set of interests that any duty serves to protect. It is harder to maintain that the duty is owed to S because S has the special interest that the duty serves to protect, as we shall see.

It is worth distinguishing the above questions because failure to do so can easily lead to confusion. In particular, following the example of debates about the nature of rights, it is tempting to propose competing Interest and Will Theories of directed duties:

> **Interest Theory.** It is necessary but insufficient for J to owe a duty to S to phi that J's not phi-ing would set back an interest of S.

[4] Compare Michael Thompson, *What is it to Wrong Someone? A Puzzle about Justice*, *in* REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 339 (R Jay Wallace, Phillip Pettit, Samuel Scheffler, and Michael Smith eds., 2004).

Will Theory. It is necessary and sufficient for J to owe a duty to S to phi that S has the power to demand that J phi or release J from the obligation to phi.[5]

These look like attempts to say what rights are; disparate and potentially incompatible attempts at that, at least because the sufficient conditions of the Will Theory conceivably include cases that do not meet the necessary conditions of the Interest Theory. Suppose I am assisting Stephanie in a magic show, and I promise her that I will dance like a chicken whenever a randomly selected member of the audience insists that I do so. The Will Theory argues that I owe it to the relevant audience member to dance like a chicken, since they have the power to demand that I do so and release me from this obligation. And the Interest Theory argues that I do not owe a duty to this audience member, who may find no amusement or entertainment in my dancing like a chicken.

Traditionally, the Interest Theory is also thought to ascribe duties too widely. The fact that my breaking my promise to Stephanie results in her becoming unusually upset and thereby sets back her employer's interest that she not be distracted from her work should not mean that I owe a duty to her employer to keep my promise. That potential objection is warded off by the above formulation, which specifies that having an interest is not a sufficient condition for being owed a duty. But there is a deeper problem for the Interest Theory. Suppose that we find the right sufficient condition, and we are now able to explain exactly when and why a duty is owed to some

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[5] In formulating these theories I partly follow the parallel theories of rights presented in Matthew Kramer, *Rights Without Trimmings*, *in* A DEBATE OVER RIGHTS 7, 62 (Matthew Kramer, N. E. Simmonds, and Hillel Steiner eds., 2002). Yet I don't follow Kramer completely for fear that his formulation begs important questions against will theories. For example, in the original Kramer spells out the Will Theory of Rights as requiring that one is 'competent and authorized' to demand or waive enforcement of the right; but whether competence is required for having a power is just the sort of contentious issue which might settle the debate about the adequacy of will theories one way or the other.

individual. For the sake of argument, suppose that the sufficient condition is the possession of a certain kind of interest, call it a 'special interest.' Now suppose further that we learn that some individual S has a particular special interest. What do we learn at this point? We learn that S has the special interest, and also that S is owed a duty in virtue of that interest. But what is added by this second fact? If we are puzzled about what it is to be owed a duty, then learning when particular individuals are owed particular duties does not remove our puzzlement. The Interest Theory does not explain why it is informative to learn that S not only has a special interest, but is owed a duty because of that interest. That is, the Interest Theory does not answer the question of Practical Difference.

The Will Theory has a complementary blind spot. Traditionally, the pressing question for it is whether a person who is unable to demand performance or release the agent from the obligation to perform, say because they are an infant, is therefore not owed any duties. This question should certainly inspire attempts at solution on the part of the Will Theorist, but it does not threaten to render the theory a non-starter. A deeper problem, which does pose such a threat, is the Antecedence Objection.[6] Suppose that we have fine-tuned the conditions of the Will Theory so that they accurately reproduce the incidence of directed duties. And now suppose that we want to know whether S is owed a duty that J phi, and the Will Theorist responds by saying that it depends on whether S has the power to demand or waive J's phi-ing. A suitable retort is that we could hardly be expected to know whether S has such powers if we did not already know that S is owed a duty. The instinct behind this retort is that facts about powers, such as the power to demand and waive performance, flow from facts about duties, rather than the reverse. The in-

[6] Simon Căbulea May, *Directed Duties*, 10 PHILOSOPHY COMPASS 523 (2015).

stinct is well-grounded, since the relevant powers make sense only against the backdrop of the duty. The power to demand performance is not the power of a tyrant but of one who asks for what is rightfully theirs; and the power to waive performance is the power to make it that what was owed no longer is. That duty is implicit in these conceptions of power makes the Will Theorist's response question-begging, and it also renders uninformative the Will Theoretic answer to the general form of our question: to whom is an (arbitrary) duty owed? This general version of our question asks what the precursor is for being owed a duty—what normative ingredients go into that status. The Will Theory instead tells us what follows from the status.

Failing to distinguish between the questions of Incidence and Practical Difference leads us to see the Interest and Will Theories as competitors, each unsuccessful in its own way. We therefore miss the fact that we need two accounts rather than one: an account of what circumstances make it appropriate to say that S is owed a duty, and an account of what follows from the fact that S is owed a duty.[7] The danger exists even for a 'hybrid theory' of the sort proposed by Gopal Sreenivasan.[8] In its simplest version, that theory looks like a Will Theory that has been gerrymandered to account for typical counterexamples: J's duty to phi is owed to S just in case either (i) S has the power to waive J's duty to phi or (ii) S has no power to waive J's duty but that is because S's disability advances S's interests on balance.[9] In response to traditionally problematic cases in-

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[7] Nicolas Cornell, *Wrongs, Rights, and Third Parties*, 43 PHILOSOPHY & PUBLIC AFFAIRS 109 (2015) also suggests a conciliatory strategy, proposing that there are two different phenomena, rights and wrongs, each of which calls for a different theory. My conciliatory strategy is different in that I think that there is one phenomenon to be explained, but that there are different inquiries (or moments of inquiry) about that phenomenon for which the Interest and Will Theories are differently suited.

[8] Gopal Sreenivasan, *Duties and their Direction*, 120 ETHICS 465 (2010); Gopal Sreenivasan, *A Hybrid Theory of Claim-Rights*, 25 OXFORD JOURNAL OF LEGAL STUDIES 257 (2005).

[9] Sreenivasan, *Duties and their Direction*, *supra* note 8 at 486.

volving addressees of duties who don't have the full powers ascribed by the Will Theory, this hybrid theory notices that the addressee is the one whose interests are responsible for the deficit. But this version of the theory still falls foul of the Antecedence Objection. In the unproblematic cases, the theory simply presents us with the Will Theory, and shares its lack of informativeness. Indeed, it's not any better in a problem case, where it stops short of basing the direction of a duty in the interests of the addressee. Instead the direction of the duty is still grounded in S's measure of power over the duty, which takes the fact that S is owed a duty for granted. While S's interests provide us with an explanation for why she lacks the power to (say) waive the duty, we do not yet have an explanation for why she is owed the duty in the first place. A more elaborate version of the theory fails for similar reasons.[10]

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[10] The complex version of Sreenivasan's theory recognizes that S's control over the duty may vary in more ways than simply having or lacking the power to waive the duty. For example, S may be unable to waive the duty in certain circumstances; and S may lack the power to waive a duty though S has a surrogate who is empowered to waive it. Thus: J's duty to phi is owed to S just in case S's measure (and, if S has a surrogate T, T's measure) of control over a duty of J's to S matches (by design) the measure of control that advances S's interests on balance. But this formulation also leaves direction unexplained, for it relies on an implicit assumption that we know whose measure of control is important.

The problem arises for two different interpretations of the account. (i) Consider the most rigorous interpretation of the formulation, on which S ranges over the entire domain of agents in each of its appearances in the formulation. On this interpretation, the theory over-generates. Suppose I make a promise to Stephanie. Thandi, an unrelated third party, does not have any measure of control over my promissory duty to Stephanie, and that is because her interests are not affected by whether I fulfill that duty or not. Indeed, giving her some measure of control might give her a burdensome sense of responsibility, so it is by design that she has none. But the promissory duty is not owed to her, though she could be substituted in for S in the sophisticated formulation. (ii) Consider an interpretation on which S ranges over the domain of agents whose interests are protected by the duty. This response also fails to meet the Antecedence Objection, since its restriction on the variable S implicitly appeals to the interest-theoretic idea that only certain agents have a reason to have control over the relevant duty.

Note that (ii) is a much more plausible response to the Extensional Challenge, but that it doesn't seem to meet it, especially if the theory must account for the duties posited by law. Consider your right not to be subjected to unwarranted searches. Suppose that you may release a police officer from their duty not to search you by consenting to the search; and so may a judge, by granting a warrant. You have a measure of control over the police officer's duty that advances your interests, though not optimally so. Though we would not describe the judge's power as one of waiver, it is nonetheless a measure of control over the duty, and one that is designed to optimally advance the interests of various members of society, including you. What is more, control is given to the judge because the judge is best placed to act as a surrogate for the various members of society who have an interest in the matter but are ill placed to determine how the duty should be controlled. On the hybrid theory, then, it seems as if the duty is owed to members of society, since control is vested in a surrogate in a way that—by design—best advances their interests on balance. But intuitively the duty is owed to you. I take this counterexample to be of the kind explored in greater detail in Matthew H. Kramer, *Some Doubts about Alternatives to the Interest Theory of Rights*, 123 ETHICS 245, 259–62 (2013). But my diagnosis differs: the problem is that the interests that explain why someone has a measure of control over a duty are not necessarily the same interests that ground the duty in the first place, but it is these latter interests, as I will argue, that also ground direction.

I have been urging that we deny that what it is to be owed a duty is a univocal question. By putting the Interest Theory and the Will Theory in competition with each other, as if they did answer the same question, we miss the fact that we need two accounts rather than one: an account of what circumstances make it appropriate to say that S is owed a duty, and an account of what follows from the fact that S is owed a duty. The Interest Theory is a natural choice for the former sort of account, and the Will Theory a natural choice for the latter. This addresses our first challenge, which is to say what the Interest Theory is supposed to be, if not a crude reduction of duties to interests. We are not committed to a conceptual conflation of interest and duty if we use the Interest Theory only to explain the incidence and direction of directed duties.

II.

Section I showed that an interest theory can meet the Conceptual Challenge. My thesis is that a contractualist interest theory can meet all the challenges. But contractualism is not obviously an interest theory, and it is even less obviously an interest-theoretic answer to the question of Direction. So, in order to show that contractualism should be understood in these ways, this section will set out a naive version of a contractualist interest theory. This naive theory won't yet be able to meet the Extensional Challenge, but in the next section I will present a more elaborate version of the theory that can.

I will begin with Scanlon's formulation of contractualism in terms of the non-rejectability of rules.

> **Contractualism.** An action is wrong just in case it is prohibited by any set of principles that could not be reasonably rejected by all those who seek such reasonably non-rejectable principles.[11]

We can derive from this formulation a heuristic for determining whether a particular principle is morally defensible: a principle of morality is one which could not be reasonably rejected (by those seeking such principles). Note that the formulation (and the heuristic) take deontic rules as their object and non-rejectability as their standard, and do not mention interests explicitly. Nor does Contractualism mention anyone special, though agents, patients, and those who seek non-rejectable principles are implicit in its formulation. So far, then, there is no express answer to the question of Direction. What is more, the reasonableness of rejecting an action or the set of principles that permits it is not dependent upon a perspective. It is true that someone who is harmed by an action may be moved to reject the action, though it is not at all certain that she would do so, or even that she would be more likely to reject it than an observer. But Contractualism asks whether someone would have reason to reject the action, and whatever such reason the victim would have would also be a reason for any bystander.

Consider Scanlon's account of promising, which begins with the idea (approximately) that promises are valuable because they give us assurance. We often have reason to want assurance that others will act in particular ways. That may be because we wish to secure other interests through reliance, or because we want peace of mind, or certainty. Given that assurance is valu-

[11] See, for example, SCANLON (1998), *supra* note 1, *at* 153. Note that 'reasonably' is to be understood in a morally substantive sense, and could not be replaced with 'rationally.' On the meaning of 'reasonableness,' and a defense of the contractualist's use of the term against the charge of circularity, see id., pp. 191ff.

able in these ways, we have reason to reject principles that do not require us to act in ways that honor the assurances we give each other. When compared with the reasons we have to dishonor such assurances, we find that the assurance-based complaint is relatively serious, and that we could not reasonably reject a principle requiring that we do what we have assured others we will do. The finer details of this principle, which Scanlon dubs ‘principle F,’ are not important to the present discussion.[12] Roughly put, then:

> **Principle F.** If (1) A assures B that A will phi, (2) A and B have the right kind of mutual knowledge and intentional attitudes towards this assurance, and (3) B does not consent to A not phi-ing; then in the absence of special justification A must phi.[13]

More could be said about the distinctive way in which a promissory obligation is formed,[14] but the heart of the Contractualist account is that failing to keep one’s promise is wrong because it violates Principle F, a principle which could not be reasonably rejected. It is this basic explanatory strategy that Margaret Gilbert and Leif Wenar think unable to capture directedness.[15]

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[12] In particular, I leave aside the details regarding what sort of communication of assurance is required to trigger an obligation.

[13] SCANLON (1998), *supra* note 1, at 304.

[14] For a start, one may knowingly assure another that one will phi—and so incur a non-promissory obligation under F—without really promising to phi. What is needed in addition is that one engage F in the right way, not by some magic combination of words such ‘I promise …’, but by assuring another that one will phi by one’s acknowledgment that it would be wrong not to phi. There are some complexities here. For example, does such an account non-circularly capture the apparent reflexivity of promissory obligation, that is, the sense that it is one’s acknowledgment that it would be wrong not to phi that grounds the obligation to phi? (For skepticism that such an account must be reflexive, and skepticism that Scanlon’s account avoids circularity, see Niko Kolodny and R. Jay Wallace, *Promises and Practices Revisited*, 31 PHILOSOPHY & PUBLIC AFFAIRS 119 (2003). Such complexities may safely be ignored for current purposes.

[15] Both put their concerns in terms of whether Contractualism can capture the notion of a *right*, say of a promisor against the promisee. Margaret Gilbert, *Scanlon on Promissory Obligation: the Problem of Promisees’ Rights*, 101 JOURNAL OF PHILOSOPHY 83, 91 (2004) [hereafter Gilbert, *Scanlon on Promissory Obligation*]; Leif Wenar, *Rights and What We Owe to Each Other*, 10 *Journal of Moral Philosophy* 375 (2013).

Gilbert's criticism begins with the reasonable thought that the directedness of a promissory obligation entails that the promisee has special standing with respect to the promisor. Suppose that Amina promises Barry that she will call him on Monday. Then Barry has special standing with respect to Amina that consists in it being appropriate for him to insist that Amina call him on Monday, and to rebuke her if she does not. But this special standing is not explained by the fact that Amina would infringe Principle F if she broke her promise. For the mere fact that she infringes a principle is something that anybody could judge; and since Barry has no special competence to judge that the principle has been infringed, symmetry seems to require that either everybody has standing to rebuke Amina for the infringement, or nobody does.[16] One might think it obvious that someone should have special standing to demand compliance and rebuke infringement; but it is not obvious from Principle F why this person should be Barry.

A tempting suggestion is that either Principle F does in fact announce who the addressee is, if we look hard enough; or that we should rewrite it so that it does.[17] The latter suggestion leaves open who should be written into the principle as addressee. The answer may seem obvious to intuition, but we want a theory. An apparently plausible theory, which we can also employ in service of the first suggestion, is a version of the Will Theory: Principle F implicitly picks out the promisee as the addressee, since it explicitly picks her out as having the power to release the promisor.[18]

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[16] This argument is suggested by Gilbert, *Scanlon on Promissory Obligation*, *supra* note 15, *at* 95–96.

[17] As Joseph Raz does in his presentation of a principle of promissory obligation, in *Promises and Obligations*, *in* LAW, MORALITY, AND SOCIETY 210 (P. M. S. Hacker and J. Raz eds., 1977) [hereafter Raz, *Promises and Obligations*].

[18] Principle F mentions the promisee in other ways too, and so one might think there are other ways of simply identifying the addressee by reading the principle. But these strategies fail for the same reasons that the proposal to identify the addressee in terms of the consent clause fails.

Gilbert considers and rejects this Will Theoretic version of a Contractualist answer to Direction, though for the wrong reason. Her concern is that the power to release can be granted by the promisor to a third party, as when (in her example) Jane promises Diana that she will look after Timmy unless Timmy says it's okay for her not to. Although Timmy can release Jane from having to perform, we judge that it is Diana who is the one with special standing to insist on Jane keeping her promise and complain if she doesn't. The Will Theoretic Contractualist will be quick to point out that there is a fundamental difference between Timmy's power of release, and Diana's power, which she retains. While Timmy can release Jane from her obligation to look after him, he cannot release her from the conditional obligation that she look after him unless he consents. Only Diana can release Jane from that obligation (call this 'the power of fundamental release'). And that distinction is not as slippery as it may at first seem, if we focus on the fact that Diana can assign her power to another, whereas Timmy cannot assign his power to another. The real problem is that the Will Theoretic Contractualist has not explained why Diana has this distinctive power of fundamental release, nor why addresseeship should track that power. Without such an explanation, we encounter a further problem when confronted with a duty which does not confer on the addressee a power of release, such as the duty not to enslave.

A different way in which Contractualism answers the question of Direction is suggested by seeing that it is an instance of the 'complaint model' of moral deliberation.[19] Contractualism holds that correct moral principles are determined by the comparison of complaints: if there is a complaint against a set of principles that is stronger than any of the complaints against an alternative set of principles, then the first set is reasonably rejectable. The question is whether it

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[19] The terminology is Derek Parfit's. SCANLON (1998), *supra* note 1, at 229.

makes sense to think that complaints rest in the hands of particular people; which is to say, whether it makes sense to think there is some important difference between the fact that a principle is unjustifiable, and the fact that it is unjustifiable to a particular person.[20] Surely, if promise-breaking cannot be justified to a promisee in some situation, it is because it could not be justified to anybody.

We can make sense of the thought that S has a distinctive complaint against a principle by seeing it as shorthand for the idea that the complaint protects an interest that S has, where S has an interest in some x to the degree that x makes S's life go better. Of course, it is not enough to have an unmet interest; complaint also marks the fact that things fall below some expected standard—one complains about the tea not because it is does not have the perfect strength, but because it is *too* weak. This is true also in the Contractualist context, and is implicit in the ideas that a principle must be *reasonably* rejectable and that the seriousness of complaints is to be compared.[21] But that does not detract from the fact that the availability of a complaint to S reflects the fact that S has an interest in the relevant standard being met.

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[20] As Scanlon frequently glosses the Contractualist formula, it is concerned with which of our actions are justifiable to others. *Id.* at 189ff.

[21] Note also that it is implicit in the idea that Contractualism is a theory of 'narrow morality'—i.e. of interpersonal moral relations, rather than, say, of whether we are bound to protect the redwoods or the Bamiyan Buddhas—that we are interested in complaints that protect the *personal* interests of individuals. Though the idea of a directed duty is correctly associated with the idea of a personal interest, this is not the place to explore the merits of limiting Contractualism to such duties and interests.

The result is that Contractualism can be understood in terms of interests: a duty is grounded in the pairwise dominance of interests that are protected by complaints.[22] That gives us our first pass at a Contractualist Interest Theory:

> **Naïve Contractualist Interest Theory.** S is the one to whom J owes it to phi if it is S's interest that is protected by the complaint that grounds J's duty.

This overcomes the basic challenges to the Interest and Will Theories. It is not subject to the Conceptual Challenge since it is not an attempt to say what directedness is, but rather to answer the question of Direction. And it is not subject to the Antecedence Objection since it does not rest on notions like *power to release* and *special standing* that accompany directedness but are downstream from the question of Direction. What is more, this naïve theory seems to be implied when we commonly say, where a morally motivated agent J fulfills his duty to S, that J does so 'for S's sake.' If I promise Stephanie that I will help her, then I may well be moved to help her by thoughts about her, and in particular by thoughts about how she would be worse off if I did not help her. It is true that I may also imagine how Stephanie would complain if I did not fulfill the

[22] Perhaps Contractualism *must* be understood in terms of interests. In the text I suggested that a complaint implicitly indicates that some expectation hasn't been met. An objection to this, which I don't find initially compelling, is that Contractualism is uninformative if complaints are understood in this way. (I am unpersuaded for reasons given by Scanlon in his response to a similar objection to the Contractualist's use of 'reasonableness.' See SCANLON (1998), *supra* note 1, at 194.) But suppose this objection turned out to be correct. Then we would have to understand complaints as implicit comparisons of sets of principles (or, to abbreviate, of actions) i.e. S has a complaint against J's phi-ing because J's phi-ing is worse in some sense than J's psi-ing. But why think that there is a winner when we compare complaints like this? Why not a cycle? The answer is that complaints are grounded in something that admits of ordinal comparison—*interest* is the most capacious concept that fits the bill. This understanding of Contractualism does not collapse into consequentialism, since deliberation is based on pairwise interest-grounded comparison of sets of principles, rather than the optimization of the balance of interests. Thus P_1 may be the optimal consequentialist principle because it maximizes the balance of interests, yet it may be reasonably rejectable because it sets back some interest more than P_2 which does not set back any serious interest more than any other set of principles. (I set aside for elsewhere the question whether merely ordinal comparison in this context raises issues related to the voting paradoxes.)

promise, but what is moving about this complaint is its legitimate content rather than than the bare fact of its being issued.

III.

The Extensional Challenge to the Contractualist Interest Theory comes in the form of two cases. Scanlon presents an instance of the first sort:

> *Sewing Machine.* Mother promises Daughter her sewing machine as an heirloom. But Daughter, bristling at Mother's and society's expectations of domesticity, does not want the sewing machine in her house. Daughter realizes that Mother mistakenly thinks she values being assured she will get the sewing machine, but she does not want to hurt Mother's feelings by pointing out the mistake.[23]

Daughter, the promisee, doesn't care much about the promised performance, and would be happier if Mother forgot her promise. But does that mean that she doesn't want the promisor to be bound? If that were so, Mother's speech act would be more like a threat than a promise—at least, the purported promise would fail for lack of uptake on the promisee's part. Yet we can imagine that the promisor doesn't care much for the promised performance, even reviles it, but

[23] The example is adopted from *id*. at 311, 312—313.

does accept that the promisor should be bound.[24] For example, the daughter may take no interest in obtaining the sewing machine, but may take an interest in being able to passively aggressively hold her mother responsible for either giving her the offending gift, or offending by not giving it. Social life permits endless complexity, and promising plays its part in the drama.

A second sort of case involves a third party who takes greater interest in the promise-keeping than does the promisee. Elaborating upon Margaret Gilbert's example,[25] we obtain:

> *Timmy's case*. Jane promises Diana that she will stay at the house all night looking after little Timmy, unless he consents to her not doing so. Diana accepts, but isn't very much worried about Timmy. But Timmy really wants Jane to come over, and will be much more distraught than Diana if Jane breaks her promise.

Here we have stipulated that Timmy takes a greater interest in Jane's performance than Diana does; but is his interest of the same kind? We may as well stipulate that it is as close to the interest that grounds promissory obligation as possible. Perhaps Timmy is anxious when left on his own or with strangers, and anxious even contemplating the possibility, so that he would gain great peace of mind from being assured that Jane will look after him. And we can make Diana's actual interests as little like the typical promisee's interest as possible. Perhaps Diana prefers that the Timmy be on his own, thinking that this will help him overcome his anxiety eventually, but

[24] This is precisely the point that counts against the theory that a promise must benefit the promisee in order to bind. As Raz pointed out, we can imagine an envious suitor who "solicits a promise, hoping and believing that it will be broken, in order to prove to a certain lady how unreliable the promisor is." Raz, *Promises and Obligations*, *supra* note 17, at 213.

[25] In Gilbert, *Scanlon on Promissory Obligation*, *supra* note 15, at 97.

she nonetheless thinks she should take up Jane's promise because of some social convention that would cast aspersions on her if she didn't do her best to find Timmy a caretaker.

The Naive Contractualist Interest Theory gets both of these cases wrong. It holds out that we look to the promisee's interest in assurance to explain the direction of the promissory obligation. But in *Sewing Machine*, the promisee takes no interest in being assured.[26] And in *Timmy's Case*, Timmy takes more interest in being assured than Diana does. So in both cases, Diana seems to lack the interest that would make her the addressee of the duty. The problem is not that we have grounded promissory obligation in assurance; similar counter-examples could be generated for analyses that invoke other values. The problem lies in the way in which we have looked to interests to characterize the promisee's complaint.[27]

In particular, we should recognize that the promisee's complaint rests on her *generic* interest in assurance, which is the interest that she has in virtue of filling the role of promisee, whether she in fact takes an interest in assurance or not. The difference between having an interest and taking an interest is reminiscent of that between judging something valuable and valuing it.[28]

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[26] Scanlon responds to this case by pointing out that Mother's promise doesn't meet the knowledge and communication conditions of F, though Mother mistakenly thinks it does, and therefore thinks she is bound. SCANLON (1998), *supra* note 1, at 313–14. This response does not rest on the fact that there is no uptake by Daughter—in my elaboration of the case there is—but rather on the fact that there isn't the sort of assurance on Daughter's part that is sufficient for triggering Principle F. On Scanlon's reading, Mother believes, but doesn't know, that Daughter wants her to give the sewing machine. But this reading ignores the distinction between wanting a thing that has been promised, and wanting that a promise be performed. Daughter does have a complaint, after all, though that is best understood not as a complaint that she doesn't get something that she wants, but rather as a complaint that she is not being treated by Mother in the way she wants. To understand the complaint in the former way is to treat Principle F, as Raz would say, as a summary rule—as simply reflecting the balance of interests rather than adding an obligation to them. Raz, *Promises and Obligations, supra* note 17.

[27] For David Owens, the problem is simply that we have looked to interests at all. Thus he believes in the possibility of "bare wronging" i.e. an action that wrongs someone but does not set back their interests. His examples, ultimately unconvincing, are of someone photographing an unaware victim who does not wish to be photographed for fear of losing their soul, and of someone raping a victim who is oblivious of the rape and physically unharmed by it. DAVID OWENS, SHAPING THE NORMATIVE LANDSCAPE (2012) at 125, 177.

[28] SAMUEL SCHEFFLER, EQUALITY AND TRADITION (2010).

One may judge that jazz is valuable in a perfectly bloodless way. In contrast, to value jazz is to be attached to manifestations of the art form and to have dispositions of affect and attention toward it. The jazz lover does not just assent to propositions about the worth of jazz. She also makes time to go to concerts, spends money on records, feels pride when musicians she regards as exemplars are recognized as such, and feels loss when an important venue shuts down for lack of funding. Similarly, you might have an interest in some x that makes your life go better, but fail to have any of the dispositions and behavior that accompany having an emotional entanglement with x. But taking an interest in x would mean that you also give it a place in your life, being disposed to attend to it, have emotional reactions to how things go with it, act in ways that serve to protect or enhance it, and so on. In doing so, the thing you take an interest in comes to take on a particularized meaning and importance within the context of your ongoing choices and commitments and attachments.[29]

I will say that S has a *generic interest* in x if it is reasonable, and reasonably foreseeable, that a representative person in S's position take an interest in x. The idea is that a generic interest demarcates that part of the world in which it is reasonable for a person to take an interest, given that ordinarily a person would take an interest in it, and could be expected to do so. Generic interests embed mutual expectations, in the normative sense, into the foundations of our moral thinking. Thus a generic interest is not a statistical representation of what people generally do take an interest in, or of the expected strength of their interest-taking. Instead, whether a person has a generic interest is a normative question: when we ask whether it is reasonable and reason-

[29] It is part of the appeal of consequentialist theories that they take seriously the things we actually take an interest in, which are the things that most vividly affect us. But part of the error of consequentialism is that it ignores the ways in which our interests range more widely than what we actually take an interest in, and more widely even than what we are likely to take an interest in.

ably foreseeable that S take an interest in x, we are asking whether it is fair for others to expect that a representative person in S's position will take an interest in x, and whether it is fair for S to expect that others will expect that. The idea of a generic interest captures the thought that the potentially conflicting freedoms of different actors are to be accommodated by calibrating mutual expectations about what people reasonably take an interest in as a matter of their positions.

Consider an example. I have a generic interest that my diary not be read. That is not because I write embarrassing things in it, or things that should be kept secret for my own sake or anyone else's. My diary could simply be a record of the weather, information which is already publicly accessible. Yet what matters is that I *could* write something embarrassing or secret in it. That is the point of having a diary, so it is reasonable for me to expect that nobody read what I have written there; and it is reasonable for others to expect that I expect that, since in cases in which I do write something secret or embarrassing there are few reasons to read it that outweigh my reason to keep it secret. These mutual expectations (perhaps: *common expectations* on the model of common knowledge) about what interest is reasonable for me to take in my diary set the scope of my generic interest in it, and it is that interest that is an input into contractualist deliberation about whether others owe me a duty not to read the diary. The language of normative expectations helps us to see that it is the balance of reasons that is operative in the representative case (in which I do actually take an interest in the privacy of my diary) that helps to understand my having a generic interest in privacy even in cases in which I don't take an active interest in it (because I don't have any reason to hide what I have written).

Something similar can be said about promising. The contractualist foundation of promissory obligation is the promisee's generic interest in assurance. That the interest is a generic one helps

to explain why a promisee is owed a promise even when she takes little or no interest in the performance of the promise. But why does a promisee have a generic interest in promissory performance? Given the role that promising plays in our lives, typical cases of promising are ones in which the promisee does take an interest in performance, and this gives the promisor greater reason to perform than he has reason to do otherwise. Because of this, it is reasonable in all cases for a promisee to expect that a promisor will perform, and for a promisor to expect that the promisee will have that expectation. That is not only because a promisor is hardly ever in a position to reliably tell whether the promisee takes an interest in the performance or not. It is also because formalizing these mutual expectation in terms of the generic interest that all promisees have has the effect of demarcating a space in which the promisee has the freedom to take an interest or not, which she may exercise by the way she embeds the promise into a life that is distinctively meaningful to her.

Scanlon couches his own contractualist theory in terms of generic reasons, which he characterizes as reasons that attach to representative standpoints that obtain in the situation when characterized in general terms, and which he opposes to reasons that arise from the particular situation of any particular person. Scanlon also emphasizes the non-statistical nature of these reasons:

> Not everyone is affected by a given principle in the same way, and generic reasons are not limited to reasons that the majority of people have. If even a small number of people would be adversely affected by a general permission for agents to act a certain way, then this gives rise to a potential reason for rejecting that principle.[30]

Given this, Contractualism is the most fitting version of a theory incorporating generic interests, since it gives us a way to go from the multiplicity of generic interests to duties, and to do so

[30] SCANLON (1998), *supra* note 1, at 204–205.

without the kind of aggregation which simply presupposes that generic interests are a representation of expectations in the statistical sense. This doesn't exclude aggregation in some sorts of cases: it is a substantive normative question for Contractualism whether a particular case should allow the aggregation and weighing of certain sorts of considerations.

I have been arguing that Contractualism is a kind of Interest Theory, and one based on generic interests. Such a theory gives us the following answer to the question of Direction:

> **Contractualist Generic Interest Theory ('Generic Contractualism').** A duty is owed to S just in case S's generic interest is pairwise dominant in a comparison of the generic interests that favor alternative principles; where S has a generic interest in x if it is reasonable, and reasonably foreseeable, that a representative person in S's position take an interest in x.

I doubt that I can comprehensively say here what makes for pairwise dominance in the comparison of generic interests. Though not determinative, it matters whether someone in S's position typically takes an interest in x, and whether she typically places great importance on it. It also matters whether the interest is connected to an important role or activity, so that even if those in S's position don't typically take much interest in x, the reasonableness of taking such an interest is what characterizes being in that position.

For example, consider again the interest that someone like S has that nobody read her diary. This interest counts in favor of a duty that J not read her diary without her permission; but J has a countervailing interest in information which will help him decide whether to trust S, that will be

to his advantage in interacting with S, and that will remove any advantage S has over J in competitive situations. We can easily imagine particular situations in which J's interest in reading the diary is very strong, and S's interest in hiding the information in it is very weak; for example, where S doesn't want J to read it because of embarrassment about her adolescent daydreams, but J wants to read it because it will provide clues about his missing child's whereabouts. We do not proceed on the basis of this sort of comparison, which is all too idiosyncratic, nor on the basis of a statistical comparison of how often someone in J's position takes a serious interest in reading private information and how often S takes a serious interest in concealing it. A better way to proceed is to evaluate the generic interests that S and J have by considering the general importance of the practice of keeping diaries and other such private spaces, and comparing that with the various means we have for obtaining information and the kinds of reasons we might have for doing so. If we restrict ourselves to the realm of teenage diaries (other sorts of private spaces and practices are likely to raise different generic concerns), a case can be made for thinking that the generic interest that a teenager has in having a space in which she can safely record her thoughts and shape her identity is sufficiently serious, and that other ways of obtaining important information sufficiently available, that the balance of interests supports a duty against reading a teenager's diary, and one owed to the teenager as the holder of that generic interest.

Granting a similar analysis of the interests underlying promissory obligation, Generic Contractualism gets both *Sewing Machine* and *Timmy's case* right. The fundamental claim is that a promise is owed to the promisee not because the promisee takes a particularly serious interest in the performance of the promise, but because of the importance of the generic interest a promisee has in performance; that is, someone in the promisee's position would reasonably and reasonably

foreseeably take an interest in performance. This is true of the daughter in *Sewing Machine*: though she may take no interest at all in the performance of the promise, it would be reasonable if she did, and it would be reasonable for her to expect Mother to act accordingly. And while it is a stipulation of *Timmy's case* that Timmy takes a stronger interest in being assured that Jane will show up than Diana does, what makes Jane's duty promissory in character is the fact that it is grounded in the generic interest that Diana has as promisee, an interest that is constituted by the reasonableness of someone in Diana's position taking an interest in the performance of the promise and the reasonableness of expecting that others act accordingly. While it is reasonable for Timmy to take an especially strong interest in the assurance given by the promise in this case, it is not in general reasonable that third parties do so, since it is first of all not typically foreseeable that they will take such an interest, or even be aware of the assurance; and furthermore, it would place a burden on a promisor that he or she could not easily avoid or even be aware of.

There is no objectionable circularity here, it bears pointing out. It is correct that the idea of a dominant generic interest is already a normative idea, since we must consider the reasons there are to expect (say) promisees to act in various ways and the importance of having a practice based on such expectations. Indeed, the idea of a generic interest is already a moral idea, since it is based not on an evaluation of whether it is rationally optimal for people to hold the expectations that they do, but rather on whether these expectations are reasonable, an evaluation that contains within it the idea of the fair sharing of burdens. More to the point of our current inquiry, Generic Contractualism does not beg any questions about Direction. The theory would be objectionably circular if the claims about dominant generic interests which are its input contained within them claims about its output, that is, claims about the direction of the duties which the

generic interests ground. But in our analysis of promising, neither the claim that the promisee has a generic interest in assurance, nor the claim that this interest is pairwise dominant, made any reference to the thought that the promisee is the one who is owed the promissory duty. It is true that our pre-theoretical judgments about promising predispose us to look for an analysis that locates the dominant generic interest with the promisee; but that predisposition is compatible with finding, to our surprise, that in fact our judgments about the direction of a promissory obligation, or even its existence, are not well founded.

IV.

It is time to take up the Positivist Challenge, which begins with the observations that we find directed duties in positive practices like law, etiquette and games; and that these duties seem capable of arbitrary variation, regardless of our actual interests. But in order to do so, I must first say something more about what motivates Generic Contractualism—more specifically, I need to say why our moral deliberation is responsive to generic interests.[31] The answer is that responding to generic interests is an important way of respecting people. 'Respect' is admittedly a term in need of interpretation.[32] But it is an old idea, worth capturing in our moral theory, that to respect a per-

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[31] Sanlon's argument in favor of generic reasons is epistemic: a deliberating agent can can only find out so much about how the interests lie, given that the interests often depend on private facts about mental attitudes, such as facts about whether a promisee is assured by a promisor's statement and whether they care to be assured by it. *Id.* at 204. But this argument at best supports excusing someone who responds to the generic reasons rather than to the interests as they actually lie. Moral judgments purport to present conclusions about the way the interests lie, rather than conclusions about how the interests seem to lie from our contingent perspectives.

[32] JOHN RAWLS, A THEORY OF JUSTICE (Revised ed., 1999) 513.

son is to value them in the way that is appropriate given their value as a person. I'll argue that once we understand the distinctive way in which people relate to interests, we'll see that considering generic rather than particular interests in moral deliberation is the appropriate way of valuing other people.

Recall that a generic interest demarcates the space of affairs in which it is reasonable for someone, as a matter of their position, to take an interest of varying intensity. That S has a generic interest is not a claim that S has an interest only in some hypothetical circumstance, but a claim that she actually has the interest. It might be helpful to think of this interest as a kind of second-order interest that S has in being able to take an interest in various ways—though the distinction between having an interest and taking an interest should be noted. Being sensitive to S's generic interest involves giving S space to take an interest in her situation in a range of reasonable ways. In the case of promising, though Stephanie doesn't in fact take an interest in my promised performance, I should respect the fact that, contrary to my best inference, she might have done so; or that she might change her mind after giving me conclusive evidence that she doesn't take such an interest. But surely it is one thing that I thought Stephanie takes an interest in my keeping my promise, and another thing that she in fact doesn't; and surely the correctness of my action is a matter of what she does in fact take an interest in and not of what I think she takes an interest in? And if that is right, then should I not be guided by what I believe she takes an interest in, since that is my best and only guide to what she does take an interest in? It is the latter two claims that I deny when I say that moral deliberation defends the perimeter of S's reasonable interest-taking, rather than her actual interest-taking. The question is why that should be so.

It is a characteristically human capacity, possibly but not obviously shared by others, that we can choose to value particular valuable things. Lesser beings are able to participate in valuable activities—consider the role that coral play in the development of coral reefs. But the coral do not value this activity in our sense, since they do not choose to invest their energy and effort in it, indeed they may be unable to do anything else. And it is conceivable that a powerful artifact of our invention will some day be able to judge (in its proper sense) that an activity like opera is one of the valuable things in the world, but will be incapable of developing the dispositions to act and react to states of affairs involving opera that are constitutive of valuing the activity. Creatures such as the coral and the AI are not put to the choice of what to value in a world full of valuable things. But we are put to that choice, and in the very same way we are put to the choice of what to take an interest in, and how fully to take an interest in these things.

Respecting the fact that another person is put to that choice—which is to say, respecting the outer perimeter of that space in which the choice is reasonably theirs to make—is a way of respecting what is distinctive about that person, namely their capacity to make the choice. It is a plausible minimal principle of respect for value that one should not, without good reason, degrade the distinctive value of a valuable thing. Such a principle underlies the fact that one should not destroy a valuable artwork for no reason. The principle also recommends that we refrain from interfering with that value in ways that fall short of destruction but nonetheless diminish or obstruct its value, including by blocking its realization or by undermining the valuing of it. This requirement of non-interference underlies the intuitions, strongly held by some, that one should not treat a non-fungible thing as fungible (say, by making sex for sale), and that sacred objects should not only be protected from harm but protected from profane uses (such as when a crucifix

is immersed in urine as part of an art work). Applied to a capacity (such as an antelope's capacity to run), respect for value recommends not just that we refrain from destroying the capacity (say, by cutting off its legs), but that we refrain from interfering with that capacity (say, by binding its legs).

This applies straightforwardly to the distinctively human capacity to take an interest in things. We should not just refrain from destroying that capacity where we find it in another, but also from interfering with it. That is why responding to the generic interest of another person, which amounts to reasonable non-interference with their capacity to choose to take an interest in their situation as they reasonably wish, is a form of respect for the distinctive value of that person as a person. Non-interference with a capacity to choose is more demanding than non-interference with a particular choice that the holder of the capacity actually makes. Non-interference with Stephanie's capacity to take an interest in my performance means non-interference with her choice to take such an interest, even if this is not how she chooses; just as non-interference with the antelope's capacity to run means refraining from binding its legs even when it does not wish to run.

The respect for agentive freedom which pervades our moral thought in the guise of generic interests is also to be found in normative practices of our own making, even when they don't reflect the actual landscape of interests recognized by morality. Consider a wealthy stepson who inherits the copyright in his mother's famous novel. The copyright no longer does the work of incentivizing the author or remunerating her hard work, and it need not reflect a moral interest that the stepson has in protecting his mother's work. Yet one owes it, legally speaking, to the stepson not to infringe the copyright in the novel. At best this duty is justified as part of a system

that serves to protect the work of authors in general, and thereby serves our common interest in a vibrant authorial culture. But how are we to square that justification with the fact that the duty is owed to the wealthy stepson? The case is difficult to sidestep, since the copyright system is not so natural that we think that an independent moral duty is owed to the stepson; yet the system is not so fraught that a natural lawyer could deny that there is a legal duty at all. Instead we are stuck with explaining how the law can generate a directed duty on the basis of interests that don't belong to the addressee.

The answer lies in the fact that the law itself generates and protects *legal interests*. Recall that S has a generic interest in x if it is reasonable, and reasonably foreseeable, that a representative person in S's position take an interest in x. By contrast, S has a legal interest in x if the law determines that it is reasonable, and reasonably foreseeable, that a legal subject in S's position take an interest in x. Legal interests need not be true or false suppositions made by the law about how the moral interests lie; there are domains in which a legal system may elect to balance the legitimate moral interests in one way rather than another, or protect them in one way rather than another.[33]

Consider as an example a seller's strict liability in tort to warn a buyer if his product contains an ingredient not generally known to be dangerous, or unforeseeably contains an ingredient that is generally known to be dangerous.[34] Tort law duties such as this often serve to compensate plaintiffs who have been injured by defendants, but they can also have the function of deterring

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[33] See also Richard Craswell's suggestion that the morality of promising underdetermines contract doctrine. Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICHIGAN LAW REVIEW 489 (1989). This underdetermination of legal policy by morality is even more likely in commercial contexts, such as intellectual property law, where it is a matter of a community's industrial and cultural policy whether to pick one vision of development over another.

[34] Restatement (Second) of Torts § 402A cmt. j (1965).

social disadvantageous activities. A seller's duty to warn serves the public interest even in cases where it doesn't serve the interest of a buyer.[35] But by imposing such a duty, law determines that the balance of expectations should be set in such a way that it is reasonable for a buyer to take an interest in being granted such a warning, and reasonable for a seller to recognize that interest. It is a moral question whether this balance is in fact reasonable; it is a fact about the law that it sets buyers' and sellers' expectations in this way and grants a duty in order to protect that balance. Something similar happens where a legal system grants a copyright holder standing to sue for infringement of the copyright, even where she has no independent moral interest in being compensated. In such a case the copyright system determines that it is reasonable for the copyright holder to take an interest in the use and reproduction of the copyrighted material, and that it is reasonable for others to expect the holder to take such an interest. As in the case of a generic interest, the copyright holder may not in fact take any such interest, but the law determines that others must still respect the space described by the possibility of their taking such an interest.

The account I have given is partly reminiscent of an account of Leif Wenar's:

> **Kind-Desire Theory.** J's duty to phi is owed to S if S occupies a kind K, and Ks qua Ks want J to fulfill his duty to phi.[36]

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[35] The buyer may be well aware of a danger that is not generally known to the public. Such a buyer may even prefer that there be no duty to warn, since she will then be at an advantage in a market for goods that are of indiscernible quality to other buyers; or because would prefer to pay a low price for a good of uncertain quality in a market for lemons, than pay a high price for a good that is known to be of high quality.

[36] Leif Wenar, *The Nature of Claim-Rights*, 123 ETHICS 202, 218–19 (2013) [hereafter Wenar, *The Nature of Claim-Rights*]. Wenar is primarily concerned to give a theory of claim-rights; I adapt his claims throughout to keep the focus on directed duties. Wenar seems to want to explain which claim-rights there are; I take up the account only insofar as it offers an explanation of Direction.

Wenar begins with the thought that social roles account for many moral and positive duties, such as those that we are owed *qua* promisee, police-office, or soccer goalie.[37] He goes on to argue for the more general claim that a duty can be grounded in a social or natural kind in order to account for duties that are owed to another simply as a human being, or as a child, and notes that roles are a subset of social kinds. This amendment, together with the reference to desires, is a key way in which Wenar's theory departs from Generic Contractualism. Wenar is permissive about the ways in which desires might be attributed to kinds: desires may be stipulated, or abbreviate claims about the norms placed upon a role-occupier or claims about what a role-occupier has reason to want, or be based on generic claims about what a kind of being does or wants to do.[38] That catholicism dilutes the explanatory potential of the theory.

Consider the Kind-Desire explanation of promissory obligation: a *promisor's duty is owed to a promisee because a promisee qua promisee wants the promisor to perform.* Here, we can readily concede that 'promisee' denotes a social role, which is one type of social kind. What matters is what it is for a promisee qua promisee to want the promisor's performance. It is false that promisees always want promisors to perform. It may be true that promisees generally want promisors to perform, but unclear why this should matter—it it conceivable that promisees' mothers equally generally want promisors to perform, but this would not mean that mothers are owed promissory duties. (Similarly, the fact that a third party beneficiary wants performance may be relevant to whether the beneficiary is owed performance, but it is not particularly important and certainly not conclusive.) It is non-explanatory to stipulate that promisees qua promisee

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[37] Wenar adopts this idea from Raz's statement that rights may be held by 'persons *qua* guardians, trustees, and the like.' J. RAZ, THE MORALITY OF FREEDOM 180 (1986).

[38] Wenar, *The Nature of Claim-Rights*, *supra* note 34, at 220ff.

want performance, and circular to say that it is a constitutive norm of the role of promisee to want performance.

The most sensible option open to Wenar is to rest on the fact that promisees qua promisees have reason to want performance. This could be but part of the story, since reasonable desires will over-generate duties. A third party beneficiary has reason to want a promisor to perform, but is not necessarily owed performance. We need to be more selective about which rational desires ground duties, and I have been arguing that Contractualism is the best way to do the selection. But Contractualism won't help the fact that the Kind-Desire Theory also under-generates duties. A promisee may well have no reason to want the promisor to perform, since the performance could be harmful. Can't Wenar make a familiar claim in response: that a promisee in a representative case of promising would have reason to want performance? At this point the theory is so close to the Generic Contractualism that I am happy to concede it is on the right track. What it lacks is an explanation of why the fact that a representative promisee has reason to want performance should influence our thinking about the case in which an actual promisee lacks such reason. Generic Contractualism's account of the relation between generic interests and reasonable interest-taking provides that explanation.

I have been arguing that Generic Contractualism can provide an interest-theoretic account of positive duties, such as those of law and etiquette. What is more, it does so without assuming that these duties protect the interests that we actually have, and so leaves it open whether there are any positive duties that do not reflect moral interests. Certainly we should be able to conceive of there being such duties. But our ability to extend Generic Contractualism in this way does more than show conceptual continuity between moral and positive obligations. The reliance of both

kinds of obligations on reasonable and reasonably foreseeable interest-takings suggests the possibility of a more intricate relationship between law and morality than the debate about positivism has allowed for. For example, it is conceivable that the law's determination of what it is reasonable to take an interest in may affect what interest-takings are reasonable and reasonably foreseeable from a moral standpoint. But such suggestions must be taken up elsewhere.

What is more relevant here is that the underlying function of the directedness of a duty is operative not just in morality but also in the law and other positive practices. In considering why generic interests ground moral duties, I have argued that a human being is the kind of being that can choose whether and how to take an interest in things, and that the appropriate way to respect the value of a being with that capacity is to leave her space to choose to take an interest as she reasonably wishes. In morality, we do this by leaving space for others to take an interest in ways which it is in fact reasonable for them to do. In law, we do this by leaving space for legal subjects to take an interest in the ways deemed reasonable by our positive practices and institutions. In arguing for these practices and institutions, we may argue that some of them reflect or facilitate or enforce moral interests that legal subjects have independently; but we may also argue that they generate legal interests that serve the general good. Certainly there are positive duties which serve the general good. But why should any of these be directed? The answer is not that the addressee of the duty would typically want performance; but rather that the success of the practice is premised upon the reasonableness of the addressee taking an interest in performance. The co-operative participant fulfills such a duty with the general good in mind, but also with respect for the addressee's role in achieving that good.

This paper has aimed to clarify one aspect of our concept of a *directed duty* by defending a generic interest-based answer to the question of Direction. In so doing I have engaged with viewpoints often raised in the debate about the nature of rights; and my attempt to reconcile will-theoretic and interest-theoretic accounts of directed duties is suggestive of how to proceed in the debate between will-theoretic and interest-theoretic accounts of rights. So it is natural to ask whether Generic Contractualism could also be an account of rights in general, or of claim-rights more specifically? That depends on how directed duties differ from claim-rights, and from rights more generally. Suppose Leif Wenar is correct in his claim that claim-rights add to the idea of a directed duty the idea that it is appropriate for someone to enforce it.[39] Then Generic Contractualism would be an account of who the holder of a claim-right is, but would still owe a story about what a claim-right is—that is, what practical difference the existence of a claim-right makes. Generic Contractualism, on its own, does not even tell us the full story about what practical difference a directed duty makes. That is a task that I pursue elsewhere.[40]

[39] *Id*. at 214.

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