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Jonker, Julian David

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In Defense of Directed Duties

by

Julian David Jonker

A dissertation submitted in partial satisfaction of the

requirements for the degree of

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in

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of the

University of California, Berkeley

Committee in charge:

Professor Niko Kolodny, Co-chair

Professor R Jay Wallace, Co-chair

Professor Martin E Jay

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Julian David Jonker

Abstract

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Professor Niko Kolodny, Co-chair

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If I promise Stephanie that I will help her move house, then not only ought I help her, I also owe it *to her* to do so. If I fail to comply with this obligation, I not only do wrong, but I wrong someone, namely Stephanie. The duty to keep my promise is a *directed duty*, with Stephanie as its *addressee*. Directed duties and related normative concepts play a central role in non-consequentialist moral theories. For example, moral rights, which seem to rule out consequentialist moral theories, are closely connected to directed duties: if S has a right that J ϕ , then J owes it *to S* to ϕ . But directed duties remain poorly understood. For this reason, consequentialists dismiss talk of directed duties as justified, at best, by its tendency to promote good outcomes. I aim to characterize directed duties in a way that shows that treating duties as directed is not simply instrumentally convenient, but is a way of acknowledging an important dimension of morality.

An account of directed duties should answer three distinct questions: (1) **Direction**. Why is a particular duty owed to S rather than T? (2) **Practical Difference**. What difference does the directedness of a duty make to what we appropriately think and do? (3) **Importance**. What is lost when a moral community fails to acknowledge the directedness of duties? Distinguishing these questions allows us to adopt insights from theories that would otherwise be seen as competitors.

(1) **Direction**. In Chapter 1, I develop a contractualist account of direction: the addressee is the person whose representative role grounds a complaint which justifies the duty. For example, the act of promising establishes several representative roles: promisor, promisee, and third party. The duty to keep one's promise is justified by the fact that, in a representative case of promising, the promisee has a generic interest in assurance, and this interest grounds a complaint that outweighs the complaints available to the promisor and third parties. Since the complaint attached to the representative role of promisee grounds the duty, in a particular case it is the promisee who is owed the duty. This means that the promisee—and more generally, the addressee of a directed duty—has a special place in an agent's deliberation: it is the potential complaint based on their generic interests that determines how the agent should act.

(2) **Practical Difference**. Directed duties make a difference not only to how we deliberate intrapersonally, but, crucially, to how we hold one another accountable interpersonally. A directed

duty gives its addressee special standing in the practice of accountability and moral repair: in particular, special entitlement to apology and redress, and special power to accept apology and forgive the wrongdoer. I develop this account of Practical Difference in Chapter 2, comparing it with competitors the Demand, Claim, and Blame Theories.

(3) **Importance.** In Chapter 3 I consider what would be lost if we failed to recognize directed duties. Observe that when J infringes a duty to S, the injury to S consists not only in the setback to her interests but also in the lack of recognition of those interests. Requiring that apology be directed to S in particular—that the apology be addressed to S in order to count as an apology—enables apology to serve as a form of recognition, one that serves to repair the original lapse of recognition. Observe further that S determines the significance to herself of how her interests have been affected, since she takes a stand on the value of what has been lost and the role that the loss will play in her life. Requiring that forgiveness be sought from S in particular enables the seeking of forgiveness to serve as a way of recognizing this fact. In sum, a practice of accountability that grants special standing to S acknowledges that she is the kind of creature who not only has interests but can take an interest in them, and can take an interest in whether others recognize them. In this way the practice of directed duties makes available a form of respect for persons grounded in their distinctive capacity to take an interest in how their interests are regarded by others.

Chapter 4 broaches the question of the relation between rights, duties, and wrongs, by engaging with Nicolas Cornell's view that rights are not co-extensive with special standing in our practice of accountability. Since Cornell endorses the Hohfeldian claim that rights and directed duties are co-extensive, his view poses a direct threat to the account I have been developing here. In Chapter 4 I argue that the threat is not a real one, that some of the interesting observations Cornell makes about contract law can instead be accounted for by weakening the Hohfeldian claim, and that Cornell's view makes it difficult to understand the scope of accountability.

Chapter 5 considers whether collectives, and in particular corporations, are the types of entities that can be owed directed duties. The view developed in this dissertation encourages us to think that there is no reason to think we owe moral duties to an entity that lacks an interest in recognition. Chapter 5 argues that collectives lack such an interest, and therefore cannot be owed moral duties. But this argument is compatible with the fact that collectives can be owed legal duties.

To my parents
to whom I owe it to do my best.

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As a longtime reader of acknowledgments, I have always assumed that most of them are politely exaggerated. But in working on this project I have come to see just how great a debt any self-respecting writer must inevitably have. I find myself wondering, quite seriously, whether I should put my name on the title page at all. If I were to footnote each place where I have adopted someone's suggestion or recommendation or idea, or where someone has spotted a serious error, or where the thought is my own but only because prompted by someone's question or objection or admission of puzzlement, then every sentence of this dissertation would have to have multiple footnotes. Most of those footnotes would name my co-chairs, and still I would not be done with acknowledging their influence, or that of other generous individuals, since there are structural and thematic debts that are hard to pin down on any particular set of sentences. So I have taken the opposite tack of writing no acknowledgments in the footnotes, though this runs the serious risk of failing to convey just how indebted the work is. But while I feel at most times a mere conduit for the ideas of others, I am still a conduit, and prone to distorting or misunderstanding the best of these ideas. So I claim authorship (and copyright) of this dissertation not primarily from a sense of pride, but primarily as an attempt to limit the liability of those who have nonetheless been so crucial to its existence.

My greatest intellectual debt is to my co-chairs. It feels like a very long time ago now that I took a seminar on promising co-taught by Jay Wallace and Niko Kolodny. I walked into Jay's office after that seminar and suggested as a qualifying exam 'something to do with relationships and morality.' At the time I thought this an exciting new avenue of moral inquiry. How lucky that I ended up then, despite my naïveté, working with two of the most careful thinkers about the subject. Jay was incredibly gracious to share his thoughts without reserve, and encourage me to keep working, even while he was working on his own project on the topic. Niko sent comments on everything I wrote with an incomprehensible combination of rapidity and thoroughness. Both Jay and Niko spent a lot of time working with me during my final summer, despite the obvious demands of their other commitments. I learned a lot about doing and writing philosophy during this period, perhaps more than at any other time in my life.

Martin Jay was an exemplary external committee member, reading drafts and making comments on nearly every page of the last draft. But this in no way accounts for his influence on the project. When I arrived at Berkeley I intended to specialize in some formal branch of philosophy. As my second year began, someone whispered that Martin Jay would be teaching Habermas, and that it would be good. Thankfully I decided to take a peek. Soon after that I realized that I would have to work in moral philosophy. Professor Jay brought the ideas of the Frankfurt School alive, and in my second semester with him, and with his encouragement, I wrote a paper on 'The Second Person,' which I vaguely thought might have something to do with the relational basis of morality. The influence has been lasting. Though I mention Habermas nowhere in the dissertation, my basic thought, that our moral practice must be understood in terms of the actual performances made available by an interpersonal and communicative practice, is Habermas's thought.

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One summer Facundo Alonso met with me every week to discuss the literature rights and duties. Some of the basic ideas of the dissertation came out of those happy afternoons.

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do my best to immortalize two of them, S and J, whose initials appear so often in what follows. In the years for which all I have to show are these few pages, Stéphanie Ries gave birth to and raised two children, and made a success of her scientific career. It has been a wonderful gift of perspective to be able to watch that from close by. Meanwhile, Jeremy Soh provided all the other perspectives necessary for sanity: late night beers, impersonations of continental philosophers, lessons in Malaysian linguistics, and Lacanian psychoanalysis in times of crisis.

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1

Contractualist Justification and the Direction of Duties.

§1. Directed duties and relational normative concepts. If I promise Stephanie that I will help her move apartment, then, in ordinary circumstances, I ought to help her move. But that is not all. I owe it *to Stephanie* to do what I have promised. If I violate this duty, then I not only do wrong; I wrong Stephanie. That is, I have a *directed duty* to do what I have promised, with myself as the *agent* and Stephanie as the *addressee*.

A wide variety of moral duties are directed, not only those arising in cases of promising or other interactions, and not only those arising in the context of intimate 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 much of what follows, I will focus on moral duties. But directed duties do arise in the law, most conspicuously in tort and contract law. A negligent tortfeasor whose wrongful action causes harm to another violates a duty of tort law owed to the latter party. A promise in a valid contract creates a duty of contract law, owed by the promisor to the promisee. Indeed, the distinction between directed and non-directed duties in morality is sometimes drawn by way of an analogous distinction between proceedings in private law and criminal law. As Michael Thompson writes,

in our system the names of particular private-legal proceedings already exhibit the peculiar nexus of representations that interests us: *Mr X v. Ms Y*, we call them, or *[your name here] v. Sylvia*. The atmosphere of a lawsuit is saturated with judgments of our type: ‘She’s done me wrong,’ we say, ‘She owes me,’ and so forth. ... [By contrast] [t]he verdict of the jury, ‘Guilty!’, expresses a property of one agent, not a relation of agents. If another agent comes into the matter—if there is, as we say, a ‘victim’—it is, so to speak, as raw material in respect of which one might do wrong.¹

¹ Michael Thompson, “What is it to wrong someone? A puzzle about justice” in R Jay Wallace and others (eds), *Reason*

The directedness of directed duties is not the only phenomenon that suggests there are interesting moral relations between individuals. 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 In what follows, I focus on directed duties in particular, since it is not obvious that the relevant judgments about duties, rights, claims, and wrongings are equivalent or even co-extensive. But questions about the connections between these relational normative concepts, and about the contrast between directed duties in morality and in law, will come up in later chapters. (In Chapter 4 I will question the correlativity of rights and duties. In Chapter 5 I will suggest that the incidence and significance of legal directed duties differs from that of the moral duties I am primarily concerned with.)

§2. The aim of this chapter. If I make a promise to Stephanie, then I owe it to her, rather than Talya, to keep my promise.³ This is a fact about the *direction* of this particular directed duty. But why do I owe my promissory obligation to Stephanie in particular? This is not the question why the obligation is directed, or what it means that it is directed to Stephanie. Although our judgments about the direction of particular duties are often made with ease, we may still ask what general principles underlie these judgments. In the particular case involving my promissory obligation to Stephanie, it is natural to respond to the question about its direction by saying that it is Stephanie, rather than Talya, who would be hurt by my failing to keep the promise, since it is Stephanie, rather than Talya, who has an interest in my keeping the promise. I intend to make good on this response, which posits a connection between the directedness of a duty and the interests of the duty's addressee.

I begin in Section I by setting the scene methodologically: I distinguish three questions we can ask about directed duties, and show how these form part of *normative-functional explanation*, a general strategy for giving illuminating explanations of normative concepts. In addition, I characterize interest theories and will theories of directedness, and show how these have distinct and non-competing jobs to do once we adopt the strategy of normative-functional explanation. In

and Value: Themes from the Moral Philosophy of Joseph Raz (Oxford University Press 2004) pp. 343–44.

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 his scales' involves at least two argument places, one for the agent Amir and one for the action of practicing his 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 ϕ* 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 broached in Chapter 5.

³ That English has gendered pronouns causes trouble for our attempts to talk respectfully, but I hope to use this feature of the language positively, in order to clarify who is doing what in my examples and schematic formulations. I will typically render agents and wrongdoers male, and patients and addressees of duties female. Nothing about gender should be read into this choice, tempting as might be.

Section II I adopt a contractualist theory of moral duty, and defend it as an account of direction against a complaint of Margaret Gilbert's. In showing how contractualism can serve as an account of the direction of a duty, I emphasize the importance of a little-remarked contractualist claim: that moral deliberation foregrounds *generic reasons*, that is, the reasons that individuals have in virtue of their representative roles with respect to a given action. Section III explores why it is important for deliberation to proceed in this way.

I. The Question of Direction

§3. Normative-functionalist explanation. An account of directed duties should answer three distinct questions:

Direction. Why is a particular duty owed to S rather than T?

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?

It is possible to distinguish questions along these lines whenever we seek to understand a normative practice. Consider how we might go about giving an account of what a knight is in the game of chess. One part of the account, parallel to the question of Direction, would give the extension of knighthood by pointing out that the pieces starting out on the second and seventh columns of the first and eighth rows count as knights (to which it might be added that it is a good heuristic for identifying a piece as a knight that it looks like a horse). But this on its own doesn't explain the role that the knight has in the game. To get a good grasp of that, we begin by saying what having one of those starting positions entitles a piece to do: on each turn it can make an L-shaped move in one of up to eight directions, say by moving two steps ahead and one step to the right, and attacking an opponent's piece on that final step. This account of its capacity to act answers a question parallel to that of Practical Difference. Why have a piece with this role? I don't have a good answer to that question, but I suspect it has to do with the strategic shape of the game, and that having a piece that does not move and attack others along straight lines makes it harder to predict an opponent's potential lines of attack. This sort of account, supposing it for a minute to be accurate and illuminating, answers a question parallel to that of Importance.

The explanation of a knight's role that I have just sketched can be thought of as a *normative-functionalist* explanation, which resembles the more widely appreciated *causal-functionalist* explanation. Causal-functionalist explanation tends to be a good way to characterize a tool, and it proceeds by describing the typical role that the tool has in our lives by enumerating the typical causal inputs or circumstances of its use, and the typical consequences, or causal outputs, of its

use. For example, the typical role of a hammer is to drive nails into wood; in particular, its use is activated by raising the hammer and bringing it down against the head of a nail with force, and its use has the consequence that the nail is driven into the wood. For another example, the typical role of a piston is to cause the wheels of an automobile to rotate; its use is typically activated by the combustion of fuel in the presence of air, and its activation results in the movement of the piston, causing the wheel axle to rotate. This sort of account of hammers and pistons has the virtue of identifying as potential hammers and pistons all those things that transform the relevant causal inputs into the relevant causal outputs: a hammer, it turns out, is anything you can hammer with and turn to that purpose.⁴

In explaining the role of a knight we did not talk about causal inputs and outputs, but rather about what it would be appropriate to treat as a knight at the start of a game, and how it would be appropriate to move the knight during the game. These rules concerning what it is appropriate to think and do spell out the possible changes in the normative statuses that make up the state of play of a game of chess. When a game begins, and I am playing white, my knight on b1 can move to either a3 or c3 on my next turn—that describes a normative status that the piece has by describing what I am permitted to do with it. If I move it to a3, then on my next move I can move it to b1, c3, c4, or b5, provided these squares are empty. So by using the piece, I change its normative status. I may also thereby change the normative status of other pieces. For example, if your king is on b5, then when I move my knight to a3, 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. A full characterization of the role of a knight entails exactly the changes in status in the situation I have just described, as well as in any other situation. This characterization is similar to causal-functionalist explanation in specifying the inputs and outputs that make up a thing's role, but the inputs and outputs are not causal relations, but rather normative statuses.⁵ That is why I call it 'normative-functionalist'

⁴ A rock, which fit the causal role of a hammer, is not aptly described as a hammer until one considers giving it that role. The importance of a human being's intentions for whether an object counts as a tool of a certain kind signals that causal-functionalism and normative-functionalism may not be just parallel, but continuous. That is, it may not be enough that an object fit a certain causal role naturally, or typically, or even intentionally. It may be that putting the tool to its purpose is a matter of seeing it as appropriately transforming certain causal inputs into certain causal outputs.

⁵ In spelling out these statuses, I lean heavily on the idea of *appropriateness*. What is appropriateness? Setting aside the word's connotations that come from its overuse in settings having to do with etiquette, politeness, and subtle social hierarchies, I use the word simply to indicate a basic normative fit—perhaps the word 'fitting' may be just as useful here, though it comes with its own distracting connotations. So, it is appropriate that one moves one's king out of check not because it would be rude not to, or unbecoming, or show a lack of self-governance. Simply, one would no longer be playing by the rules if one did not.

Related to this, the reader may dispute whether in the case of chess the relevant statuses are truly normative, since there is no sense in which one must move a piece in any particular way unless one has adopted some particular end, say playing a game of chess by the rules. Whatever the right thing is to say about this, it is convenient to describe the statuses involved in a chess game as normative, given the deontic language that must be used to describe them. Perhaps what is shared with truly normative statuses is that, once one has adopted the goal of playing a game of chess by the rules, these statuses do enter into one's deliberation in much the way that truly normative statuses do. But, as the existentialists were fond of noting, it is always open to one to revise one's goals. In some situations one need not play by the rules, and in some situations one should not.

explanation.

This sort of explanation is useful beyond the characterization of games. What is it to perform the speech act of promising? Certainly uttering the words ‘I promise ...’ will often do the trick; but it will not always, and it is not required. Saying ‘I promise that I will find you wherever you go’ is, in some circumstances, a threat rather than a promise. And I can promise by saying ‘I give you my word that ...,’ or any of a range of other statements and gestures whose meanings depend on our shared context and cultural resources. An adequate characterization of the speech act must take the normative-functionalist route, setting out the circumstances in which it is appropriate to make a promise to someone (perhaps: the promised performance is not unwanted or immoral or redundant), and the consequences of doing so (perhaps: it is appropriate for the promisee to feel assured that one will perform, and it is required of the promisor in most circumstances to perform).⁶ Exactly this route is taken by Robert Brandom in his treatment of assertion: an assertion is a move in a practice he calls ‘the game of giving and seeking reasons,’ and can be thought of as a move that is appropriate when one is entitled to believe something, and that in turn makes it appropriate for one’s hearers to feel entitled to believe what has been said. Indeed, Brandom’s project partly involves showing that the content of particular assertions can be understood on this normative-functionalist model, that is, by enumerating the precise changes of normative status which particular assertions make appropriate.⁷

One might think that a reason for adopting functional explanation in the case of the hammer is that hammers are multiply realizable. That is, hammers come in different sizes and shapes, and made out of different materials. One hammer may be large, with a wooden handle and a hexagonal steel head. Another may be small, with a plastic handle and a round aluminum head. But treating multiple realizability as a rationale for functionalism gets things backwards. Rather, it is the fact that a hammer is a functional kind that explains its multiple realizability. That is, a hammer just is a thing which is pressed into the role of converting certain causal inputs into certain causal outputs. So anything which can play that role can count as a hammer. Indeed, hammers are not limitless in their multiple realizability. An object with a pointed ‘head’ made out of putty would probably not do, since its shape and material render it unsuitable for the functional role.

Something similar is true in the case of normative-functionalist explanation. The fact that there are many different ways to promise is an indication that we should seek a normative-functionalist characterization of promising; but this multiplicity of ways of promising is ultimately a symptom, rather than the grounds, of the fact that promising is a normative-functionalist kind. We find it important, in our interactions, that we are able to alter normative statuses in the ways that promises allow, and we treat anything that can do that as a promise. This is just to say that when we seek to understand what a promise is, what we care about is what changes in normative status a promise

⁶ Something like this approach can in fact be discerned in JL Austin, *How to do Things with Words* (2nd edn, Harvard University Press 1962), given his concern with what speech acts do, and with the felicity conditions that must be fulfilled in order for them to do what they do.

⁷ See generally Robert B Brandom, *Making It Explicit* (Harvard University Press 1994). For a defense of this understanding of what it is to be an assertion, see John MacFarlane, “What is assertion?” in H Cappelen and J Brown (eds), *Assertion* (Oxford University Press 2010).

brings about, and when, and why such changes matter to us. But this is just to ask the three questions that normative-functionalist explanation answers.

My proposal is that we seek to understand features of our moral practice in this way. This is certainly viable for normative practices, like the law, that are continuous with our moral practices.⁸ In saying what it is to be a judge in a particular legal system, we 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 we say what ‘moves’ it is appropriate for them to make (perhaps: they are able to 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 with 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 appropriate 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.

In the case of judges, I think the normative-functionalist characterization of their role answers all the explanatory questions we may ask under the headings ‘what is it to be a judge,’ and ‘why do we have judges’? I cannot make sense of there being any further distinctive metaphysical question about what it is to be a judge.⁹ There are certainly metaphysical questions, more precisely meta-ethical ones, about the nature of legal practice, and we may ask these about judges. For example, we may ask: what is the normative force of the status that a judge has, and in virtue of what does it have that force? But similar questions may be asked of all aspects of our legal practice. Similarly, I doubt that there is a distinctive metaphysical question to be asked about the directedness of duties that goes beyond the three questions I have enumerated. There are important meta-ethical questions to be asked of directed duties, to be sure, but they are the same questions that are to be asked of non-directed duties and other aspects of our moral practice. I may ultimately be wrong about this, and it may be that the relational nature of a directed duty invokes a seemingly traditional meta-ethical question in a radically new key. But we need to give an account of directedness in the terms I have been describing before we can judge whether that is so.

§4. Will and interest theories. It is also important to distinguish the above three questions in order to avoid a confusion that has arisen in the literature about rights, which have a close connection with

⁸ By ‘continuous’ I do not mean to make any claims about the actual or proper convergence of law and morality. Rather, the law is continuous with our moral practice at least in the sense that it invokes and relies upon normative notions that are most familiar to us from, or even originate in, our interpersonal moral lives: *obligation*, *permissibility*, *wrongness*, *duty*, and so on.

⁹ This is to deny Michael Thompson’s thought that relational normative concepts present us with a metaphysical puzzle—cf. Thompson (n 1).

directed duties. Traditionally, two kinds of theories of rights have been given: interest theories and will theories. Roughly put, interest theories characterize rights in terms of their protection of the interests of right-holders, while will theories characterize rights in terms of the power or capacity to demand or waive fulfillment or enforcement of the rights. But the word ‘characterize’ in the previous sentence is too loose to give us a sense of what these theories are supposed to explain. Often the theories are described in terms of necessary and sufficient conditions, as in the following statement, which partly follows Matthew Kramer’s description:

Interest Theory of Rights. It is necessary but insufficient for S to hold a right that such a right preserves an interest of S.

Will Theory of Rights. It is necessary and sufficient for S to hold a right that S has the power to demand or waive enforcement of the right.¹⁰

Philosophers are sufficiently used to defining terms by way of necessary and sufficient conditions that these will look like attempts to say what rights are; disparate and potentially incompatible attempts at that. But I have been urging skepticism about asking the question ‘what is it to be an x’ as a univocal question in the context of our normative practices. As in the case of a knight in chess, when characterizing a right we should say what it is that makes it appropriate to think that someone has a right, and also what their having a right then makes it appropriate for them or others to do. In this light we should pause to consider the content of these theories and what aspect of rights they most naturally characterize. By saying that a right serves to protect an interest, an interest theory is most naturally taken as a description of what makes it appropriate to have a right. And by saying that a right gives the right-holder the power or capacity to waive or demand fulfillment or enforcement, the will theory is most naturally taken as a description of what holding a right makes appropriate. Taken together, these make up a potential account of the role of a right, that is, they describe a right as a mapping from certain normative-functional inputs (or *normative circumstances*) to certain normative-functional outputs (or *normative consequences*). Instead of asking which one of these theories is better, we should ask whether each is a correct characterization of the normative circumstances and consequences of having a right, and whether, when taken together, they describe a role that is both coherent and important for our moral and legal practice.

I do not think that I have resolved the debate between the interest and will theories of rights here. But I hope this serves to motivate the strategy of normative-functional explanation. I have been arguing that it is both the appropriate form of explanation to adopt with respect to features of our moral practice, and that adopting it suggests a way to clear up confusions of the sort we find in the debate about the nature of rights. A similar sort of confusion can arise in relation to directed duties, and my contention is that normative-functional explanation, and in particular distinguishing

¹⁰ I deviate from the presentation in Matthew Kramer, “Rights without trimmings” in Matthew Kramer, NE Simmonds, and Hillel Steiner (eds), *A Debate over Rights* (Oxford University Press 2002) p. 62 because it seems to beg important questions against will theories. For example, in the original Kramer spells out the Will Theory of Rights as requiring ‘being competent and authorized to demand or waive...,’ but the issue of whether competence is required for having a power is just the sort of contentious issue which promises to settle the debate about the adequacy of will theories.

the questions of Direction and Practical Difference, avoids that confusion. The best way to show that is simply to pursue that form of explanation and convince the reader that it is illuminating. But let me pause now to show quickly how confusion might arise if we do not distinguish our questions as we have done.

Begin by noticing that correlates of the interest and will theories can seem to vie for our attention when we ask what a directed duty is. We can characterize these theories in the following way:

Interest Theory of Duties. It is necessary but insufficient for J to owe a duty to S to ϕ that J's ϕ ing would set back an interest of S.

Will Theory of Duties. It is necessary and sufficient for J to owe a duty to S to ϕ that S has the power to demand that J ϕ or release J from the obligation to ϕ .

These theories appear to compete with each other at least because the sufficient conditions of the Will Theory of Duties conceivably include cases that do not meet the necessary conditions of the Interest Theory of Duties. In addition, each set of conditions seems to be assailed by counterexamples. But, I will suggest, the problems go deeper than this.

The Interest Theory of Duties is typically thought to be in danger of ascribing duties too widely. Certainly if everyone who has an interest were owed a duty we would have absurd results. 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 does not mean that I owe a duty to her employer to keep my promise. That result, which is typically thought a fatal objection to theories of this sort, is warded off by the formulation, which specifies that having an interest is not a sufficient condition for being owed a duty. The challenge then is to say what is sufficient for being owed a duty.

But there is a deeper problem than this for the Interest Theory of Duties, one that arises for the Interest Theory of Rights as well. 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 individual. For the sake of argument, suppose that the sufficient condition is the possession of a certain kind of interest, let's call it a ' δ -interest.' Now suppose further that we learn that some individual S has a particular δ -interest. What do we learn at this point? We learn that S has a certain 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 without more. That is, the conditions of the Interest Theory do not tell us why it is not redundant to say that S has a δ -interest, and that in addition she is owed a duty because of that interest. That is, the Interest Theory does not answer the question of Practical Difference.

Similarly, the accuracy of the conditions given by the Will Theory of Duties could easily be questioned. Are we to think that a person who is unable to demand performance or release the agent from the obligation to perform, say because they are an infant, therefore is not owed any duties? That is the sort of question that should inspire attempts at solution on the part of the Will

Theorist, since it is a real problem but not one that threatens to render the Will Theory a non-starter. But there is a deeper problem that does pose such a threat, and which I will call the ‘Antecedence Objection.’¹¹ Again, suppose for the sake of argument 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 one wants to know whether S is owed a duty that J ϕ , and the Will Theorist responds by saying that it depends on whether S has the power to demand or waive J’s ϕ ing. One might retort that one could hardly be expected to know whether that is so if one did not already know that S is owed a duty. But why this retort? The instinct behind it is that questions about powers, such as the power to demand and waive performance, flow from facts about duties, rather than the reverse. (And the Interest Theorist might agree at this point, saying that questions about duties flow from facts about interests, rather than the reverse.)

Is this instinct well-grounded? Well suppose that we did have an enumeration of the powers and of where they lie, so that we could in fact tell whether S is owed a duty by applying the Will Theory. Still, there is a question that one might have had in mind when asking whether S is owed a duty and that still goes unanswered. Perhaps that question is better framed by asking why S is owed a duty. The answer, that S has a certain power, is unsatisfactory because it still does not tell us why S is owed the duty—it does not give us a very general principle or way of thinking by which we can figure out, from first principles as it were, whether S is owed a duty. It’s difficult to articulate what would count as a satisfying theory, but as a heuristic one might ask whether the theory provides a guideline for moral deliberation as to whether S is owed a duty or not. An enumeration of who has which powers does not seem to fit that bill. Of course, we might be given a way of determining who has which powers, and then we would have a way to determine, without the aid of a list, who has which powers; and also, who is owed which duties.

My contention is that by putting the Interest Theory of Duties and the Will Theory of Duties in competition with each other, 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.¹² The Interest Theory is a natural choice for the former sort of account, and the Will Theory a natural choice for the latter. That is not a definitive classification, since there are no doubt ways of altering each theory to fit the alternate demand. But my contention for now is that this is a promising strategy, and dispels both the appearance of competition and the deeper kinds of problems that may attend each theory. This is the strategy that I pursue in what follows.¹³

¹¹ Following the lead of Simon Căbulea May, “Directed duties” *Philosophy Compass* 10(8) (8 2015) 523.

¹² Nicolas Cornell, “Wrongs, rights, and third parties” *Philosophy & Public Affairs* 43(2) (2015) 109 suggests a similarly conciliatory strategy, proposing that there are two different phenomena—rights and wrongs—that each call for a different theory. In Chapter 4 I will argue that we cannot separate rights and wrongs in the way that he proposes. For now it will do to point out that 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.

¹³ Let me point out, all too briefly, that in referring to interests in the account of Direction, I do not purport to reduce directed duties to interests. That much should be evident from what I have said so far about the failure of interest theories to answer the question of Practical Difference, which is a failure to say what more is added to the claim that S

II. Contractualism as an Account of Direction

§5. Contractualism. I started with the example of making a promise to Stephanie. Our question about Direction in this case is: why do I owe it *to Stephanie* to keep my promise? I want to show now that contractualism, which explains why there is a duty to keep one's promises at all, can also show why that duty is owed to Stephanie.

Apart from characterizing the domain of contractualist judgments as 'what we owe to each other,' Scanlon explicitly acknowledges the directedness of duties when he applies his contractualist theory to the case of promising and criticizes a prominent alternative account of promissory obligation. This alternative, the conventionalist account defended by Rawls,¹⁴ claims that there is a social convention of promising, and that promissory obligations arise because fairness requires that we not exploit this convention. Scanlon's objection is that conventionalism fails to confirm that 'the obligation to keep a promise is owed to a specific individual who may or may not have contributed to the practice of promising.'¹⁵ But despite raising this worry, Scanlon does not return to the subject of directed duties and he is not explicit about how contractualism is to explain that a promissory obligation is owed to the promisee.

Crudely put, Scanlon understands the promissory obligation as one that is to be defended in terms of the value of assurance. We often have reason to want to be able to rely on the conduct of others. But even when we are not in a position to act in reliance on their conduct, we may nonetheless reasonably want to be assured that they will act in a particular way. This may be because we hope for peace of mind, or because we hope to secure other interests. But assurance is valuable even if none of these things follow from it, for it sometimes just is of great importance to us to know that someone will take a particular action.¹⁶ Now recall that contractualism declares an action to be wrong just in case it would be prohibited by any set of principles that could not be reasonably rejected.¹⁷ This formulation gives us a heuristic for discerning defensible moral principles: they are those which could not be reasonably rejected. Given that assurance is valuable to us in the ways just mentioned, 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

has an interest of the right kind by the claim that she is owed a duty. In Chapter 2 I will suggest that it is not possible to give an account of Practical Difference that excises any mention of relational normative concepts. But none of this should prevent us from relying on the idea of an interest in order to explain the incidence of directed duties, or on the natural idea that directed duties serve (in a way still to be properly understood) to protect our interests.

¹⁴ John Rawls, *A Theory of Justice* (Revised, Harvard University Press 1999).

¹⁵ T M Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) p. 316.

¹⁶ *ibid.*, p. 303.

¹⁷ 'Reasonably' is to be understood in a morally substantive sense, and could not be replaced with the word 'rationally.' On the meaning of 'reasonableness,' and a defense of the contractualist's use of the term against the charge of circularity, see *ibid.*, pp. 191–97.

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. Roughly put, then:

Principle F. If (1) A assures B that A will ϕ , (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 ϕ ing; then in the absence of special justification A must ϕ .

Satisfying F does not on its own suffice to create a promissory obligation; one may knowingly assure another that one will ϕ without really promising to ϕ . What is needed in addition is that one engage F in the right way, not by some magic combination of words, but by assuring another that one will ϕ by one’s acknowledgment that it would be wrong to ϕ . There are some complexities here, which I ignore. What I take to be essential to a contractualist account of promissory obligation—as with contractualist accounts of other moral obligations—is that the obligation is grounded in a principle, perhaps Principle F, that belongs to a set of principles that could not be reasonably rejected.

§6. Gilbert’s worry. It is this basic explanatory strategy of comparing alternative sets of principles that leads Margaret Gilbert to wonder how the contractualist account could possibly acknowledge the directedness of the duty to keep one’s promise.¹⁸ Her 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. Perhaps one thinks 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. Or perhaps Principle F could be reformulated so that it explicitly states that Barry has this standing; still, we would not have an explanation of why it should be reformulated in this way, and certainly not a unified explanation of how to formulate the principles governing various non-promissory directed duties so that these principles identify the relevant addressees.

But Principle F does point out that it is the promisee who has standing to consent to the promisor not doing what was promised.¹⁹ So the contractualist may claim that it is this consent

¹⁸ A similar concern is raised in Leif Wenar, “Rights and *What We Owe to Each Other*” *Journal of Moral Philosophy* 10(4) (2013) 375, claiming that there is studious avoidance of talk of rights and directed duties on the part of Scanlon.

¹⁹ 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.

clause which establishes that the promisee has special standing with respect to the promisor. But Gilbert's explicit response to this claim is not entirely conclusive. She points out that a promisor may give a third party the authority to consent to non-performance, as when Jane promises Diana that she will look after Timmy unless Timmy says it's okay for her not to. Since Diana remains the one with special standing to insist on Jane keeping her promise and complain if she doesn't, we see that this special standing does not correlate with standing to consent.

To this the contractualist might reply that Principle F establishes a more basic status than the standing to consent granted to Timmy in the example. For while Timmy can release Jane from her obligation to look after him, he cannot release her from the conditional obligation that she look after Timmy unless he consents. Only Diana can release Jane from that obligation (call this 'the power of fundamental consent'), or perhaps change its terms by granting standing to consent to someone else. There are two reasons to contest this move, neither clearly brought out in Gilbert's discussion. One is that a directed duty may not always be accompanied by this fundamental power of consent: Jane owes Timmy a duty not to kill him for profit, and Timmy does not have the power to release her from this obligation, though he is its addressee. The other issue is that, once we acknowledge that Diana's power of consent differs from Timmy's in being the fundamental power of consent, we may wonder why that fundamental power is granted to Diana, or more generally, to the promisee. It would obviously not be sufficient to say that it is because Diana is the one to whom the promise was made, nor that it is because she is addressee.

§7. Contractualist justification. I propose to show that the contractualist account of directedness is to be found in its model of moral deliberation, though a summary formulation of contractualist reasoning may make this strategy sound unpromising. The contractualist holds that an action is wrong just in case it is not permitted by any set of principles that could not be reasonably rejected by all who seek to find reasonably non-rejectable principles by which to live. As Scanlon glosses this formula, it is concerned with which of our actions are justifiable to others. But a critic will note that the addressees of duties have no special place in either of those formulations. While it is true that a promisee threatened with promise-breaking would, on reflection, reject a set of principles that permitted the breaking, and reasonably so, so would one who is only potentially a promisee and so only potentially threatened with promise-breaking. Since anybody could find themselves a promisee, anybody could reasonably reject such a set of principles. The same might be said about justifiability. If promise-breaking cannot be justified to a promisee in some particular situation, is it not because it could not be justified to anybody, rather than conversely?

To this it may be replied that the notion of justifiability *to others*, or even of reasonable rejection, are special notions, such that the claim that an action is not justifiable to others, or is reasonably rejectable, itself gives a special place to those who would be wronged by the action. But how so? The basic idea of contractualist deliberation, which we might, after Parfit, refer to as 'the complaint model,'²⁰ involves comparing the various complaints that might be made against alternative sets of principles. 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.

²⁰ Derek Parfit, "Equality or priority" (1991).

But Scanlon's contractualism specifies this complaint model in several important ways, such as by requiring that reasons be grounded only in the well-being, claims, or status of individuals.²¹ The specification that is important for us, though it has been relatively neglected in discussions about contractualism, is the requirement that complaints be grounded in *generic reasons*, which is to say the reasons attached to representative standpoints, grounded in the situation when characterized in general terms, rather than in the situation of any particular person. Scanlon describes them as follows:

Generic reasons are reasons that we can see people have in virtue of their situation, characterized in general terms, and such things as their aims and capabilities and the conditions in which they are placed. 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.²²

Specifying the complaint model allows the contractualist to identify the decisive complaint against a prohibited kind of action as one that attaches to a particular role. But then we have a general test for the extension of a directed duty: a duty is directed to that person who occupies that role which grounds the decisive complaint. This is not a mysterious or ad hoc test, since it is intimately tied to the procedure of determining which duties we have.

The idea is as follows. If Jane makes a promise to Diana, then our very understanding of what it is to make a promise puts Jane in the role of promisor, and Diana in the role of promisee. Timmy, as a third party beneficiary, occupies a more contingent sort of role, since the very idea of promising does not carry with it the requirement that anyone occupy that role. That is, the fact that promising essentially makes place for promisor and promisee, but nobody else, is what allows us to characterize Timmy as a third party. Having characterized roles in this abstract way, we can proceed to consider the generic reasons that one might have in virtue of occupying one of these roles. Such a generic reason is one that it makes sense for an occupant to have, though an actual occupant of the role need not have it, and may have some other reasons given the actual details of the situation. For example, given that promises have the point of assuring the promisee that the promisor will perform some action or ensure the subsistence of some state of affairs, it makes sense that someone who occupies the role of promisee would have an interest in being assured of the promisor's performance. So we may say that a generic interest in assurance is attached to the representative role of promisee, and that there is a complaint that is grounded in that generic interest in assurance and attached to the role of promisee.

The contractualist account of promising then has it that this complaint is decisive when it comes to comparing sets of principles that do and do not contain Principle F. The result is that a set of principles that doesn't contain F, and therefore an action that infringes F, could be reasonably rejected because of the decisiveness of the complaint attached to the role of promisee. We might say, putting all this too crudely, that an infringement of Principle F could not be justified *to the*

²¹ Scanlon, *What We Owe to Each Other* (n 15) p. 219.

²² *ibid.*, pp. 204-205.

promisee, though what is really meant is that the infringement is to be rejected on the basis of the interests tied to the representative role of promisee. In our example, it is Diana (and not Timmy) who occupies this role, and who there has the grounding generic interest in assurance. So in this case, the promise is owed to her.

III. The Importance of Generic Reasons

§8. Generic reasons as a veil of ignorance. Contractualism can accurately pick out and explain the direction of a directed duty such as the obligation to keep a promise. But questions remain. One set of questions, to be answered in the next chapter, concern what practical difference it makes that a duty is directed, and how that fits with the contractualist account of a duty's direction. Another more immediate question asks why a moral agent is required to consider complaints grounded in generic reasons. That approach gets us the right results, which may be enough for us to endorse it as an account of directed duties. But we would like to know whether there is something to be said in favor of this aspect of our moral practice. The answer, I will suggest, is that generic reasons abstract from morally irrelevant considerations. I will draw analogies with the veil of ignorance and our interest in privacy in order to suggest that conclusion, but defend it on the basis of a distinction between having an interest and taking an interest.

As a first analogy, consider Rawls's veil of ignorance, which he recommends as a 'device of representation' that can help to determine principles that would be chosen under fair conditions.²³ In Rawls's case, the veil of ignorance is intended to represent a bargaining situation in which the principles of a just society are to be chosen, and it is intended to remove bargaining advantages and disadvantages. As he puts it:

The idea here is simply to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves. Thus it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles. It also seems widely agreed that it should be impossible to tailor principles to the circumstances of one's own case. We should insure further that particular inclinations and aspirations, and persons' conceptions of their good do not affect the principles adopted. The aim is to rule out those principles that it would be rational to propose for acceptance, however little the chance of success, only if one knew certain things that are irrelevant from the standpoint of justice.²⁴

It is striking that the use of generic reasons in contractualist deliberation appears to function as a constraint on what information can be used in deliberation, and so it is tempting to think that

²³ John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) p. 86,

²⁴ Rawls, *A Theory of Justice* (n 14) pp. 16–17.

the use of generic reasons also acts as a filter excluding morally irrelevant considerations.²⁵ But the challenge for this analogy is to say more about what is being excluded in the case of contractualist deliberation, and why. Unlike the Rawlsian original position, contractualist deliberation is not concerned to reproduce a bargaining situation, and so the question is not whether one party could take advantage of another. Rather, it concerns the comparison and assessment of potential complaints for reasonableness and significance. Given that, why should there be a need to exclude any considerations?

But the issue is not that considerations need to be excluded. Deliberation, as something that an agent does in a particular situation, is prone to focusing on the considerations that arise in that particular situation. But if the point of moral deliberation is to arrive at principles which we, who are motivated to find such principles, might agree to live by, then the deliberator needs to consider not just the particular situation with which he is confronted, but the range of situations to which a principle would apply. That is already a reason to think about complaints in terms of generic reasons and representative roles.

§9. Generic reasons and respect. There is another reason to consider complaints grounded in generic reasons, and that has to do with respect. To see this, it may be worth considering first an interesting feature of the way we value our privacy.

Consider the complaint you would have if I read your diary—it is at base, a complaint that I have intruded upon your private sphere. But what is wrong with me doing that? In some versions of this scenario, reading your diary reveals information that is embarrassing to you and causes you emotional pain; or perhaps it impairs your relationships or exposes you to financial loss. We could fill in the details in a variety of ways, explaining how the intrusion sets back any of a variety of interests. But this hardly explains why we intrinsically value privacy, as I think we do. So consider a scenario in which I read your diary and learn nothing except some innocuous details about the changing weather patterns—indeed, information that I might have learned from public sources, and that in no way endangers any interests of yours. What would your complaint be now, if I pressed you to say how I had harmed you?

Some philosophers have tried to show that what is at stake when it comes to privacy is a kind of discretion that is necessary for the possibility of intimacy, or identity, or of special relationships.²⁶ There is a wide set of theoretical options here, but what is common to them is the thought that the interest in privacy has to do with wanting a sphere of discretion because of things that one *might* want to do within that sphere, rather than with what one does actually do. In the case of your diary, you may well complain that it doesn't matter that I didn't read anything embarrassing or damaging or intimate, but that I might have done so. And that complaint doesn't depend on the fact that you

²⁵ Scanlon may be read as rejecting the need for a veil of ignorance, in Scanlon, *What We Owe to Each Other* (n 15) pp. 206ff. But his concern is to point out that the kinds of considerations relevant to moral deliberation are different from those involved in setting up the principles of a just society, rather than to reject the idea of any sort of veil that helps us determine morally relevant considerations.

²⁶ Julie Inness, *Privacy, Intimacy, and Isolation* (Oxford University Press 1992); James Rachels, "Why privacy is important" *Philosophy & Public Affairs* 4 (1975) 323; Adam Moore, "Privacy: its meaning and value" *American Philosophical Quarterly* 40 (2003) 215; Thomas Nagel, *Concealment and Exposure* (Oxford University Press 2002).

had written anything embarrassing or damaging or intimate, but only that you might have done so. Nor is it a defense if I point out that I *knew* that you had not written anything of this kind in your diary, and merely wanted to read about the weather. Even if you had never taken an interest in writing such things down, you may well say that you have an interest in having a private space in which you are at liberty to write those things. A complaint of this sort will sometimes be put in terms of respect, for want of a more articulate form of expression. You might say that I failed to respect your privacy, and that I failed to respect you, even though I did not in any other way make you worse off. I did make you worse off: I intruded on your private sphere. But there is nothing to point at as an indication of harm or damage, only possibilities that you might gesture at to make the injury vivid.

This feature of our concern for privacy is reflected more widely in the moral sphere. If I break my promise to Stephanie, she may complain that she was relying on me to keep my promise, and there may be all sorts of determinate and conspicuous ways in which I have made her worse off. But there may be none; she may even have a prosaic enough outlook that she feels no insult. Still she might formulate a dispassionate complaint to the effect that she *might* have relied upon my performance, or that she *might* have placed value in being assured of my performance. These are not complaints about the negative expected utility of my conduct. The complaint is that it was legitimate for her to rely on my performance or to value being assured of it, and that I should have conducted myself accordingly. Just as privacy makes available a space of opportunity that is valuable because it enables behavior that would otherwise be embarrassing or dangerous or overly revealing, even when one doesn't engage in that behavior, so too promising makes available a space of opportunity that is valuable because it enables behavior that depends upon assurance of another's behavior—and it is reasonable to care about the integrity of that space even if one does not in fact depend on that assurance.

Here's another way to put the point: when I make a promise to Stephanie, then even if she doesn't *take* an interest in (say) assurance, she does *have* an interest in it, because she might well take such an interest—where 'might' is meant not simply in the sense that it is possible that she does so, but in the sense that it would be reasonable for her to do so. This distinction between having an interest and taking an interest is worth elaborating. The distinction is parallel to (perhaps derives from) that between judging that x is valuable and valuing x. Valuing x involves not just making the judgment that x is valuable, but also having the disposition to be emotionally responsive to how things go with x, seeing it as appropriate to engage with x in certain ways, and seeing x as a source of reasons for action.²⁷ One may think jazz valuable but not care much for attending jazz concerts, or really spend much time fretting about the vibrancy of the local jazz scene—but valuing jazz would involve dispositions and behaviors much like these.

Similarly, one may have an interest in some x that makes one's life go better, but one might fail to have any of the dispositions and behavior that accompany having an emotional entanglement with x of the sort that the valuer has. This is not just a matter of awareness. One might be aware of the interest one has in having access to fresh produce, but still fail to care much about that interest. Taking an interest in x would mean that one also gives it a place in one's life, being

²⁷ Samuel Scheffler, "Valuing" in *Equality and Tradition* (Oxford University Press 2010).

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. By doing so, the thing one takes an interest in naturally comes to take on a particularized meaning and importance within the context of one's ongoing choices and commitments and attachments—just as the music lover who values jazz will not just display the general attitudes and behavior of the representative jazz lover, but will come to have quite particular habits and reactions that characterize her particular history of interaction with the music form and a particular form of emotional entanglement and identification with it. So if Stephanie is a jazz lover with a particular affection for the music of Keith Jarrett, and I promise her that I will take her to the Keith Jarrett concert, then she does not just have a generic interest in my keeping my promise. She also takes an interest in my taking her to the concert, and when I don't her loss and her response will take on the particular quality that reflects the particular way that she took an interest in my keeping my promise.

This raises an obvious question. In deliberating about whether to keep my promise or not, why should I be sensitive to the interests Stephanie *has*, which is to say the generic interests she has as a promisee, rather than to what she actually does take an interest in? One suggestive response already emerged from thinking about the veil of ignorance: thinking in this more general fashion allows us to discern principles which we would agree to live by, since we are alive to all the kinds of cases that we might encounter, rather than simply the case before us. But the response I am considering now is different, and has more to do with what is required to respect an individual, which is to say, what is required to value that person as a person. What has emerged from the discussion of the distinction between having an interest and taking an interest is that a person has the capacity to take an interest in things. So, perhaps, to treat Stephanie in accordance with what she might take an interest in, rather than simply what she does take an interest in, is to treat her as more than a bundle of interests (in the way of utilitarianism). It is to treat her as the kind of being that is capable of taking an interest in a situation in a variety of different ways. Treating her in that way is then a way of valuing that capacity, and so is a way of valuing her as a person.

2

What Difference does Directedness Make?

§10. The question of Practical Difference, and why we should answer it. In what way is owing it to Stephanie to do what I have promised different from simply having to keep my promise? What is added to a duty by the fact that it is directed? More precisely, we can ask:

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

The question presupposes familiarity with the notion of a duty, and focuses on the element of directedness. A satisfying answer may take for granted an ordinary understanding of what it is to be under a duty—such as that J’s having a duty to ϕ indicates that ϕ ing should have a particularly important place in J’s deliberation, and that J is open to criticism (of the kind involved in blame) for not ϕ ing. It must then proceed to show what further difference directedness makes to the way in which the *addressee* (Stephanie, in my example), the *agent* (myself, in my example), or third parties may appropriately act.

Without a substantive answer to the question of Practical Difference, ‘owing it to Stephanie’ is in danger of sounding like a quaint or parochial way of talking that does not reflect anything of moral significance. The consequentialist will be allowed to think that this way of talking is at best a convenient way of achieving optimally valuable states of affairs, rather than an acknowledgment of a dimension of morality whose importance is not a matter of the optimization of value. Given the potential for such skepticism, we should also aim to answer the following question:

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

This question is not satisfied by a simple list of the consequences of acting as if duties were directed, or of failing to do so. Rather, it seeks a characterization of the kind of moral significance or meaningfulness that we overlook when we do not acknowledge directedness. But we need a substantive account of Practical Difference before we can begin to address the question of

Importance. For if the directedness of a duty has no impact on what it is appropriate for anyone to think or do, then it will be difficult to see how it could be non-instrumentally important. And we will hardly be in a better situation if we cannot say substantively what difference directedness makes, but merely insist that it does make some sort of difference. This suggests a heuristic for an adequate account of Practical Difference—it should provide a fruitful framework for providing an account of Importance. So in this chapter I will sometimes criticize a theory because it lacks any potential for providing an account of Importance. But I will only defend a positive answer to the question of Importance in the next chapter.

§11. Argument strategy. Several characterizations of Practical Difference can be discerned in the literature. According to the Claim Theory, what it is for J to owe it to S to ϕ is for S to have a claim against J to ϕ . According to the Demand Theory, what it is for J to owe it to S to ϕ is for S to have special standing to demand that J ϕ . According to the Blame Theory, what it is for J to owe it to S to ϕ is for S to have special standing to blame J for not ϕ ing. We find all three theories in Stephen Darwall’s claim that directed duties

entail a distinctive discretionary second-personal authority that obligees have to make claims and demands of obligors and hold them personally responsible.¹

But it will be useful to assess each theory on its own, and I argue in Section I that each fails to capture the practical difference that directedness makes, since it is either inaccurate, or too obscure to give us further purchase on understanding the importance of directedness. Unfortunately the defects of each theory are such that combining them, in Darwall’s manner, will not produce a new theory without those defects.

But the Claim, Blame, and Demand Theories are not entirely misguided either. Each attempts to say something about the special standing that an addressee of a directed duty has in virtue of its directedness. What is required is a fuller and more illuminating understanding of the addressee’s special standing. In Section II, I develop this general strategy by elaborating a Repair Theory of directedness: if J owes it to S to ϕ then S has special standing in our practice of accountability, in particular insofar as it aims at moral repair—S is the proper recipient of apology and redress if J does not ϕ , and S is the one who has the power to accept J’s apology and to forgive him. This account is illuminating, since it characterizes directedness in terms of familiar features of our moral practice, and shows that these features amount to a distinctive way in which our practice of holding each other accountable is structured.

Does the Repair Theory give a full account of the Practical Difference made by directedness? One concern is that it is too focused on what appropriately follows wrongdoing, and neglects the intuition that directedness matters in advance of wrongdoing, perhaps as a way of structuring an agent’s deliberation. Indeed, it may seem that the account of Direction given in the last chapter already provides a significant, possibly self-standing, answer to the question of Practical Difference: a duty’s directedness makes it appropriate to give the addressee of the duty special place in

¹ Stephen Darwall, “Bipolar obligation” in *Morality, Authority, and Law* (Oxford University Press 2013) pp. 31-32.

deliberation. In Section III I argue that this last claim is true, but says less than one might think, and not enough to provide a satisfactory answer to the question of Practical Difference.

I. Against the Claim, Blame, and Demand Theories.

§12. The deontic character of duty. In order to say what difference directedness makes, we should begin with our ordinary understanding of what it is to have a duty. If I have a duty to ϕ , then my deliberation about what to do is subject to a normative constraint. The duty has a special normative force, which we may label ‘deontic,’ such that ϕ ing occupies a special place in my deliberation about what to do. One way of describing this special influence is that a duty to ϕ is an especially weighty consideration in favor of ϕ ing. If I have made my promise to Stephanie, and I subsequently discover that an old friend is in town on the same day, then the fact that I have made a promise *outweighs* the reason I have to see my old friend instead. But this can make it sound as if deliberation in the presence of duty is simply a matter of weighing the values of alternative actions. Instead, the experience of taking a duty seriously is typically one of feeling that certain alternatives have been *excluded* from serious consideration, rather than simply outweighed. That is, a duty has special influence on deliberation as an exclusionary reason: if I am under a duty to ϕ then I have a second-order reason to discount certain reasons against ϕ ing.²

Could it be that directedness has something to do with this way of characterizing the force of a duty? R Jay Wallace suggests that the directedness of a duty is what explains its deontic character.³ That is plausible as a claim about why certain duties, namely the directed ones, have the normative force that they do. But non-directed duties have deontic force too, so deontic force cannot be what makes for the difference between a directed duty and a non-directed duty. Even if all moral duties turn out to be directed, as is suggested by Scanlon when he describes morality as the domain of ‘what we owe to each other,’⁴ it is at least conceivable that one could be under a moral duty that is not owed to anyone. Indeed, Scanlon concedes that there are behaviors, such as cutting down a redwood just for fun, that we ordinarily call morally wrong even though the wrongness involved is not simply a matter of what we owe to each other.⁵ It is intelligible that I am under a duty not to

² Joseph Raz, *Practical Reason and Norms* (Hutchinson and Co 1975) pp. 35–48.

³ R Jay Wallace, “Lecture 1: Relational normativity and the problem of moral obligation” (2015). But compare R Jay Wallace, “The deontic structure of morality” in David Bakhurst, Margaret Olivia Little, and Brad Hooker (eds), *Thinking about Reasons: Themes from the Philosophy of Jonathan Dancy* (Oxford University Press 2013), in which the suggestion is that deontic force is not simply a matter of how a duty shows up in deliberation, but must instead be understood as implicated in a relational structure. One way of understanding this suggestion is that a directed duty has its distinctive force in virtue of the fact that it is implicated in such a structure—that is compatible with the suggestion explored in the text. But a different way of understanding Wallace’s suggestion, closer to the account I defend in Section II, is that a directed duty’s deontic character is not to be understood using the metaphor of force, but instead as referring to an interpersonal structure which the duty constitutes.

⁴ Scanlon, *What We Owe to Each Other* (n 15) pp. 171–77, and generally.

⁵ *ibid*, pp. 172–73.

cut down redwoods just for fun, and that this duty is not owed to anyone in particular, given that it is grounded in the impersonal value of the redwoods.⁶ Still, insofar as this is a duty, it has the same force as a directed duty, since it excludes considerations in favor of alternate courses of action. So we should not understand Wallace's claim as a response to the question of Practical Difference.

One might develop Wallace's claim by proposing that directed duties are distinctive in the way that they come to have deontic force. This view is also implicit in Scanlon's suggestion that justifiability to others has a shaping effect on our deliberation.⁷ Even if it turns out that the impersonal values which underlie other kinds of duties have a similar shaping effect, we can still see moral duties as distinctive in that they are grounded in a particular kind of value, namely the value of the relationship constituted by acting in a way that is justifiable to another. These are claims about the justification of directed duties, and are reminiscent of the claims I made in Chapter 1 as part of my account of Direction. Does such an account of justification leave open the question whether, and how, anyone should act differently given that the force of a duty is grounded in this way rather than another? It grounds at least the following norm: if an agent wishes to deliberate with some degree of moral understanding, then he should grasp the special justificatory role of the addressee in his deliberation. But I will argue in Section III that, on its own, this is a less than satisfactory account of Practical Difference.

More generally, examining the way in which a duty's force structures an agent's alternatives is not a promising place to begin an account of directed duties. Directedness is a *relational normative concept*, which is to say that it essentially involves argument places for more than one person. So it makes sense to locate directedness within a framework that is interpersonally structured in a way that this aspect of an agent's deliberation is not.⁸ But the challenge involved in taking up this strategy is that we must find an interpersonal framework that has a sufficiently familiar structure that it actually sheds light on the nature of directedness, rather than presenting us with a different label for it.

§13. The Claim Theory. The phenomenon of *claiming* provides an example of a conceptual framework that is interpersonal but does not much illuminate directedness, even though it provides us with a useful vocabulary for talking about directedness. Joel Feinberg observes that:

If Smith owes Jones five dollars, only Jones can claim the five dollars as his own, though any bystander can *claim that* it belongs to Jones.⁹

⁶ Elsewhere I have argued that a duty is owed to the person whose interests ground a complaint that justifies the duty. On this view, a duty not to cut down a redwood is not owed to anybody because nobody's interests ground a complaint that is centrally involved in justifying the duty.

⁷ Scanlon, *What We Owe to Each Other* (n 15) pp. 153–58.

⁸ To this it may be objected that deliberation can be about another, and so can be interpersonal in the way demanded. That is correct, and the idea that an addressee has special place in an agent's deliberation will be an element of an account of directedness, though there isn't room to develop it here. The observation in the text is that the simple description of deontic force, as a way of structuring alternatives, does not yet make essential place for anyone other than the agent.

⁹ Joel Feinberg, "The nature and value of rights" *Journal of Value Inquiry* 4(4) (4 1970) 243, p. 251.

Feinberg's distinction is compelling, but it presents us with the same task facing us in the case of directedness: that is, to say what difference is made to what it's appropriate for anyone to do. It is true that between *claiming* and *claiming that* there is a striking difference of logical form. When used in a normatively potent way, the locution 'to claim that' takes a normative proposition as its object; whereas the locution 'to claim' takes an entity or a state of affairs as its object. One claims that *the five dollars is owed to Jones*, whereas Jones claims *the five dollars*. What is important is not just the difference in type of the second argument, but the fact that the propositional object of 'to claim that' must explicitly name Jones as the one to whom the five dollars is owed. In contrast, the 'to claim' statement presupposes that the one who performs the speech act of claiming is also the one to whom the five dollars is owed. But noticing this difference in logical form does not tell us what practical difference it makes that Jones is able to claim the money rather than simply claim that he is owed the money. So while Feinberg's distinction is an important one, the idea of a claim is on the side of what needs to be explained, rather than of what has the power to explain.

The above characterization of claiming relied on the idea of a directed duty when it said that Jones's claim presupposes that he is owed the five dollars. Can we do without such reliance, by making do with the idea that Smith ought to ensure that Jones has five dollars? More generally, we might say that for J to claim ϕ from S is for J to claim that S ought to make it the case that J has ϕ . This formulation makes no overt reference to a directed duty, or to the notion of owing; but it is also clearly false. That is because J may claim that S ought to make it the case that J has ϕ without claiming ϕ from S—because, say, it is best that S do this or because someone else has claimed it from him.¹⁰ We have replaced the relational idea involved in claiming with the non-relational concepts of *claiming that* and *ought*. Our problem remains: how can we obtain sufficient distance from the concept of *claiming* in order that we can characterize it, without at the same time losing sight of its distinctively relational quality?

§14. The Demand Theory. One way of interpreting the idea of a claim involves saying that a claim enables S to make a demand on the one who owes her a duty. Stephen Darwall, for example, says that directed duties:

entail a distinctive discretionary second-personal authority that obligees have to make claims and demands of obligors and hold them personally responsible.¹¹

This suggests a Demand Theory of directed duties: if J owes it to S to ϕ , then S has special standing to demand that J ϕ . But the proposal is either inaccurate, or too obscure to provide a satisfying account of Practical Difference. It is inaccurate if what is meant is that it is only appropriate *for S* to demand that J comply with his duty. While there may be reasons of prudence and politesse for a third party to 'mind their own business,' there are no general moral reasons to do so, and we in fact think of morality as being everyone's business. We all may, and do, take an interest in the moral status of others' actions, and, in particular, in how those actions treat people. This is particularly

¹⁰ See also Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1992) p. 61.

¹¹ Darwall, "Bipolar obligation" (n 1) pp. 31-32.

evident in cases in which the potential victim of an action has been made too timid or unaware to stand up for herself, and in which it is not just appropriate, but good, that third parties insist that the relevant duty be fulfilled. Perhaps what is meant is not that S uniquely has standing to enforce the duty, but that her standing is special in some way. This suggestion is reinforced by Darwall's description of the addressee as having *second-personal authority*, which suggests that his authority is of a special kind. But second-personal authority is simply described as the authority to make claims and demands upon others.¹² Without a better understanding of what a claim is, we do not gain any insight into what practical difference is made by having this kind of authority, and so we do not gain any insight into the practical difference made by directedness. As with the language of claiming, we seem to have simply re-labeled the problem with a term that needs explanation just as much as directedness does.

Darwall says of the addressee's power to demand that it is discretionary, and one may take from this the suggestion that what is distinctive about the addressee's standing is that it is up to her whether the agent must fulfill the duty or not—that is, that the addressee has special standing in the sense of having the normative power to release the agent from the duty, or to consent to non-compliance. But it is not true that the addressee of a duty necessarily has this power. For example, J is under a duty not to enslave S, no matter what S says. Perhaps we are to think that this duty is not directed, and that insofar as J were to owe it to S not to enslave her, she would be able to waive that part of the prohibition. Yet it sounds stilted to say that if J breaks a promise made to S he wrongs her, whereas if he enslaves her he does wrong, but does not wrong her. Nor should we revise our judgment that S may not consent to her own enslavement. It is a hard-learned lesson of human history that those who are enslaved or in danger of being enslaved are particularly prone to consenting to the enslavement.¹³ Theirs may not count as adequate consent given the circumstances of duress and misinformation, but given that the danger is a real and very present one in these circumstances, and given that the power of consent in fact undermines the person's autonomy and is unlikely to further any other interests, there is good reason not to grant a power of waiver to an addressee, for the sake of that addressee's interests. Perhaps this defense of an inalienable claim not to be enslaved ultimately fails. Still, it is enough that we can make sense of a duty owed to S, but to which S cannot consent, in order to see that this account does not give a satisfactory answer to Practical Difference.

Note also that there are, conceivably, non-directed duties which give a power of release to someone who is not the addressee. Consider for example a duty not to search someone's premises without a judge's consent—if this duty is owed to anybody, it is the resident and not the judge. Perhaps the resident has some more fundamental power of consent, so that even where a judge's consent is not received, he may still allow a search of his premises? That would certainly be a reasonable rule, but it is still intelligible that there be a rule granting the power of consent in such cases only to someone who is thought to be beyond corruption and undue influence, such as a

¹² For example, second-personal authority is a 'distinctively second-personal kind of practical authority: the authority to make a demand or claim.' Stephen L Darwall, *The Second-Person Standpoint* (Harvard University Press 2006) p. 11.

¹³ This is not to render the enslaved somehow responsible for their enslavement—consistent with my argument, 'consent' here is meant to describe the form of the behavior rather than its normative force.

judge. Such a rule need not create a duty owed to the judge, and assigning the power to the judge would in fact be done for the sake of the resident.¹⁴ So not only is having the power of consent not a necessary accompaniment of being owed a duty, it is also insufficient for being owed a duty.

§15. The Blame Theory. Following Darwall again, we may attempt to characterize the special standing of the addressee from the perspective of backward-looking criticism rather than forward-looking enforcement. In particular, the Blame Theory proposes that if J owes it to S to ϕ , then S has special standing to blame J for not ϕ ing.¹⁵ This proposal too is either inaccurate or obscure. It is inaccurate if what is meant is that it is only appropriate for S to blame J for not ϕ ing, for reasons that are very similar to those that apply in the case of the Demand Theory. For a start, it cannot be that the addressee is the only one who is entitled to blame the agent. For suppose that I promise Stephanie I will help her move, and when the appointed time comes around I am so much enjoying having coffee with you that I say: ‘I said I’d help Stephanie, but never mind. Let’s rather continue our conversation.’ Whatever Stephanie could say about my behavior, you could say too. Even if you are also enjoying the conversation, it would not be at all odd for you to say that I really should help Stephanie; that she may be relying on my assistance, or that she would find it hurtful if I didn’t help her. And your view of me might dim in exactly the same way that Stephanie’s would upon my breaking the promise.

One may worry that it would be odd, even objectionable, for a perfect stranger to rebuke me for not keeping my promise. But we must be careful to distinguish between the fact that there may be reasons of prudence and politesse—and perhaps moral considerations of privacy, tolerance, and humility—for a third party to refrain from blaming a wrongdoer, and the thought that the third party lacks standing to do so. That there are reasons for a third party to hold her tongue is not sufficient for showing that she is strictly disqualified from blaming me, or even that her blame must take on some less intense form. We see this in cases of promising involving public figures like politicians and celebrities, where the normal expectations of privacy have fallen away and our prudential reasons for being disinterested have been outweighed by the reasons we have for taking an active interest in their affairs. Where, for example, a celebrity has acted violently toward his partner, it is not somehow mistaken for a member of the public to express a measure of indignation about this.¹⁶ So the thought that an addressee is the only one who has standing to blame runs

¹⁴ This way of thinking about how the power of waiver is to be assigned is influenced by the ‘hybrid theory of directed duties’ proposed by Gopal Sreenivasan, “Duties and their direction” *Ethics* 120(3) (2010) 465. That theory proposes that a duty is owed to S just in case S’s measure of control over the duty matches (by design) the measure of control that advances S’s interests on balance.

¹⁵ Margaret Gilbert, “Scanlon on promissory obligation: The problem of promisees’ rights” *Journal of Philosophy* (2004) 83 endorses this theory when she says that a promissory obligation gives the promisee special standing to rebuke the promisor for non-compliance. R Jay Wallace, “Reasons, relations, and commands: reflections on Darwall” *Ethics* 118(1) (1 2007) 24, p. 29 might also be understood as endorsing this theory when he says that ‘the person who is wronged by you has a privileged basis for complaint against you’; though there is some ambiguity as to whether he is saying something about the practical difference made by directedness, or about the way in which a directed duty is justified.

¹⁶ In cases like this there may well be reason for third parties to publicly express their disapproval and blame. See T M Scanlon, *Moral Dimensions* (Harvard University Press 2008) p. 169. Indeed, there are cases in which we think it

counter to our ordinary moral judgments about appropriate blame. It also runs counter to a very appealing conception of morality according to which each is answerable to a universal community of moral agents. When I am the victim of an injustice that is widely accepted or even rendered invisible by contemporary norms, I do not only think that my trespasser is answerable to me. I might warn him to consider how he will be regarded by history, and it may comfort me that the more enlightened inhabitants of the future will blame him too.

Even in an ordinary case such as my promise to Stephanie, it is difficult to see what is *mistaken*, rather than annoying or rude, about a third party rebuking me for breaking my promise. Yet that is what the idea that Stephanie has special standing to blame seems to require. Certainly that is what talk about standing in its ordinary domain amounts to. A legal subject who lacks standing to sue in a particular case does not just have good reason not to litigate the matter; rather, their lack of status undermines any attempt to litigate. Yet it is never a mistake of this sort for a third party to judge that an agent has infringed a duty owed to an addressee, or to entertain the affective and interpersonal responses that transform this judgment into an instance of blame. This is what Raz seems to have in mind when he says against the Will Theory of rights, which characterizes a right in terms of special standing, that it rests on an analogy with the legal rule of *locus standi*, which determines who has the power to litigate where some legal wrong has ostensibly been committed; and that this analogy is prone to being exaggerated.¹⁷

Perhaps some third parties are disqualified from blaming because of limits imposed by socio-temporal distance,¹⁸ or by the moral significance of their own actions, such as when they have committed the very same act that they would blame.¹⁹ But these facts cannot be worked up into an account of unique standing for addressees. Instead, they show that even an addressee can lack standing to blame. I can owe a duty to Stephanie to keep my promise, but if she herself regularly breaks her promises, or if she purposefully places me in a position such that it is inevitable that I will not keep my promise, then she may well lack standing to blame me for noncompliance. Yet she remains the one to whom I owe it to keep my promise.²⁰ In sum, being the addressee of a directed duty is neither necessary nor sufficient for having special standing to blame or complain.²¹

objectionable if a third party does not blame a wrongdoer, such as where the wrong is particularly egregious or the third party stands to benefit from the wrong.

¹⁷ See Joseph Raz, "Legal rights" *Oxford Journal of Legal Studies* 4(1) (1 1984) 1, p. 5.

¹⁸ See Macalester Bell, "The standing to blame: a critique" in D Justin Coates and Neale A Tognazzini (eds), *Blame: Its Nature and Norms* (Oxford University Press 2012), interpreting Williams as thinking that we cannot properly blame those who are not our moral contemporaries.

¹⁹ GA Cohen, "Casting the first stone: who can, and who can't, condemn the terrorists?" in *Finding Oneself in the Other* (Princeton University Press 2013); R Jay Wallace, "Hypocrisy, moral address, and the equal standing of persons" *Philosophy & Public Affairs* 38(4) (4 2010) 307.

²⁰ For an elaboration of this argument, see Simon Căbulea May, "Moral demands and directed duties" (Presented at Directed Duties 2016 conference, Simon Fraser University, 2016).

²¹ My objection is different from the 'antecedence objection' that is sometimes made against the Claim, Demand, and Blame Theories: that is, that they get the explanation of directedness backward. See May, "Directed duties" (n 11). The latter objection has some bite if we are trying to answer the question I call Direction: why is a particular duty owed to S rather than to T? For if our goal is to determine *who* the addressee of a particular duty is, it does not seem helpful to say that the addressee is the one who has special standing to claim, demand, or blame. In a case in which we

§16. Resentment and indignation. As in the case of the Demand Theory, the more suggestive and more accurate idea is not that the addressee is uniquely entitled to blame one who violates a duty owed to her, but that her standing to do so is special in some other way. In the case of blame, this raises the possibility that what is special about the addressee's standing is the way in which she may blame. A prominent way of making out this suggestion is the Strawsonian claim that resentment is the characteristic emotion that accompanies blame by an addressee, one that is distinct from the emotional response available to bystanders. Strawson distinguishes personal reactive attitudes like resentment from impersonal or vicarious reactive attitudes like indignation, describing indignation as 'resentment on behalf of another.'²² This suggests a Strawsonian version of the Blame Theory: the addressee of a directed duty has special standing to resent the person who violates the duty.

But can we make out the difference between resentment and indignation in an illuminating way? It is not enough to say that indignation is 'resentment on behalf of another,' for this simply presupposes that the phenomenon we are tracking has its home in the emotional responses of the wronged person, and that the response of a third party is distinct and derivative. That is, it asserts rather than argues that the emotional responses of a wronged person and a bystander are different. Strawson does say more:

The generalized or vicarious analogues of the personal reactive attitudes rest on, and reflect, exactly the same expectation or demand in a generalized form; they rest on, or reflect, that is, the demand for the manifestation of a reasonable degree of goodwill or regard, on the part of others, not simply towards oneself, but towards all those on whose behalf moral indignation may be felt, i.e., as we now think, towards all men.²³

Interestingly this threatens to reverse the intended priority of resentment and indignation, since the generalized demand that is implicit in indignation seems to express the more serious and paradigmatically moral complaint. I may complain about someone's action because I don't like it, or it hurts me, or imposes a burden on me; but for this complaint to be a moral one, of the sort that Strawson associates with resentment, it must go beyond marking that the action is one of which I disapprove. It must also mark the fact that my disapproval is reasonable, in the sense that it gives proper weight to the various considerations that lie for and against acting in that way. But such a complaint would also be appropriate if the action had been performed to the disadvantage of

are puzzled about why Stephanie, rather than Thandi, is the addressee of a promissory obligation, we are very likely to be at least as puzzled about why it is Stephanie, rather than Thandi, who has the relevant special standing with respect to the promisor. Whatever understanding we do have is likely to be parasitic on the pre-theoretic understanding that the duty is owed *to Stephanie*. But this is not a problem for these theories in answering the question of Practical Difference, insofar as there is at least some hope that we can characterize the relevant special standing in a way that sheds light on directedness. That doesn't mean that we must try to give a reductive account of that special standing that avoids all implicit use of directedness or relational normative concepts.

²² P F Strawson, "Freedom and resentment" in *Freedom and Resentment and Other Essays* (Routledge 2008) p. 16; see also R Jay Wallace, "Lecture 2: Relational requirements without relational foundations" (2015) p. 34.

²³ Strawson, "Freedom and resentment" (n 22) pp. 15–16.

someone other than myself in a similar normative position. That is, a moral complaint essentially contains the same ‘generalized’ expectation that Strawson finds in indignation. The problem is that we cannot treat indignation as the generalized form of resentment without thereby undermining the moral status of resentment.²⁴

Wallace does not make this claim about generalization in distinguishing resentment from indignation. Instead, he points out that

[w]e feel resentment when we believe that another person has wronged us, violating a directional duty to us not to treat us in certain ways; resentment, indeed, can be understood as the characteristic form of complaint that bearers of relational rights and claims are in a privileged position to lodge when those rights and claims have been flouted.²⁵

I have no objection to this statement, but it will not do as the basis of an illuminating account of Practical Difference. It may well be that resentment contains the distinctive complaint that it is *I* who have been wronged, or that it is a duty owed *to me* that has been violated. But these are the very facts whose significance we seek to explain by saying that the addressee has special standing to blame. The problem is not that we are committed to a sort of circularity in our account—it may turn out that we are unable to escape using relational normative concepts in any accurate account of directedness.²⁶ The issue, rather, is that we have not moved beyond labeling the difference that is made by the fact that a complaint belongs to the addressee rather than a third party. One way to see that we have not said enough is to ask whether we are in a better position to answer the question of Importance. We are not—for we do not yet have a sufficiently independent grasp of the difference between resentment and indignation to say why it is important that our moral practice make such a distinction.

II. The Repair Theory.

§17. The Millian insight. The Blame Account adopts a Millian strategy of explanation: it expli-

²⁴ This is particularly evident from Strawson’s attempt to describe a person who entertains resentment but not indignation. Such a person, he says, would ‘appear as an abnormal case of moral egocentricity, as a kind of moral solipsist.’ (Strawson, “Freedom and resentment” (n 22) p. 16.) But it is hard to imagine what a moral solipsist would be like, so entwined is the moral project with our concern for others. Strawson describes the solipsist as ‘seeing himself as unique both as one (*the one*) who had a general claim on human regard and as one (*the one*) on whom human beings in general had such a claim.’ But he immediately remarks that this ‘is barely more than a conceptual possibility; if it is that.’ Strawson is right to be puzzled. While it may be psychologically possible that an individual be disposed only to entertain resentment, it is difficult to see how the commitments involved in entertaining resentment do not at the same time commit her to responding with indignation in relevantly similar cases, even if she in fact fails to do so. We are all to some degree like this person, but only because we are blind to what our personal feelings of resentment commit us to.

²⁵ Wallace, “Reasons, relations, and commands: reflections on Darwall” (n 15) pp. 30–31.

²⁶ Thompson (n 1) argues that any reduction of relational normative concepts to non-relational ones will simply leave out the relational aspect that distinguishes them.

cates a moral phenomenon in terms of its role in our practice of criticizing each other and holding each other accountable. When we try to say what it means that an action is *wrong*, or that you have an *obligation* to do something or other, it is typical to focus on the deliberative use of these terms, as we do when we say that what it is for an action to be wrong is for it to be the case that it is one that you ought, all things considered, refrain from performing. But this way of proceeding risks neglecting the fact that we reasonably take an interest in the moral status of an action for the sake of criticism as well as deliberation. This is reflected in the structure of our moral practice. There is a general connection between our judgments about what it is permissible and impermissible to do, and our judgments about which actions there is reason to blame. Some philosophers have acknowledged this point by saying that blame is characteristic of moral obligation,²⁷ or that facts about moral obligation entail certain facts about the appropriateness of blame,²⁸ or presuppose them,²⁹ or that moral obligation is conceptually connected to our practice of accountability.³⁰ These are all ways of taking seriously the critical role of our moral claims.

But some philosophers go further than this, and argue that notions like moral wrongness are to be explained or defined in terms of their role in our practice of holding each other accountable. Allan Gibbard, for example, says that an action is wrong if it properly meets with ‘sanctions of conscience and of public opinion: sanctions of guilt and remorse on the one hand, and of blame, resentment, and moral outrage on the other.’³¹ This strategy of explaining a puzzling moral concept in terms of facts about our practice of holding each other accountable may be called ‘Millianism,’ since philosophers like Gibbard are disposed to explicitly invoke Mill as a precursor.³² (Whether Mill himself would count as a Millian is doubtful.³³)

²⁷ Bernard Williams, *Ethics and the Limits of Philosophy* (Harvard University Press 1985) p. 177.

²⁸ R Jay Wallace, “Rightness and responsibility” in *Blame: Its Nature and Norms* (Oxford University Press 2012).

²⁹ Wallace, “Lecture 2: Relational requirements without relational foundations” (n 22).

³⁰ Stephen Darwall, “‘But it would be wrong’” in *Morality, Authority, and the Law* (Oxford University Press 2013).

³¹ Allan Gibbard, *Wise Choices, Apt Feelings* (Clarendon 1990) pp. 41-42. John Skorupski takes a similar line, though with less confidence. He considers the claim that ‘x is morally wrong if and only if the agent ought to be blamed (by himself and others) for doing x,’ though he is ultimately unwilling to call it a definition (John Skorupski, *Ethical Explorations* (Oxford University Press 1999) p. 142). And Stephen Darwall appears to embrace it in Darwall, *The Second-Person Standpoint* (n 12) pp. 91ff as well as Darwall, “‘But it would be wrong’” (n 30), but it is difficult to pin him down.

As these philosophers are quick to acknowledge, these formulations will need to be refined further, since it is not every wrong action that attracts appropriate blame, but those for which the agent is in some sense responsible. A helpful discussion of this issue can be found in Wallace, “Rightness and responsibility” (n 28). But we can set this complication aside.

³² See for example Gibbard (n 31) p. 41, Skorupski (n 31), Darwall, *The Second-Person Standpoint* (n 12) p. 92, Darwall, “Bipolar obligation” (n 1) p. 21, Darwall, “‘But it would be wrong’” (n 30) p. 58.

³³ Millians typically begin with Mill’s statement that

[w]e do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience. (John Stuart Mill, “Utilitarianism” in Mary Warnock (ed), *Utilitarianism and On Liberty* (Second, Blackwell 2003) p. 222, s. 14)

The contemporary eye lingers on the suggestive references to conscience (and elsewhere, blame), yet Mill himself was more concerned (as in his discussion of justice) with the ideas of punishment, sanction, and enforcement as the

§18. Accountability and repair. Can we give a Millian explanation of directedness? That strategy is already suggested when philosophers say that the addressee of a directed duty has special standing to blame, or to complain, or to take some other such accountability-related stance. But the theories examined so far focus on the reactions available to an addressee immediately before and immediately after wrongdoing, and in doing so leave out the fact that we participate in a practice of accountability that allows for an extended exchange of responses between agent and addressee. By observing the structure of this exchange it is possible to more fully characterize what is special about the status of the addressee. In doing so, we arrive at the

Repair Theory. An addressee has special standing in our practice of accountability in the sense that she is the proper recipient of apology and redress, and the one who has the power to forgive the agent.

In this formulation, ‘practice of accountability’ refers to the familiar sequences of responses available to wrongdoers and wronged following an apparent wrongdoing, responses which include excuse, justification, apology, redress, and forgiveness. Each response has appropriateness conditions as well as success conditions. For example, an apology is appropriate in the case of a wrongdoing which is not excused or exempted; and acknowledgment of the wrong and sincere expression of guilt are required for a purported apology to count as a successful apology. What is more, an apology that is successful, in the sense of fulfilling these conditions, can fulfill the appropriateness conditions of other responses, in particular making it reasonable for the recipient to withdraw resentment and embark upon the process of forgiveness. It is this normative articulation of the exchange of responses which makes it fitting to describe them as a practice.

The practice also grants distinctive statuses to particular individuals. As the Repair Theory observes, it is the addressee of a directed duty who is granted the status of being the proper recipient of an apology by one who violates the duty. That S is the proper recipient of apology simply means that it is a part of the success conditions of apology that it be made to S rather than to someone else. For an apology to be made to S involves two kinds of address, in much the same way that sending a birthday card to someone involves two kinds of address, one on the envelope and one in the message. First, the wrongdoer must address the apology to S in much the way that the card is sent with the aim of being received by the intended recipient. Second, the wrongdoer must address the apology to S in the way that the content of the birthday card is concerned with the intended

characteristics of moral obligation. While contemporary Millians are much interested in blame as an affective reaction to wrongdoing, Mill treats blame as an interpersonal version of punishment. The shift in emphasis and conception is vital. There are a range of reasons that potentially make punishment of an offender appropriate, including considerations of desert, deterrence, rehabilitation, catharsis, and so on. While there might be a similar range of reasons that favor adopting an emotional reaction toward an offense, our attitudes are not that easily shaped by our recognition of these reasons. Instead, the sentiments that accompany (perhaps constitute) blame are typically responsive to considerations of desert, and they are less open to the kind of deliberative revision to which we occasionally subject our practices of punishment. This makes contemporary Millianism a more plausible explanation of our pre-theoretical judgments about moral wrongness, while Mill’s own formulation instead sets an agenda for replacing our moral judgments with some ostensibly more rational set of practical attitudes. He remains, in this way, very much a utilitarian.

recipient, observing that person's birthday, rather than someone else's. So too, a proper apology is concerned with the hurt feelings, disappointed expectations, violated interests and so on of the addressee, rather than those of someone else.

There are cases in which it seems appropriate for a wrongdoer to apologize publicly, or to a wide variety of people. A president who has had an affair with a young intern might apologize not only to his wife and the intern but also to all citizens. But this is because he not only commits whatever wrongs are involved in having an affair without his wife's knowledge and without concern for the intern's vulnerability, but also acts in a way that undermines the trust of those he serves as president, and thereby wrongs them. An adolescent caught stealing might apologize not only to the storekeeper but also to his mother. But here again, the second apology is not ultimately concerned with the harm inflicted on the storekeeper, but with the disappointment that he causes his mother. One action may wrong various people in various ways, and may infringe a number of duties owed to different people; with respect to each such infringement, the wrongdoer is to apologize for that particular form of wrongdoing to the person who is wronged by it.

The Repair Theory also observes that the addressee has the power to accept apology, and to forgive the wrongdoer. I don't assume that there is a duty to forgive, or a duty to seek forgiveness. But it is a conspicuous feature of our lives that we do seek forgiveness in the aftermath of wrongdoing, and that it seems to make sense that we do so. Since forgiveness typically indicates the overcoming of lingering resentment and alienation, a wrongdoer who is denied forgiveness will have *prima facie* reason to continue to feel guilt and to wonder whether he has done enough by way of apology and redress. So being the one who is able to accept apology and to forgive establishes a significant power over the wrongdoer. It is a familiar and poignant feature of our moral lives that it is the wronged person who is uniquely in a position to dispense forgiveness.³⁴

As in the case of apology, there will be situations which seem to involve third party forgiveness, but these are seen to be consistent with the idea that only the wronged party has the power to forgive once we take up a more precise view of the wrongs involved. Linda Radzik, for example, considers such cases as Bill Clinton's affair with Monica Lewinsky and Mel Gibson's racist outbreaks, pointing out that media commentators and the general public are in a position to consider forgiving Clinton and Gibson, even though they are bystanders who are not given such standing by the standard theories of forgiveness.³⁵ But we should resist the idea that members of the public are mere bystanders in such cases. As noted earlier, a president owes it to those he serves to conduct himself in a manner worthy of their respect and trust; and he also owes it to female members of a society that systematically disadvantages them to do his best to set a good example while acting as an office-bearer and symbol of that society. Similarly, someone who uses a racial epithet is guilty of offending not just his audience or those who accidentally come to hear it, but all those who are its target, and the standard of care may well be higher in the case of a public figure who has the power to shape others' attitudes.

³⁴ Jeffrie G Murphy and Jean Hampton (Cambridge University Press 1988) p. 21; Kevin Zaragoza, "Forgiveness and standing" *Philosophy and Phenomenological Research* 84(3) (3 2012) 604, Adrienne M Martin, "Owning up and lowering down: the power of apology" *Journal of Philosophy* 107(10) (10 2010) 534, p. 535.

³⁵ Linda Radzik, "Moral bystanders and the virtue of forgiveness" in Christopher R Allers and Marieke Smit (eds), *Forgiveness in Perspective* (Rodopi 2010).

§19. Objections to extensional adequacy. The Repair Theory avoids the defects that afflicted the various accounts considered so far. First, it is extensionally adequate. When it comes to non-directed duties such as the duty not to cut down the redwoods, or the legal duties of criminal law, nobody has the special standing with respect to accountability described by the Repair Theory. In the case of non-directed duties, third parties are not the proper recipients of apology and they do not have the power to forgive, even though they do have standing to demand performance and blame duty-bearers for non-performance. And while an addressee might lack the standing to demand and to blame because of hypocrisy or complicity, this does not undermine the facts that she is the one to whom apology is to be made, and the one with the power to forgive.³⁶ So the Repair Theory is not in danger of attributing too broadly the normative status that is distinctively established by the directedness of a duty.

This is so even in the case of an addressee who is incapable of receiving apology or granting forgiveness, say because she is rendered incompetent to do so by illness, or because she no longer exists. In such cases it is useful to say that the ill or non-existent addressee is the person to whom apology would have had to be made, and who would have had the power to forgive. That apology is no longer effective and forgiveness no longer available does not undermine the fact that it is the addressee to whom the wrongdoer is accountable, but in fact affirms it. This is compatible with the fact that wrongdoers must sometimes try to content themselves with symbolic means of apology and seeking forgiveness (for example, apologizing at the dead addressee's graveside), or feel forever frustrated in their wish to apologize and be forgiven.

Indeed, the fact that moral repair may be appropriate but impossible accounts for the sense of tragedy that accompanies certain sorts of wrongs. Murder, for example, by eliminating the victim, makes moral repair impossible, and there is little the wrongdoer can do to assuage his remorse. But this sort of tragedy is present also in some cases that do not involve the death of the addressee. For example, one who suffers the trauma of sexual violence may find it psychologically impossible to be in contact with the offender, and this may make it difficult or impossible for the offender to do what is required for moral repair. There is a sense in which the offender also injures himself by his action, though this injury is not of the same kind or degree as that suffered by his victim.

§20. The objection from circularity. The second way in which the Repair Theory surpasses the theories considered previously is by being more illuminating. A critic might say that the theory's use of relational normative concepts makes it no better off than an account like the Claim Theory. In particular, the responses of apology and forgiveness are themselves directed notions, in the sense that the relevant performatives (such as 'I am sorry' and 'I forgive you') must be addressed to another. The nature of such address can also appear mysterious, and a natural thought is that address must be characterized using relational normative concepts.³⁷ Compare the case of asser-

³⁶ But note that hypocrisy or complicity may make it more appropriate for the addressee to accept apology and issue forgiveness.

³⁷ As suggested by Rebecca Kukla and Mark Lance, *Yo! and Lo! The Pragmatic Topography of the Space of Reasons* (Harvard University Press 2009), who make use of the idea of second-personal reasons.

tion. There are good reasons to think that we should characterize the speech act of assertion in normative terms: a prominent suggestion is that assertion involves a special commitment to the truth of the proposition asserted.³⁸ This commitment involves ‘taking responsibility’ for the truth of the commitment;³⁹ perhaps that means licensing others to believe the proposition or to make similar commitments.⁴⁰ But what distinguishes an assertion addressed to Hilary, as opposed to one made to Ilhaam, or to the world at large? It is tempting to say that it is the fact that a commitment is made to Hilary, rather than to Ilhaam or to the world at large. That sounds a lot like the sort of normative relation involved in promissory obligations and other directed duties.

So the centrality of address in my account seems to threaten circularity. But is it really objectionable that the Repair Theory invokes these directed performatives? Apology and forgiveness are perfectly familiar phenomena, even if we don’t understand their intricacies, and so it is already illuminating to draw a connection between them and directed duties, even if in doing so we remain within a circle of relational normative concepts. The aim of this chapter has been to pursue the strategy of locating one such relational normative concept in a field of phenomena that are familiar, though not necessarily any less relational. The resulting explanation should be taken in a Strawsonian spirit: it does not reduce directedness to entirely non-relational terms, but it does connect it up with familiar aspects of interpersonal life that appear quite vital to us in our everyday interactions.⁴¹

III. Direction and Practical Difference

§21. The account of Direction is not an account of Practical Difference. The account of Direction given in Chapter 1 concluded that when I make a promise to Stephanie, my duty is owed to her because she occupies the role whose complaint grounds my duty. That means that when I deliberate about whether to keep my promise or not, it is particularly appropriate for me to think about the complaint that Stephanie has in virtue of her role. And it is quite ordinary, useful, and, in light of this account, appropriate that I be motivated by thoughts about how breaking my promise would affect Stephanie and what she might say to me in response. We might summarize all of this by saying that Stephanie has special place in my deliberation. But if we do that, then do we

³⁸ MacFarlane (n 7); also John R Searle, *Speech Acts* (Cambridge University Press 1969) p. 29.

³⁹ MacFarlane (n 7).

⁴⁰ Brandom (n 7) pp. 141–98.

⁴¹ ‘Only connect,’ Strawson says (echoing E. M. Forster), urging that philosophers take up ‘the real project of investigating the connections between the major structural elements of our conceptual scheme.’ PF Strawson (Columbia University Press 1985) p. 22. In his influential paper, ‘Freedom and resentment,’ Strawson sought to alleviate our puzzlement about moral responsibility by showing that it is presupposed by the reactive attitudes that play a central role in our practical lives, lives that we could not easily abandon. What is most resonant about this way of thinking is the idea that a fundamental moral concept is to be understood in terms of the role that it plays in relation to familiar and indispensable features of everyday human life.

not have an alternate account of Practical Difference to the one that has been offered here? That apparent competitor is the:

Deliberative Theory. The directedness of a duty makes it appropriate to give the addressee special place in deliberation.

This is not a repeat of the account of Direction. That account explained why a duty is owed to one person rather than another, and not what difference it makes to appropriate action that the duty is directed. But furthermore, that account made use of the idea that a directed duty is justified in a particular way, rather than the appropriateness of deliberating in any particular way. It was the connection between the justification of a directed duty and the addressee of that duty that supplied the explanation of the duty's direction, rather than a connection between appropriate deliberation and the addressee. But of course the fact that a duty is justified in one way rather than another can make it appropriate to deliberate in a way that is parallel to that justification. The agent who does this may be thought to have moral understanding or insight, and this may inform the rest of his moral life, perhaps making it more likely that his deliberation in other cases will deliver the right verdicts, or that he will go beyond what duty requires in a way that is morally valuable. Suppose that I see that I should keep my promise by thinking about the effects that not keeping it would have on Stephanie. Then I may well come to see that there are other actions, such as lying to her, that I should refrain from because of similar effects on her; and I may come to see that there are further things I could do that are not required by duty but that nonetheless would benefit her and would be good to do.

In such general terms this may seem very plausible, but we should ask what exactly is meant by giving special place in deliberation to the addressee, and how exactly it is related to the justification of the duty. In the story I just told about Stephanie, there were two ways in which she had special place in my deliberation. The first is that she had a *motivationally distinctive* place in my thoughts. When I considered whether to keep my promise or not, thoughts about Stephanie were particularly able to move me to keep my promise, perhaps because of the affective potency of thoughts about the look on her face when she learns that I have not kept my promise, or because of the frequency with which my thoughts turn to her interests, or something of that order. The second is that she had a *normatively distinctive* place in my thoughts. That it is Stephanie to whom I owe it to keep my promise leads me to draw different conclusions about what it is appropriate for me to do. It may be that the need to keep my promise strikes me as being particularly important. But the effect needn't be on my immediate action. I may come to think that not only should I keep my promise to her, but that it would be good for me to attend to her interests in other ways too.

The first claim about distinctiveness does address the question of Practical Difference, but not in a way that sets us up to answer Importance. The first claim may well be true: it seems to me plausible that thinking that one owes it to someone to do something is more likely to move one to act properly than thinking that one simply ought to do it. It is one thing to be told that I must help Stephanie because I promised I would and I ought to keep my promise. It is quite another, and in ordinary experience much more effective, to be told that it is because of her that I ought to do it, and to be told how not keeping my promise will affect her. Of course it is an empirical question

whether thoughts like this really do bring the claimed motivational effects, and it brings the further question whether some other way of thinking about one's duty might be even more effective. Perhaps thinking that God wills it is most likely to produce the right kind of agency. The problem is one that will be brought out in the next chapter for various empirically-grounded claims about why directedness is important. The motivational distinctiveness of thoughts about directedness makes the importance of directedness too contingent, too dependent on what techniques of moral agency we have at our disposal right now, and so fails to show that directedness is important as a reflection of moral reality. Another way to see this is to consider that we could gain all the benefits of motivational distinctiveness by thinking, as the consequentialist does, that it will be good to treat our duties as if they are directed, even while denying that they are in fact directed.

The claim about normative distinctiveness, insofar as it is plausible, should lead us to endorse the Repair Theory. The claim that a directed duty gives the addressee a normatively distinctive place in deliberation cannot simply amount to the thought that the duty has special force. For a duty's having special force is not relational in the way that giving someone place in one's thought is. That is evident from the fact that non-directed duties have special force too, as I argued at the beginning of this chapter. Perhaps it is the case that the special force of a directed duty is somehow due to, or connected with the fact that it is owed to the addressee. But this is not an idea that competes with my account, since it is consistent with the claims made in Chapter 1 about how directed duties are justified, and it does not add to those claims any further claim about how directedness alters the appropriateness of our actions.

If it is to answer the question of Practical Difference, the claim that a directed duty gives its addressee a normatively distinctive place in deliberation must amount to the claim that this place entails the appropriateness or inappropriateness of certain further responses. Why is it not enough that a directed duty makes a difference to how it is appropriate to think? In particular, why is it not enough for the Deliberative Theorist to say that the directedness of a duty makes it appropriate to give the addressee a normatively distinctive place in deliberation? I have been suggesting in the last paragraph that it is not very clear what this means, unless it means what the Repair Theory tell us. But in response to this the Deliberative Theorist may insist that it is enough for the agent to reach conclusions about what to do by tracing the path of contractualist justification of the kind described in Chapter 1. I think the proper reply to this is to ask why this should matter. So it may be that what ultimately troubles me about the Deliberative Theory is its failure to set us up to ask what is important about directed duties. Sure, it may be important to deliberate in the manner of contractualist justification, if only because we are more likely to get things right. But could one not do that and jettison all thought that the resulting duties are directed? That would be especially tempting given that contractualist deliberation about duty proceeds in terms of the generic complaint of notional and representative persons, rather than in terms of the person to whom a duty is owed.

In contrast, the Repair Theory tells us something informative about the special place of the addressee. If I owe my duty to Stephanie, then what is distinctive about her place in my deliberation is that I should notice that if I were to violate my duty I would have to apologize *to her*, and ask forgiveness *of her*. So the Repair Theory is just an instance of the Deliberative Theory. The question is whether it gives the right characterization of the normative distinctiveness of an ad-

dressee in deliberation. Since an ideal moral agent with full understanding of moral reality would deliberate in a way that reflects the justification of his duties, we may ask whether the normative status ascribed to the addressee by the Repair Theory is an appropriate reflection of the addressee's connection to the justification of the duty. One way to put this is: is it morally appropriate that the person who occupies the role whose complaints grounds a duty therefore has special standing to hold the duty-bearer to account? I turn to that question now.

§22. Interests and Repair. The issue to which we have turned now is whether the account of Direction and the account of Practical Difference show the right kind of fit. It may help to see how this question fits into the general project of normative-functional explanation. Recall the example of normative-functional explanation of judges. One question we can ask is whether we have described a coherent role. This question is continuous with but distinct from the question of Importance. In the case of judges, we can ask what point there is to having them in our legal system. That is one way of asking the question of Importance. But we can also ask whether it makes sense that people qualified in such and such a way have such and such powers. A full answer to that will necessarily invoke an account of the importance of judges, since the way in which qualifications and powers combine will affect whether judges can serve their general purpose in the system. But even in advance of an account of their importance, we can ask an initial question about whether there is a natural fit between their qualifications and powers, or whether there are surprising mismatches that an account of the importance of judges had better explain.

For example, if it is a requirement of being a judge that one has been to medical school, that would be a surprising mismatch given that a judge's powers are all related to the legal system rather than to medical practice. Some mismatches might raise questions about intelligibility: for example, suppose it is a requirement of being a judge that one be appointed by another judge, but judges are not given the power to appoint judges. Other mismatches might raise questions about fairness or desert: for example, if being a judge comes with great powers and few responsibilities, then we might question whether it is fair that only individuals from a certain location are eligible to become judges—and we could frame that question in terms of whether being from a certain location shows that one deserves the powers that come with being a judge. Again, a full answer to that sort of question will rely on an account of Importance, but we can determine in advance of such an account whether there is an apparent mismatch, and doing so might guide us in giving our account.

Nothing in the accounts of Direction and Practical Difference raise concerns about the intelligibility or coherence of the role they describe for the addressee of a directed duty. But we may wonder whether the circumstances for being an addressee—occupying the role whose complaint justifies the duty—warrant the status that goes along with that role—having special standing to hold the duty-bearer to account. That question may seem especially forceful to one who embraces the Deliberative Theory because of the idea that the addressee's special place in deliberation has something to do with the particularity of the addressee. That idea is rejected by my account of Direction, which grounds addresseeship in the addressee's occupancy of a representative role, rather than the bare particularity of the particular addressee. But this sort of proponent of the Deliberative Theory may wonder why simply occupying a role is the sort of thing that makes an addressee

deserve to be the one who has special standing.

The answer to this is to be found in the distinction, made in Chapter 1, between having an interest and taking an interest. By considering representative roles and the generic reasons for complaint that these roles supply, contractualist justification describes an individual as having a sphere of interests worthy of respect that goes beyond what they actually take an interest in. So when an individual finds themselves in a role relative to someone's action, they may complain that the action sets back an interest that they have in some state of affairs, even though it is only the case that they might have taken an interest in this state of affairs, rather than that they do. For example, if I break the promise I make to Stephanie, she may complain that she might have acted in reliance upon my keeping my promise, even though she did not. But when I do break my promise, I harm Stephanie in particular ways that depend on what she does take an interest in. While she will feel insulted regardless of the effects of my promise-breaking, further sorts of harm will vary with choices she has made. Perhaps she had relied upon my promised performance when she arranged her schedule, and so she can now no longer attend an important conference. Or perhaps the importance of the promise to her was primarily about her need for assurance that I would be there for her as a friend in a difficult situation. What she finds acceptable as apology and redress, and what will be sufficient for her to forgive me, will depend on these sorts of decisions. That is to say that the process of moral repair is sensitive not only to what her interests are, in the general form that contractualist deliberation takes as an input, but also to what she takes an interest in.

So even in advance of an account of the importance of directedness, we can see that there is a *prima facie* fit between the practical circumstances which give rise to the directedness of a duty, and the practical consequences of that directedness. Even though the directedness of a duty arises from a generic complaint that an individual only steps into, rather than from a complaint that is entirely distinctive of that individual as a particular individual, it is nonetheless appropriate that the particular individual be granted special standing. That has to do with the fact that, in moving from deliberation to action, an agent has an effect on the actual world, and on actual individuals, and on the things they take an interest in. It is the individual affected who should have some sort of say as to what happens to repair the damage done by wrongdoing. But which individuals should have such a say? Those who are in a position, given what they might take an interest in, to be most seriously affected.

3

The Importance of Directedness.

§23. The question of Importance. Chapters 1 and 2 have provided a normative-functionalist account of directed duties: that is, an account that characterizes the normative circumstances which give rise to directed duties and the normative consequences that flow from their existence. So far, this account provides a characterization of a moral practice that includes directed duties. But it doesn't tell us why we would want to participate in such a practice. So we may still ask the following question:

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

Imagine for a moment, and for the sake of contrast, a consequentialist theory that explains away the appearance that some duties are directed. Such a theory would posit that thinking of duties as if they were directed, and so believing that these duties assigned special standing to addressees, could have certain beneficial consequences. But a theory of this sort would not answer Importance, since treating duties as if they were directed does not count as acknowledging that they are in fact directed. It might be difficult or even impossible to believe that a duty is not in fact directed while maintaining the fiction that it is so as to reap the benefits of acting according to that fiction. But supposing this stance possible, we would like to know what it misses out on in a world which does contain directed duties. What of importance would the consequentialist fictionalist learn upon learning that duties are in fact directed (aside from the fact that he was wrong)?

The question of Importance is similar to that posed by Feinberg when he imagines Nowheresville, a community that has everything our moral practice does but lacks rights.¹ I have not framed the question in the same way, because I worry that directed duties (and rights, for that matter) are too basic a feature of our moral reality for us to fully pursue the thought experiment. In particular, I doubt that there is a coherent perspective from which we can imagine that moral reality might be different while assessing the moral importance of that difference, for it is difficult to see how we

¹ Feinberg, "The nature and value of rights" (n 9).

might endorse any assessment that is not made from the perspective of moral reality as we take it to be. But we can make sense of the idea that a community fails to acknowledge this aspect of reality, and it is not a stretch to interpret certain actual communities, distant from ours in space and time (Warring States Era Confucians, for example), as doing exactly that.² And we may ask, from our perspective of course, why we think that a community that fails to acknowledge the phenomenon that we acknowledge thereby goes astray, not just epistemically, but in a way that is morally significant. In so asking, we do not ask for a list of the empirical results of ignorance or non-observance, but for a characterization of the dimension of moral significance that is overlooked.

This concern about perspective bears on why Importance is framed as a question about what is lost, as opposed to what is gained by a moral community that does recognize directedness. The latter form of the question is overly ambitious insofar as it suggests that we can stand outside of our practice of recognizing directed duties and say what we have to gain by adopting it. But if directed duties are a basic element of our moral thinking, then it is unlikely that we can derive them from a perspective which is divorced from our ordinary moral thought. By asking instead what we would lose if we did not recognize directedness, we allow an answer that consists in recalling and articulating those elements of our ordinary moral thought that make sense of our commitment to directed duties.

§24. Reformulating the question of Importance. In Chapter 2 I defended the Repair Theory as an account of the practical difference made by the directedness of a duty: the difference it makes that J's duty to ϕ is owed to S is that S has special standing to hold J accountable for not ϕ ing, and in particular S is the one to whom apology and redress must be made, and the one with the power to forgive J. I claimed that certain competitor theories failed to give as illuminating an answer to the question of Practical Difference as the Repair Theory, and in particular that they failed to provide a basis for an answer to the question of Importance. By contrast, the Repair Theory does generate an answer to that question, as I will argue in this Chapter. But as a prefatory step to showing that, it is worth noting that the Repair Theory is already an advance beyond its competitors insofar as it induces a tractable reformulation of the question of Importance.

Before setting out the reformulation let me introduce some terminology. Let's call the distinctively structured practice that accompanies directed duties, and that I described in the last chapter, a 'directed practice of accountability.' This practice has a directed structure insofar as it assigns a distinctive normative status (special standing to hold a wrongdoer accountable) to certain individuals (addressees of directed duties). Then a community that implicitly grasps the directedness of duties is one that at least *participates* in the directed practice of accountability, by behaving in a way that conforms with its directed structure, though this participation might fall short of acknowledgment. Members of such a community go about treating the addressees of directed duties as the ones to whom apology and redress must be made, and as the ones who have the power to forgive—even if they fail to notice that their behavior has this structure or to consider its significance. But

² I must simply pass over the crucial and difficult question of who I think *we* are. At the very least 'we' refers to myself and the moral philosophers likely to read this. That ours might, for all we know, turn out to be a parochial practice, or a mistaken one, does not prevent us from taking it seriously and doing our best to make sense of its claims.

when participation in a directed practice of accountability becomes sufficiently self-reflective, it can rise to the level of acknowledgment of the directed structure of the practice. Members of such a community would notice and remark upon the fact that their practice assigns a special status to the addressees of directed duties, perhaps making this explicit by saying that they owe it to such addressees to fulfill their duties, or that they would wrong them by failing to fulfill their duties.

If a failure to acknowledge the directedness of duties involved overlooking some dimension of moral significance, that dimension would also be overlooked by a community that failed to participate in a directed practice of accountability. And a community that participates in a directed practice of accountability but failed to acknowledge that fact might have their moral lives enriched in a way that reflects the moral importance of directedness, but they would not be in the habit of giving voice to that dimension of moral importance. So if we can articulate what of moral importance is involved in participating in a directed practice of accountability and acknowledging its directed structure, then we have found a way of characterizing the distinctive moral significance that accompanies directed duties. So the question of Importance becomes:

Directed Practice Importance. What is lost when a community fails to participate in a directed practice of accountability? And what is lost when a community fails to acknowledge the directed structure of its practice of accountability?

These questions about participation in a practice and acknowledgment of its structure are more tractable because they ask, from the perspective of the practice, why it involves acting in certain ways. That is a question we can sensibly ask without having to imagine that moral reality were very different. By analogy, consider a relatively abstract question we might ask about chess: why should we have knights in that game? Equipped with an understanding of the normative-functional role of a knight, we can ask a more tractable version of this question: why (given the point of the game) does it make sense that a piece that has the position of a knight move in an L-shape?

Directed Practice Importance points us to particular questions about the way we appropriately behave in the wake of wrongdoing: why should anybody have special standing to hold a wrongdoer accountable, and why should it be the addressee in particular who has that special standing? By enabling us to ask questions of such specificity, the Repair Theory already represents an advance beyond the Claim, Demand, and Blame Theories. But it also answers these questions. When J fails to comply with the duty he owes to S, he injures S not just by setting back her interests but by failing to recognize her. But a practice of accountability that gives special standing to S makes available a form of recognition, in the wake of wrongdoing, that comes as close as is possible to repairing the original lapse of recognition. So if we did not acknowledge the directedness of duties, and so did not acknowledge the special standing of addressees, we would lose this form of moral repair, and fail to acknowledge the importance of relations of recognition.

§25. The argument strategy. In the course of imagining Nowheresville, a community that has all of our moral furniture except for rights, Joel Feinberg remarks that ‘[t]o respect a person . . . , or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker

of claims.³ The suggestion is that if the inhabitants of Nowheresville came to see themselves as makers of claims they would add to their moral repertoire a way of seeing each other as worthy of respect. It is this thought that our relational normative concepts are connected to respect that I wish to pursue in this chapter. It is a traditional Kantian thesis that our moral judgments cannot be captured by consequentialism because of their connection to respect. So if we can show that directedness involves this connection with respect then we can vindicate the idea that judgments involving directed duties favor a non-consequentialist conception of morality.

But to make good on the claim that directedness is connected to respect, two specifications are necessary. First, as I will argue in Section I, the relation between directedness and respect should be seen as a non-contingent one. That there are contingent connections between respect and directed duties is made plausible by considering the effect on J of the thought that he owes it to S to act in a certain manner. This thought may well remind him that he should act with respect toward her; it may cultivate in him that attitude of respect; and giving voice to the thought may be a useful way of expressing his respect for S. Such hypotheses are not a particularly convincing way of showing that directedness is a distinctive source of importance, and so they are perfectly compatible with a consequentialist conception of morality which denies that duties are truly directed, and admits only that thinking of duties as directed will produce good consequences.

Second, we should specify what respect involves in order to avoid vague and inconclusive suggestions. In Section II, I set out an attitude that I will call ‘recognition,’ which I will eventually claim is involved in respect for persons. But first I argue that a directed practice of accountability makes available a particularly appropriate form of recognition in the wake of wrongdoing. This provides us with an argument for the moral significance of directedness; it marks the fact that we participate in a practice that enables us to stand in relations of recognition with each other. In Section III, I argue that directedness enables recognition even where there is no wrongdoing. By acknowledging that one stands in a directed practice of accountability, one acknowledges the special place of the addressee and thereby recognizes them. Is it not then simpler to say that directedness enables one to recognize an addressee by giving them special place in deliberation? It is true that it does, but it is hard to say exactly what this special place is in a way that is illuminating. Characterizing the addressee’s place in directed accountability remains the most illuminating way of doing so.

So directedness articulates the way in which we stand in relations of recognition with each other. But what is so important about these relations of recognition? In Section IV, I present two arguments in favor of thinking that respect requires recognition. First, I argue that acknowledging an interest in recognition makes sense of the idea of self-respect, and of the claim that being too ready to forgive shows a lack of self-respect. Second, I pursue a Strawsonian argument that recognition is a natural attitude that plays a key role in our interpersonal relationships. What is distinctive about human beings is a particular way of being social, one which rests on exhibiting and making explicit attitudes about each other. Recognition is the particular form of valuing a creature that is distinctive in this way. This is an interpretation of the thought that respect is the distinctive form of valuing persons.

³ Feinberg, “The nature and value of rights” (n 9) p. 252.

In sum, recognition is an aspect of respect, and the directedness of duties marks the fact that we participate in a practice of accountability that enables recognition in the wake of wrongdoing, and also provides a way of expressing that fact in advance of wrongdoing. This vindicates Feinberg's thought that there is a non-contingent connection between seeing someone as the potential addressee of directed duties and respecting that person, in the sense of recognizing them.

I. Contingent Connections with Respect

§26. Respect as an ideal of moral agency. It is tempting to think that when I say 'I owe it to Stephanie to keep my promise,' I mark the fact that Stephanie has a special place in my deliberation. And while I do not have to think specially of Stephanie in order to fulfill what duty requires of me, perhaps I fall short of an ideal of moral agency if I do not. In keeping with these ideas, Adam Kadlac has argued that only one who frames his deliberation using relational judgments exhibits the right kind of moral attitude; if I do not keep my promise because of the thought that I owe it to Stephanie to do so, then I miss out on something of moral importance even if I do keep my promise.

Kadlac imagines a scenario in which a boy punches his younger brother in the stomach, and is then told by his father to go to his room and reflect on what he has done. Kadlac considers the kinds of reflections the older boy might entertain, and argues that some of these could not count as exhibiting a distinctively moral concern:

If the boy proceeds to reflect on his actions, his thoughts might take a distinctively monadic [i.e. non-relational] form. That is, he may consider his past behavior in light of rules whose violation he believes to constitute moral wrongdoing. "It is wrong to punch people in the stomach," he might think to himself. "And I should do what Dad tells me to do." While these rules clearly make reference to various others—generic "people" in the former case and his father in the latter—those others may figure only incidentally in his self-evaluation. He may instead be troubled primarily by his failure to live up to the standard in question in the same way that he might criticize himself for forgetting to brush his teeth or carefully recheck his math homework. These sorts of rules may not identify distinctively moral standards of behavior.⁴

That moral deliberation features addressees of duties non-incidentally can be thought of as a characterization of an appropriate moral attitude, perhaps to be called 'respect' or 'proper moral concern.' But why is it important that one have this attitude? What does one miss out on by not thinking in this way? By way of an answer, Kadlac imagines the perspective of the victim who fails to feature in this way in an agent's deliberation:

⁴ Adam Kadlac, "Does it matter whether we do wrong?" *Philosophical Studies* 172(9) (2014) 2279, p. 2282.

[P]ut yourself in the position of the younger brother who has just been punched in the stomach. You may think it appropriate for your brother to be punished for his actions, and you would certainly be upset if your father did nothing to acknowledge what had happened to you. However, if your brother tells you that the reason why he must spend the afternoon in his room is simply that he failed to obey his father, this explanation will almost certainly strike you as unsatisfactory. After all, it was your stomach that was punched, not your dad's. And if your older brother thinks that the primary basis of his remorse is that he violated a rule—even a morally significant rule—you may think that some important pieces to the puzzle have been left out, namely, you and your now aching belly.⁵

This worry, that the younger brother does not find a proper place in the older brother's reflections, appears to echo a criticism of consequentialism made by Bernard Williams, to the effect that the theory does not make place for the personal commitments and special relationships that make a life into a recognizably human one. Williams's concern is not just that a committed consequentialist would be so preoccupied with maximizing impersonal goodness that she could have no interest in personal projects, except by 'happy accident.'⁶ Rather, the problem is that even if a consequentialist theory can envisage a moral agent who pursues, say, friendship, perhaps because doing so is competitive with other ways of producing goodness, this agent does not respond to her friend in the right way. The consequentialist agent may behave toward her friend in just the way that we would ordinarily expect of friends, yet she does so out of a concern for impersonal goodness, rather than out of concern for her friend. To adopt Kadlac's phrase, the consequentialist's friend appears 'only incidentally' in her deliberation, and is available to be replaced by some other source of equal or greater goodness.⁷

Let us suppose that this is all correct, that the ideal moral agent has a distinctive attitude, call it 'respect,' toward those who would be injured if she did not act according to duty. One question, which I will answer over the course of this chapter, is what the content and worth of this attitude is. Another question, which I turn to now, is how relational normative judgments, such as the thought that one owes it to another to act in a particular way, are connected to this attitude.

⁵ Kadlac (n 4) p. 2282.

⁶ This is Wolf's phrase, and her version of the criticism, one that can perhaps be laid at the door of any systematic moral theory, is especially vivid: Susan Wolf, "Moral saints" *The Journal of Philosophy* (1982) 419, p. 425.

⁷ This is the concern that Williams voices in a famous passage in which he considers what a moral theory can say about a man, faced with two drowning people, who chooses to rescue the one who is his wife:

[S]urely *this* is a justification on behalf of the rescuer, that the person he chose to rescue was his wife? It depends on how much weight is carried by 'justification': the consideration that it was his wife is certainly, for instance, an explanation which should silence comment. But something more ambitious than this is usually intended, essentially involving the idea that moral principle can legitimate his preference, yielding the conclusion that in situations of this kind it is at least all right (morally permissible) to save one's wife. . . . But this construction provides the agent with one thought too many: it might have been hoped by some (for instance by his wife) that his motivating thought, fully spelled out, would be the thought that it was his wife, not that it was his wife and that in situations of this kind it is permissible to save one's wife. (Bernard Williams, "Persons, Character, and Morality" in *Moral Luck* (Cambridge University Press 1981) p. 18, emphasis in original.)

§27. Cultivating and recalling respect. It is striking that Kadlac's story takes place in the setting of moral education. Perhaps what we learn from it is that relational normative judgments are an important tool for *cultivating* respect. And if we take the Repair Theory seriously, I think we can see how this is so, since it is plausible that participating in a directed practice of accountability, and acknowledging that one does so, may serve to cultivate respect. The special standing of the addressee requires that a wrongdoer make a genuine apology to her, thereby acknowledging the injury or potential injury done to her, and seek forgiveness from her, thereby giving her an elevated status with respect to the wrongdoer. Performing these actions may well bring the wrongdoer to develop the attitude of respect that was absent at the time of the wrongdoing, not just toward the particular addressee, but toward others.

This is an empirical claim, but one that is antecedently plausible, especially in light of what has been recorded about the moral education of children. Developmental psychologist Martin Hoffman argues that a prominent part of the moral development of children, the development of internalized moral motives, takes place by way of *induction*. An induction involves showing someone the harm caused or about to be caused to an individual, and the way their action causes that harm.⁸ Teaching a child how to genuinely apologize for their actions involves something like induction, since a genuine apology acknowledges that harm of a particular sort was done by the wrongdoer's action. So in learning to apologize in a specific case, the child may well also learn that the victim has interests that were undermined by the child's action but that deserved respect, and in learning this the child may also learn that others more generally share these interests and deserve respect insofar as the child should act in a way that is sensitive to those interests.

In this domain, as in others, pedagogical techniques may serve not only to show the way to skillful agency, but may help the mature agent stay on track. Just as a mnemonic may not only help memorize information, but serve as a prompt for recalling the memorized information, so participation in a directed practice of accountability (and acknowledgment of that practice by making use of judgments about directed duties) may serve to *remind* the mature moral agent that he should maintain an attitude of respect toward others. In a specific case, recognizing in advance that violating a directed duty would necessitate apology to the addressee may well remind the agent that it is the addressee who stands to be injured, and this may lead to his acting with the right attitude of respect for the addressee. Again, this is an empirical claim, but one that is antecedently plausible, since it is a part of our ordinary experience that we find it harder to perform an action that we are told will injure a particular individual than one which we are told is wrong for some more abstract reason.

§28. Expressing respect. I have been considering the possibility that directed accountability causes or enables the attitude of respect that we associate with ideal moral agency. But the connection could go in the other direction as well. That is, it may be that our directed practice of accountability emerges from the ideal moral attitude and gives it expression. But the idea that a

⁸ Martin L. Hoffman, *Empathy and Moral Development* (Cambridge University Press 2000) pp. 140–71.

practice of accountability could be valuable because of its expressive role is a difficult and ambiguous one and deserves explication.

Expression is often thought of as a symbolizing relation. That is, if something S expresses something valuable V, then S stands as a sign of or symbol for V or the value of V. It is V that is the primary thing of value, but S can be valuable too insofar as it is an expression of the thing of value, especially when V is a particularly abstract entity. Consider memorials for the departed, flags of our nations, and the emblems of our various groups and projects. We seem to value these symbols not only because they serve to identify our projects to others, but simply because they stand for the value of these projects.

We must be careful to distinguish this expressive value from the value such symbols inevitably have as a result of helping us to focus our individual attention and coordinate our collective attention upon the underlying value. That fellow citizens have died at war for our nation's survival is a humbling thought that is valuable to reflect upon, but it can be difficult to engage in such reflection given the daily demands made of us. By setting aside a symbolic day, and the symbolic acts of lowering a flag and keeping a moment's silence, it becomes much easier for everyone to make time to join in a collective act of remembrance and to focus their attention on this act by focusing their attention on the symbolic acts. That makes these symbols valuable because of their role in cultivating and recalling a valuable attitude of reflection. But my claim is that the symbols can also be sensibly valued simply insofar as they stand for the thing of underlying value. That is, the underlying value may be sufficiently abstract that the best or only way to engage in the patterns of behavior and attention and attitude that constitute valuing it is to value the symbol. That explains what would be so upsetting about someone playing loud music during the memorial silence, or burning the flag on the day of remembrance: by attacking the symbol, the antagonist would also attack the symbolized value.

Perhaps granting special standing to an addressee and describing this by saying that a duty is owed to the addressee serve a similarly symbolic function. Here, as in the cases of the flag and the commemorative day, the claim is not just that special standing serves to prompt or encourage the pattern of attention associated with a valuable attitude. In addition, that special standing, and the practice that establishes it, symbolize the elevated place that the addressee has in the attitudes of the ideal moral agent. So by participating in a directed practice of accountability one finds a way of expressing the evaluative attitude that goes along with having respect for others.

Note that our symbols tend to be conventional, and the symbolic relation I have been describing is a contingent one. A critic of directedness would conclude that there is nothing special about directed accountability as an expression of the attitude of moral respect, and that some other symbol could be found, perhaps one that is more convenient. That is true also of the other sense in which we sometime use the idea of an expression. Sometimes S expresses V not in the sense of symbolizing it, but in the sense of giving it a publicly accessible form. For example, a poet's words may give expression to her appreciation of some subtle beauty in the world. I doubt that we should think of this as a relation between something inner and something outer, as if there were a feeling or belief within the poet that is then made public as an outward act—for I doubt that there is anything that can be recovered independently of the outward act. In any case, we may only be in a position to value the poet's appreciation of the world's subtle beauty by valuing the literary form she gives

that appreciation. But it is also quite possible that this appreciation could have taken some other form, being expressed through different poetic choices or even in a different medium. Of course we may, and often do, intrinsically value the aesthetic qualities of a particular poem. But when we value the poem as an expression of some mental aspect of the poet, we do not value it intrinsically, for we would not value the poem in this way if it had been produced in some mechanical manner.

On either interpretation, the relation of expression is a contingent one. Perhaps directed accountability provides us with a way of valuing the attitude of an ideal moral agent by expressing that attitude in one of the ways described here. But that would not show how a directed practice of accountability is significant in itself. For that, we need to show that such a practice is a particularly appropriate expression of respect, or that it is a particularly appropriate way of enabling or constituting that attitude.

§29. The insufficiency of contingent connections. While it is plausible that a directed practice of accountability does serve to cultivate, recall, and express respect, these relations fail to fully capture the importance of directedness. They describe a non-constitutive role that thoughts of directedness play in prompting us to have respect and enabling us to express respect, where what is of ultimate importance is that we have and express respect. This gives directedness too contingent a role to avoid the skepticism of the consequentialist, who thinks that it is merely useful to think that one owes duties to others. One way of bringing out this worry is by noticing that, given these merely contingent relations to respect, it would be open to us to abandon the directed practice of accountability if we found other, more effective means of furthering moral compliance and moral cultivation and symbolizing the place an addressee should have in an agent's thought.

A second worry is that these contingent responses to Importance make our talk of directed duties condescending, the kind of thing which could profit only the immature or weak-willed or unsure moral agent. Third, this way of explaining Importance risks placing the addressee in the background of the explanation. That the directed practice of accountability is important to the addressee in particular is suggested by Feinberg when he remarks that the normative status of having a claim gives that person something to stand on, making it 'a most useful sort of moral furniture.'⁹ Yet what has been said so far indicates that the practice benefits the addressee only indirectly, through its effects on the agent or the general moral culture.¹⁰ More generally, the problem is that we are led to see directedness as merely a useful way for agents to think. If we are to fully vindicate directed duties, we should show not simply that it is important to think of certain individuals as having special standing in our practice of accountability, but that they actually do have such standing, and that we would lose something important if this were not so.

⁹ Feinberg, "The nature and value of rights" (n 9) p. 252.

¹⁰ Indeed, these accounts would continue to apply if we substituted an impartially valuable state of affairs for some human addressee. It may well make sense to offer apologies to the redwoods insofar as this will induce in us proper respect for their value and make it more likely that we will not destroy them. But we do not ordinarily think of duties as capable of being owed to impersonal entities or states of affairs. An account of Importance that recognized duties owed to impersonal entities as having the same kind of importance as ordinary directed duties would overgeneralize the case for directed duties and making our ordinary moral judgments seem deficient.

II. Recognition in the Wake of Wrongdoing

§30. Recognition. Let us narrow our focus to an element of respect that that I will call ‘recognition.’ What we would lose by failing to participate in a directed practice of accountability is an important way of recognizing others. That is not simply because participation in a directed practice of accountability prompts or encourages recognition. Rather, a directed practice of accountability enables recognition, in the strong sense that such a practice constitutes performances that amount to recognition. In particular, an addressee’s special standing with respect to apology and forgiveness is constitutive of the fact that apology and the seeking of forgiveness are ways of recognizing the addressee.¹¹

The term ‘recognition’ is evocative and often used without much explication. I have in mind something quite specific:

Recognition. J recognizes S iff J acknowledges

- (i) that S has interests which are sufficiently important that J should act in a way that is sensitive to their importance; and
- (ii) that S’s interests include a second-order interest in knowing that J aims to act in a way that is sensitive to her interests.

It is a familiar aspect of human life that we care about whether others recognize us in this two-fold way, and see a need to recognize them in turn. This can be seen not just in the fact that we do care about acting in a way that is sensitive to the interests of others, and care about whether others act in a way that is sensitive to our interests; but also in the fact that we care about justifying, excusing, and exempting actions which only seem to set back important interests, or which do set them back but which could not reasonably have been avoided. If I promise Stephanie that I will help her move, but I am prevented from keeping my promise because I am laid low by a fever, then I have an excuse for not keeping the promise. But I should tell Stephanie why I am unable to keep the promise, since Stephanie reasonably takes an interest in knowing that I have an excuse, given her second-order interest in knowing whether I care enough about her interests to aim at acting in a way that is sensitive to them.

If I did not have an excuse, and had merely decided not to keep my promise because I did not care enough about Stephanie’s interests, then I would be guilty of a lapse of recognition on two counts. First, Stephanie had an interest in being assured that I would help her move, and this interest was set back when I failed to turn up. Second, Stephanie also had an interest in my aiming to act in a way that was sensitive to her interests, and this interest was set back when I failed to keep the promise because I did not care enough about her assurance interest. Now we may ask what sorts of actions would come closest to repairing these injuries. Nothing can take the place of the lost assurance, but insofar as Stephanie had incurred material losses because she had relied

¹¹ I will restrict my attention to directed apology in what follows, though a similar argument can be given for directed requests for forgiveness.

on my promise, there may be ways to restore her to more or less the same level of material well-being, and Stephanie will now have an interest in this being done. Since Stephanie has an interest in knowing that I recognize her, she will also have an interest in my adjusting my attitude and in knowing that I have done so; in particular, she will have an interest in knowing that I have come to see and regret that my action constituted a lapse of recognition. I can satisfy this interest by communicating to her that I see how my action set back her interests, and that I am sorry that I acted in this way. So doing this is itself a step toward recognition, given how her interests lie in the wake of the wrongdoing.

§31. Directed apology constitutes recognition. I claim that it is not just acknowledging the wrong and expressing remorse, but apologizing *to Stephanie*—that is, *directed* apology in particular—that constitutes recognition in these circumstances. This is not obviously so, as it may seem that whatever acknowledgment of her interests is expressed in apologizing to her could just as well be expressed by apologizing to everyone. Yet what is important about a directed apology is not that it expresses recognition but that it constitutes recognition. It is true that apologizing is an expressive act; that in addressing Stephanie in particular I express something about how I have treated her and what I now think of that treatment. But Stephanie has an interest in knowing that I have had this change of mind, and the expressive act is precisely what is called for by this interest. So the act of addressing her in this way does not only express that my original wrongdoing was a failure to recognize Stephanie; it is itself a way of recognizing her in the wake of the wrongdoing.

The role of address here is the same as its role in other areas of life—such as in thanking, greeting, congratulating, and telling, which all require address to whomever is thanked, greeted, congratulated, or told. In order to *tell* Thandi that there is a phone call for her, I must address *to her* the assertion that there is a phone call for her. I can make a statement to everyone that there is a phone call for her, knowing that she will overhear; but this is not the same as telling her. It makes a difference which I do if Thandi has a special interest in coming to know what the assertion communicates. Suppose I know that Thandi has been waiting anxiously for a call because it brings news of her brother's health, and she is sitting in another room with friends who are consoling her when the phone rings. It would be impersonal and odd if I went to the group and announced to nobody in particular: 'there is a phone call for Thandi.' The natural thing to do would be to address the news to Thandi. But what is so odd about the public announcement? It couldn't just be that addressing someone is typically the most reliable way of conveying information to them. For I can be quite sure that Thandi is listening as attentively as anybody for the news, and I can say the impersonal thing in my loudest voice, standing as close to Thandi as possible. What is odd, rather than simply inefficient, is my lack of acknowledgment that she has a special interest in hearing the news. Of course, in making the impersonal announcement I can aim at satisfying that interest. But I should also aim at satisfying Thandi's second-order interest in knowing whether I care about her interests. In addressing Thandi, I single her out as the proper recipient of the news, and in so doing show that I am sensitive to her special interest in hearing that there is a phone call for her; I show that I am announcing the news not for any old reason, but because I know that she has an interest in hearing it. That is the expressive part of address. But in expressing my sensitivity to her interest in the news, I also satisfy her second-order interest in knowing whether I care about this interest.

That is the way in which address does not merely express recognition of Thandi's interests, but constitutes it.

The same is true of directed apology. In apologizing I express my changed attitude toward Stephanie; and in apologizing *to Stephanie* I express recognition that she has an interest in the quality of my attitude toward her. That is the expressive part of apology. But part of her interest in my attitude is the second-order interest in knowing whether I care about her interests. So in expressing the fact that I do now care about her interest, my apology to her satisfies that second-order interest, and so constitutes my recognition of her. Perhaps we could devise another way of doing this (perhaps, a public apology that includes the words 'and I know that Stephanie has a special interest in hearing me say this'), but address is a very natural way to do it, given that it plays such a prominent role in other parts of our lives, and given its contingent connections to moral development, as outlined earlier.

§32. Recognition and consequentialism. It is worth observing at this point how this account differs from anything the consequentialist could say, though my remarks will be too brief to count decisively against the imperial maneuvers of which consequentialism is all too capable. Indeed, accepting that there are directed duties and that they are connected to an interest in recognition already make a consequentialist explanation of our moral judgments implausible for a number of reasons. If there are directed duties, and the account of Direction presented is correct, then directed duties are justified in a way that is very likely unlike many consequentialist accounts of justification. That is because contractualist justification considers complaints that are grounded in generic reasons, and that is incompatible with a consequentialist account that considers the actual consequences of an agent's action. No doubt there are theories that take into account the typical consequences of an action, and weight these according to their typicality. But it remains to be said in what sense such a theory is consequentialist, in much the same way that it must be clarified in what sense rule utilitarianism is truly consequentialist.

Indeed, if it were my topic it would be appropriate to pause for much longer on the question of what warrants being called a consequentialist theory. A theory like act-utilitarianism has several features which may be invoked as assets or liabilities (or necessities) in discussions about consequentialism. One such feature ('Aggregation') is the fact that utilitarian justification involves aggregation of the various good-making features of alternative actions. Another such feature ('Actualism') is that utilitarian justification restricts itself to considering the consequences of alternative actions—and I suspect that this, as much as Aggregation, is part of the instinctive appeal of the theory. I have been suggesting that Actualism is incompatible with the sort of justification that grounds directed duties. It is also difficult to reconcile with the actual practice of recognition. Suppose I act in a way that aims to show Stephanie that I am sensitive to her interests—as I do when I apologize to her. Doing that satisfies an interest, and the consequentialist will claim that it is open to him to acknowledge that interest in his ledger of good and bad consequences, and perhaps even to say that it is the best in this case if I do apologize to Stephanie. But I can hardly apologize, not in a way that constitutes recognition, if I have the consequentialist's calculation in mind (though admittedly here I cut short a debate about whether consequentialism must be a theory of decision-making). In that case, I do not show Stephanie that I aim to act in a way that is sensitive

to her interests, but only that I am to respond to the impersonal mass of interests as I find them. These sorts of concerns about Actualism seem to me to count against Aggregation too, since being actually sensitive to S's interests seems to count against the possibility of letting an accumulation of dispersed and minor interests outweigh a serious interest of hers. That is the thrust of much contractualist argument, though much more needs to be said to defend it.

I have been suggesting that acceptance of the existence of directed duties and interests in recognition count against taking consequentialism seriously. But the consequentialist may now propose that we should not accept the existence of these things, and that what we find instead is that it is typically optimal to act as if they exist, to say things like 'I owe it to Stephanie . . .,' or 'I not only acted wrongly, but wronged Stephanie.' It is very difficult to counter this sort of argument, except by noting that it urges skepticism about a general feature of our moral practice, and that we should be loathe to think that our moral practice involves us being subject to a general illusion, especially with respect to some aspect of our practice that we think important. And the consequentialist's contention about what is typically optimal should immediately strike us as an exaggeration of his theory's explanatory power. In fact we think that apology and redress and the seeking of forgiveness are almost always appropriate responses to wrongdoing, and not hostage to how the consequences of alternative actions lie. It is hard to see how the consequentialist can stay fast to his focus on the actual consequences of actions and think that we will find that it is *typically* optimal to respond in these ways. And it is not only the generality of our accountability practice that the consequentialist fails to explain. In the next section I will argue that acknowledging that one owes a duty to another is a way of recognizing them even in advance of wrongdoing, but only because of the way in which this gives articulation to our directed practice of accountability. But if we do not in fact have such a general practice, as the consequentialist suggests, then saying that one owes it to another will fail to count as a form of recognition. Perhaps, the consequentialist will now counter, that is just as it is, and we are deeply mistaken about the import of basic forms of moral talk—but then he reveals his proposal for what it is: not a theory of morality, but deep skepticism about morality.

III. Recognition Without Wrongdoing

§33. Articulating recognition. I have been arguing that directed duties involve us in a directed practice of accountability, and that this practice makes available performances that constitute appropriate ways of recognizing addressees in the wake of wrongdoing. We needed to adopt the Repair Theory in order to see that directed duties are important in this way, since the Repair Theory characterizes directed duties in terms of the structure of the performances that are appropriate in the wake of wrongdoing. But this whole picture might strike one as too beholden to a scenario in which a duty is violated. Is there not some moral significance in thinking that I owe it to Stephanie to keep my promise in advance of violating any duty? Could it not be important even for the per-

fect moral agent, incapable as a matter of character of violating any duty, to have a thought of this relational nature?

In fact, directedness is important in these settings, but an understanding of its importance is best grasped by way of the account just given of its importance in the wake of wrongdoing. Suppose I say, in advance of violating my duty, that I owe it to Stephanie to do what that duty requires. Given the Repair Theory, in saying this I implicitly acknowledge that Stephanie has special standing to hold me to account for not fulfilling my duty. But in doing that, I commit myself to the fact that it would be appropriate to recognize Stephanie if I were to violate the duty, since it would be appropriate to carry out those performances made available by the directed practice of accountability which constitute recognition in the wake of wrongdoing. So, in acknowledging that I owe it to Stephanie to do what duty requires, I acknowledge that Stephanie would deserve recognition of the sort made available by the directed practice of accountability if I did not do what duty requires.

But by acknowledging that Stephanie deserves recognition of this kind, I acknowledge the fact that she has the two-tiered structure of interests that makes such recognition an appropriate response to wrongdoing. In acknowledging that she has that structure of interests and that they make recognition appropriate, I take those interests seriously, in just the way that recognition demands. And by giving expression to this thought, by saying that I owe it to Stephanie to do my duty, I satisfy her interest in knowing whether I aim to take her interests seriously. So by having this relational locution available, I am able to recognize her in advance of any wrongdoing, though this form of recognition is interestingly parasitic on having available the apparatus for recognizing her in the wake of wrongdoing.

§34. Recognition and deliberation. It is tempting to paraphrase the claim just made in the following way: by thinking that I owe it to Stephanie to fulfill my duty, I give Stephanie special place in my deliberation; and by saying that I owe it to Stephanie to fulfill my duty, I express the fact that I give her special place in deliberation. But the first claim is misleading, and the second insufficient as an account of the importance of directedness. The second claim is underwhelming for the reasons discussed in Section II. The fact that a locution expresses a certain valuable attitude may lead us to value that locution, but it does not show why we should intrinsically value that locution, and so it does not show why the directedness referred to by the locution has any moral significance independent of its role in allowing us to express the valuable attitude. That is too contingent a relation to value to capture the role of directed duties in our moral thought or to fend off a consequentialist skepticism about directedness.

Now let's consider in more detail the first claim i.e. that by thinking that one owes it to another to fulfill one's duty, one gives them special place in deliberation. This is an especially tempting claim in light of Kadlac's example of a parent asking an older boy to reflect on why he should not have hit his younger brother. The suggestion is that the older boy should think about the harm caused to his brother, and perhaps also the feeling of insult; and that in future these thoughts should be with him as he decides how to act. That provides us with a picture of what it might be for the older boy to give his younger brother special place in deliberation: his brother appears on his 'moral radar,' featuring non-incidentally in his thought, so that thoughts of what it would be like to be his younger brother have determinative weight on his thinking about what to do. This suggests

the following account of Importance: directedness is important because judging that one owes a duty to another is a way of giving them special place in deliberation, and giving them special place in deliberation is a feature of ideal moral agency.

That is true as far as it goes, but the problem is in how far it goes. In what way does one give another special place in deliberation by thinking that one owes a duty to them? I have argued in Chapter 2 that we should not think of the judgment that one owes it to another as marking the deontic force of one's duty, since a non-directed duty can have such deontic force. A better idea is that giving the addressee special place in one's deliberation amounts to acknowledging that they have special standing. But how to characterize that special standing? As I have argued in Chapter 2, the most illuminating way to characterize it is in the way the Repair Theory does, as special standing to hold one accountable. But if we accept this, then saying that a judgment that one owes a duty to another gives them special place in deliberation does not provide a distinct account of Importance, but simply abbreviates the one given here.

An alternate thought is that giving someone special place in deliberation means attending to their particularity in a way that can be a distinctive source of motivation. This is also a tempting conclusion to draw from Kadlac's example. When the older boy thinks about what he has done, it is his younger brother in particular who features in the older brother's thoughts: the look on *his* face, the complaint as *he* would raise it, the particular ways in which it would harm *him*. But the familial context of the story misleads us when it comes to thinking about duty more generally. When we think about the effects our actions have on a loved one, it is difficult to avoid thinking of the very personalized form of harm that might come to them, and of the very personal way in which we would have to answer to their complaints. But not all wrongdoing follows that model, and deliberating in this very personalized way can in fact be misleading. In thinking about whether to keep my promise to Stephanie, I may do better to think about the general ways in which breaking my promise might affect someone in her position, rather than thinking about how she actually will be affected, for she may actually derive great benefits from my breaking my promise. That is a crude rehearsal of the argument in Chapter 1. The conclusion that we should draw from it now is that directed duties do not call upon us to give someone special place in deliberation in the sense of being moved by thoughts of their particularity.

I have been arguing that we need to adopt the account given so far if we are to make sense of the claim that thinking of oneself as owing it to another means giving them special place in deliberation. In particular, I have been arguing that the accounts of Direction and Practical Difference presented in Chapters 1 and 2 that make sense of the idea of giving someone special place in deliberation. But it is worth noting now that giving someone special place in deliberation does not amount on its own to recognizing them. That is why the performances of apology and seeking forgiveness are required in the wake of wrongdoing, over and above a change of heart.

That is what distinguishes my use of the term 'recognition' from the much looser use of the term elsewhere. Consider, for example, Scanlon's claim that acting on the basis of contractualist deliberation is a way of standing in relationships of recognition with others:

The contractualist ideal of acting in accord with principles that others (similarly motivated) could not reasonably reject is meant to characterize the relation with others the value and

appeal of which underlies our reasons to do what morality requires. This relation, much less personal than friendship, might be called a relation of mutual recognition.¹²

But whatever Scanlon means by recognition, it is not enough to deliberate in a certain way, or even to act upon that deliberation, in order to count as recognizing others in the way I have defined. The interest that another has in being recognized is an interest in knowing that the agent aims to act in a way that is sensitive to their interests. But mere conformity with duty, and acting in a way that does not in fact set back their interests, is not enough to show such an aim. For an agent may conform with duty for purely self-interested reasons, or out of sheer luck. So acting in the moral way does not guarantee that an agent in fact recognizes others. But I have been arguing that the moral agent can say things, such as that he owes it to others to act in certain ways, which do count as recognition insofar as they are genuine. And in the wake of wrongdoing, he is required to do and say things which indicate recognition. It is not surprising that we require recognition after wrongdoing, but not before. We are human, and weak, and it is difficult to act on the basis of duty in the way that the ideal moral agent does. So sometimes we need the props of reputation and social sanction and self-interest in order to act in the moral way. But when we do act contrary to duty, then it becomes reasonable for others to insist that we meet the higher standard of recognizing them.¹³

It's natural to ask at this point why we should insist on recognition after wrongdoing, and why we should care about recognition at all. I address these questions next.

IV. Respect Requires Recognition

§35. A Strawsonian argument. I want to argue now that recognition, as I have defined it, is an important aspect of our moral lives, and that in particular it is an element of respect for others.

In introducing recognition, I pointed out that the structure of our practice of accountability is explained by the fact that we do have an interest in recognition. We can begin with the Strawsonian point that various reactive attitudes, including but not limited to those involved in blame, are responses to the quality of will of others.¹⁴ For example, I feel gratitude toward Stephanie when she aims to act in a way that helps me, say by going out of her way in order to send me comments on a paper. I do not have that reaction when her self-interested action merely happens to benefit me, as for example when she moves her car and unwittingly frees up a parking space for me. And

¹² Scanlon, *What We Owe to Each Other* (n 15) p. 162

¹³ This does not mean that we can insist on an arbitrarily high standard after wrongdoing, as we would if we required the wrongdoer to compensate for all harm flowing from his action. Cf. Cornell, "Wrongs, rights, and third parties" (n 12). But it is appropriate and reasonable to ratchet up our standards in the sense of requiring recognition because that it is a sensible and not overly demanding way to guide the wrongdoer toward the sort of behavior which we may expect of him but which he failed to exhibit in this instance.

¹⁴ Strawson, "Freedom and resentment" (n 22).

I excuse someone who has acted wrongly but unintentionally because, given that they did not intend to act in that way, their action does not show disregard for my interests.¹⁵ These basic and pervasive facts about our reactive attitudes show that we do care about whether others aim to act in a way that is sensitive to our interests or not.

But the interest in recognition is an interest in knowing whether others aim to act in that way, and it is satisfied by their communicating with us in a way that shows that they have that aim. But again, observing our practice with respect to reactive attitudes and accountability shows that we do have such an interest. And as noted in Section II, our practice of accountability involves us in actually asking for and communicating excuse and justification and apology, and this shows that we do care about whether others recognize us, and that we care about showing others that we recognize them. Moreover, this is a pervasive concern, since the practice of accountability is a very general one that bears on all our actions and relationships with others.

But why should the fact that we do show an interest in recognition lead us to see that as an intelligible and reasonable interest? Perhaps arguments about general features of morality sometimes must bottom out in simply describing how that feature fits together with other aspects of our moral practice; and in the case of recognition we are left to point out the structural role it plays in the ways we inevitably do respond to each other's actions. It may be thought that we see this sort of tamping down of vindictory ambitions when Nagel says, against the thought that we can only hold someone responsible for what is within his control, that we simply don't do this in a wide range of judgments that we inevitably make;¹⁶ or when Strawson says, against the thought that we could quite generally refrain from resentment and other reactive attitudes, that 'a sustained objectivity of inter-personal attitude . . . does not seem to be something of which we human beings would be capable . . .'¹⁷ And a natural concern about this sort of argument is that it is not really much of an argument, since we may ask whether even very pervasive features of our moral practice, and even inevitable and inescapable features of human life, are mistaken.

But I think neither Nagel nor Strawson set their so ambitions so low. Nagel's argument seems to be that we could not be agents if we did not make certain sorts of judgments—but that sort of argument seems too ambitious for the current subject. Strawson's argument, on the other hand, is not that a set of judgments are required for the possibility of agency, but that life without them is 'practically inconceivable.' This doesn't simply mean that it would be very difficult or even impossible to overcome our tendency to make these judgments, but that a commitment to them

is part of the general framework of human life, not something that can come up for review as particular cases can come up for review within this general framework. . . . [I]f we could imagine what we cannot have, viz, a choice in this matter, then we could choose rationally only in the light of an assessment of the gains and losses to human life, its enrichment or impoverishment . . .¹⁸

¹⁵ R Jay Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press 1994) pp. 127–136.

¹⁶ Thomas Nagel, "Moral luck" in *Mortal Questions* (Cambridge University Press 1979).

¹⁷ Strawson, "Freedom and resentment" (n 22) p. 12.

¹⁸ *ibid.*, p. 14.

The two thoughts at play here concern the (i) *fundamental* and (ii) *evaluative* nature of certain phenomena that we wish to interrogate, but it is important to note how these properties interact in order to make the phenomena practically inescapable. Begin with the thought that the reactive attitudes are fundamental. That is so not just because they feature pervasively in our interactions with others, and occupy a central place in the significance of those interactions. In addition, Strawson claims, the reactive attitudes make available to us the human relationships that help to give our lives meaning.¹⁹ So they are fundamental in the sense of being part of the framework in which we experience valuable and meaningful elements of human life. That explains the evaluative nature of the framework. If we were able to make a choice about the framework, that choice would affect whether certain valuable features of life would be available to us or not, and so it would be irrational to make this choice without regard for the values that are introduced in this way. But this evaluative aspect of the phenomenon also affects the way in which it is fundamental. For the thought that we can step back and evaluate the framework of which the phenomenon is a constitutive part assumes that there is some vantage point from which to make such an evaluation. But if the framework gives rise to basic values of human existence, then it is part of the basis of our evaluative judgments, and it no longer makes sense to imagine stepping outside of this framework in order to evaluate it, as if there were a perspective without from which we could wield the very capacities which we are only granted within the framework.

So we can seek a *Strawsonian vindication* of a phenomenon by showing that we are practically committed to it, because it is fundamental, in the sense of establishing part of the framework in which some of the basic values of human life arise. That work is not entirely descriptive, though part of it is done by showing that the phenomenon we are interested in really does show up in a very general way in human life. But in addition, we should show how the phenomenon is connected to things we care about, and that it is reasonable by our own lights that we care about these things. That is perhaps the best we can do to show that we are not making a deep-rooted mistake. In the case of recognition, part of the burden of Strawsonian vindication has already been shouldered by noticing that recognition is a general feature of our practice of accountability, since it grounds our reactive attitudes, insofar as they respond to others' quality of will, and grounds our wish to give and seek actual communication of excuse, justification, and apology. But that is not the only way in which recognition establishes a framework for the enjoyment of valuable human relationships, as we will see next.

§36. Recognition and human sociality. I have been arguing that an interest in recognition explains some very general features of our practice of accountability: the target of the reactive attitudes, and the interest in actual communication of the judgments that are made in the course of that practice. If that is right, then the interest in recognition is part of the framework in which we pursue moral relationships with each other.

But the interest in recognition is also an important element of the framework in which we pur-

¹⁹ Insofar as this claim is true, it is because the reactive attitudes contain judgments about the attitudes of others toward us, and our relationships are partly about the attitudes of others. That is of great importance to my aim of showing why we value recognition, but right now it is not to the point of the current topic, which is Strawson's style of vindication.

sue other, more intimate relationships with each other: friendships and love, familial relationships, collegial relationships, and so on. What these relationships share with each other, and sometimes share also with our moral relationships, is that they are established by repeated interactions, and include expectations about what future interactions will be like. For example, the bond in a romantic partnership typically occurs by way of repeated interactions in which the lovers exhibit care for each other and interest in each other, and it gains much of its energy from shared expectations that these interactions will continue into the foreseeable future. As such, relationships like romantic partnerships really revolve around the relatives' (for instance, the lovers') interests in the attitudes of each toward the other. As a participant in a relationship, one cares about how the other relative thinks about oneself, and one cares about communicating to the other relative how one thinks about them. This concern encompasses the interest in recognition, though it can extend far beyond it too: one might care not only about whether the other is sensitive to the importance of one's interests, but also about whether the other goes to special lengths in order to support those interests, or regards them as special relative to the interests of others. But that further concern is not relevant to us now. What matters is that recognition plays at least as crucial a role in human relationships as the reactive attitudes; it would be at least as difficult to conceive of human relationships without that concern as it to conceive of them without the reactive attitudes.

But Strawsonian vindication calls for us to show not only that recognition is fundamental in the sense of grounding these valuable features of human life, but that it fits with the other judgments made from our evaluative perspective. So we may well ask: what exactly is the value of the interest in recognition to both moral relationships and special relationships? And does it really go beyond mere vanity? That is, is it not just a symptom of the frailty of the human ego, a natural tendency but one that nonetheless should be expunged if we are to achieve proper self-confidence and independence? Knowing whether another recognizes me can be a helpful tool in my own planning: it provides me with some insight into whether I can rely on and trust that person, whether I can expect them to cooperate with me, whether I should seek them out for deeper relationships, or whether I should instead avoid doing these things. So recognition clearly has instrumental value. Of course, it is not an entirely reliable indicator of whether I can trust someone or expect cooperation or seek intimacy; but it may be as good an indicator as there is. And while there are conceivable circumstances in which I live so isolated a life, or am so unlikely to be involved in reciprocal or repeated interactions with others, that there is no point to using recognition as a guide for what I do, these circumstances are rare to the point of non-existence in the world in which human beings actually live.

But recognition does not only have instrumental value. That is the lesson we learn most vividly in our intimate relationships, where we care about how our intimate relatives feel about us apart from any benefits that may be derived from their attitudes. Why do we care in that way, and is it not just a matter of vanity? Note that caring about whether another recognizes me is fundamentally different from caring about whether they think I am intelligent or good-looking or have promising career prospects. I must admit to sometimes caring about those things too, but those concerns are much harder to defend against the charge of vanity. Caring about recognition is different because it amounts to a concern that the other person sees me as an equal, and sees that my interests count in the same way that theirs do. Vanity is a concern to be seen as special, or even elevated, so

the concern to be seen as an equal cannot be counted as a type of vanity. Indeed, insofar as it is a basic moral concern grounded in a belief in the equality of all, it is as safe from the charge of vanity as any other concern I may have for myself. Perhaps there is some apparently more modest attitude I may take in which I don't care whether others see me as an equal, but that in fact seems to border on an objectionable arrogance, for by not caring about how others think about me at all I potentially dismiss the importance of their attitudes altogether.²⁰

§37. An argument from self-respect. I have argued that we have an interest in recognition and that it is intelligible in the light of our moral practice and our human sociality. Now I want to argue that our interest in recognition is a key part of respect. I will do that by showing that recognition can make sense of a plausible claim that is sometimes made about having respect for oneself.

The claim is that an overeagerness to accept forgiveness without adequate apology or redress shows a lack of self-respect. David Novitz writes that people who forgive too easily

do not manifest the right degree of self-respect; they underestimate their own worth and fail to take their projects and entitlements seriously.²¹

And Jeffrie Murphy claims that

the primary value defended by the passion of resentment is self-respect, . . . proper self-respect is essentially tied to the passion of resentment, and . . . a person who does not resent moral injuries done to him (of either of the above sorts) is almost necessarily a person lacking in self-respect.²²

Murphy goes on to suggest that this person lacks not only self-respect but respect for others, since by failing to take seriously his own moral value, he also fails to take seriously the equal moral value of all persons.²³ This suggestion is reminiscent of my own argument in the last section, to the effect that the interest in recognition can be endorsed as a reflection of the belief that all have equal moral value. But it doesn't give an adequate explanation of why the readiness to forgive should count against self-respect.

I may forgive my offender so that both he and I may escape the turbulence of blame and resentment, or because I have cultivated a generous attitude of compassion, while maintaining that his action was wrong and continuing to recognize the way in which it set back my interests. But, a philosopher like Murphy will respond, by wronging me my offender also insulted me, failing to take my interests seriously and so failing to treat me as an equal. My resentment is a protest against that insult, and I should only withdraw the protest when the insult has been taken back by suitable apology and redress. The problem for this response is that it is not clear why I should take the

²⁰ A similar point, that refraining from resenting others may lapse into 'Nietzschean' arrogance, is made by Murphy and Hampton (n 34) p. 18.

²¹ Christopher Novitz, "Forgiveness and self-respect" *Philosophy and Phenomenological Research* 58(2) (2 1998) 299, p. 299.

²² Murphy and Hampton (n 34) p. 16.

²³ *ibid*, pp. 18–19.

apparent insult seriously, and so it is not clear why I should put any effort into protesting it. Secure in my beliefs that I am indeed an equal, I may notice that my offender's action says something demeaning about my moral value, but there is no reason to take it as a serious indication of my moral value.²⁴ So it seems I can go ahead and forgive while hanging on to my self-respect.

This argument rests on the assumption that respect primarily involves an appreciation of the equal moral worth of all, and self-respect an appreciation of one's own moral worth. But we can resist the argument, and vindicate the everyday thought that hasty forgiveness threatens self-respect, if we accept that recognition is an element of respect. The immediate difficulty raised by this proposal is: what would the recognitive element of self-respect involve? If I recognize another, then I act in a way that is sensitive to the importance of their interests, and also to their interest in knowing whether one aims to act in a way that is sensitive to the importance of their interests. I can act in a way that is sensitive to the importance of my own interests, just as surely as I can fail to do so (as I often do). But what should I do to satisfy my interest in knowing that I aim to act in such a way? When it comes to another, I often require some positive action on their part if I am to learn what their attitude toward me is. But do I not know my attitude toward myself as surely as I know my other attitudes?

It is a piece of blind optimism to think that I do know my own attitudes. That is the lesson of recent work on implicit bias and on the possibility of inconsistent beliefs, and it is also the long-running preoccupation of psychoanalysis. It would also be naïve to think that I have reliable access to my attitudes about myself. It is an all too natural part of human life that we undertake self-destructive action without clearly knowing that we do. It can take work to reveal one's estimation of oneself. So there is something to be done when it comes to satisfying the second clause of recognition, namely, showing oneself that one is sensitive to the importance of one's own interests.

My claim is that when I insist on apology and I am cautious with forgiveness, these are signs to myself that I have the right attitude to myself—they are ways of recognizing myself in the sense that they show me that I am sensitive to the importance of my own interests. This goes beyond the belief in equal moral value that is typically associated with respect. Insistence on apology and caution with forgiveness do not just rest on a belief in my own moral value, but they enact that belief and communicate to myself that I really do have the belief. If I never have to confront my offender in this way, then I could quite easily fool myself into thinking that I take my interests seriously, even though I do not.²⁵

§38. Vindicating Feinberg. I set out to vindicate Feinberg's claim: '[t]o respect a person . . . , or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims.'²⁶ I have been arguing that recognition is an element of respect, and that the importance

²⁴ A critique of forgiveness that follows much this line of thought has been developed, and defended as an interpretation of Confucian thought, by Kwong-Loi Shun, "Resentment and forgiveness in Confucian thought" *Journal of East-West Thought* 4(4) (4 2014) 13.

²⁵ This argument serves my present purpose but is not quite enough to reject the Confucian argument in *ibid.* For the Confucian may question the importance we place on self-respect, and respect; or he may hypothesize that the sage-like agent would be sufficiently confident in his self-valuation that he has no need for such outward displays of self-worth.

²⁶ Feinberg, "The nature and value of rights" (n 9) p. 252.

of the directedness of duties is that it establishes ways to recognize each other in the wake of and in advance of violating duty. The conclusion to draw immediately from this is that directedness enables us to respect each other. This is not as strong as Feinberg's claim, which suggests a constitutive relation: what it is to respect another is to see her as someone to whom duties may be owed. But something stronger can be said.

I have argued that directedness establishes ways to recognize each other as a response to the question of Importance. While that question does not force us to adopt a perspective external to our ordinary moral practice, it does ask us to say something general about the worth of a basic feature of that practice, and that doesn't press us to be mindful of whether there are other ways of organizing our practice. The response given here acknowledges that directedness provides a way of recognizing others, but not necessarily the only way of doing so; though I have argued that given the centrality of address in our practice of directed accountability, directedness is a particularly salient way of enabling recognition.

When we are not asking this distinctly philosophical question about the importance of directedness, we are in a different position, and we can accept our directed practice of accountability as our practice, as our way of recognizing each other. This gives rise to a stronger claim about respect and directed duties. I have said that respecting Stephanie requires recognizing her, which requires acknowledging her first-order and second-order interests. But, given how our practice of accountability in fact works, to acknowledge that she has that arrangement of interests is just to acknowledge that she could have special standing in that practice—that it would make sense to address an apology to her in the event of failing to fulfill a duty grounded in her interests. According to the Repair Theory, that is just what is involved in acknowledging that I owe it to her to do my duty. So, given the way our practice of accountability is in fact, to respect Stephanie, and to recognize her, is to see her as potentially having special standing in our practice, which is to see her as potentially one to whom I owe duties.

4

Rights, Wrongs, and Duties.

§39. Cornell’s claim. Having a right against someone and owing someone a duty are both relational normative notions. But how are they related to each other? A popular analysis, owed to legal theorist Wesley Hohfeld,¹ identifies a subset of rights, the claim-rights, in terms of their being *correlative* with directed duties:

Hohfeldian Analysis. S has a right that J ϕ s just in case J owes S a duty to ϕ .

I call this an analysis, but I do not want to commit Hohfeld to any stronger claim than that there is a version of co-extension here. In particular, I won’t commit Hohfeld to the claim that claim-rights and directed duties are equivalent, or that one can be defined in terms of the other. Still, if one accepts the Hohfeldian Analysis, then it is tempting to think that the account of directedness that I have been defending sheds light on the nature of rights (in what follows, I will abbreviate ‘claim-right’ to ‘right’). In particular, one might accept:

Accountability Analysis. S has a right that J ϕ just in case S has special standing to hold J accountable for not ϕ ing.

Can the Accountability Analysis be defended? In a series of papers Nicolas Cornell has presented a range of reasons for thinking that it is wrong.² The Accountability Analysis’s equation of rights and special standing can be separated into two directions of entailment:

¹ Wesley Newcomb Hohfeld, “Some fundamental legal conceptions as applied in judicial reasoning” *Yale Law Journal* (1913) 16.

² Nicolas Cornell, “The possibility of pre-emptive forgiveness” *Philosophical Review* 126(2) (2017) 241; Nicolas Cornell, “A complainant-oriented approach to unconscionability and contract law” *University of Pennsylvania Law Review* 164 (2016) 1131; Nicolas Cornell, “The puzzle of the beneficiary’s bargain” *Tulane Law Review* 90 (2015) 75; Cornell, “Wrongs, rights, and third parties” (n 12). See also Nicolas Browne Cornell, “Wrongs without Rights” (PhD thesis, Harvard University 2015). Note that Cornell talks primarily about special standing to complain. For the reasons given in Chapter 2 I think this is an inadequate characterization of the special standing that accompanies being owed a directed duty. But all his arguments carry over if we talk about special standing to hold someone accountable as I have described it.

Sufficiency. Rights are sufficient for special standing i.e. if S has a right against J that J ϕ then S has special standing to hold J accountable for not ϕ ing.

Necessity. Rights are necessary for special standing i.e. if S has special standing to hold J accountable for not ϕ ing then S has a right against J that J ϕ .

Cornell denies the Accountability Analysis, and he denies both of its component claims. But he accepts the Hohfeldian Analysis, so his position is that directed duties are not co-extensive with special standing in our practice of accountability. I deny the Accountability Analysis too, but that is because I deny the Hohfeldian Analysis. Reasons for doing so will emerge in my discussion, but the focus will be on showing that Cornell's observations do not threaten the Repair Theory. But it is also true that the phenomena that Cornell observes and that seem to undermine Sufficiency and Necessity are intrinsically noteworthy; so examining his arguments in detail will lead us to a better understanding of the relations between rights, duties, and special standing.

§40. The argument. We can maintain the Sufficiency clause of the Accountability Analysis, but not Necessity. In other words, having a right entails having special standing to hold duty-bearers accountable, but the converse is not true. I will assess two main arguments against Necessity, and three main arguments against Sufficiency, all due to Cornell. Let me set out a road-map of Cornell's arguments and my responses.

Against Sufficiency:

- (1) *The argument from pre-emptive forgiveness.* Cornell's argument: given that it is possible to forgive in advance of wrongdoing, and given that forgiveness can involve waiving one's standing to complain, it is possible to have a right but lack standing to hold a trespasser accountable. My response: it is possible to waive elements of one's special standing, but this does not undermine the claim that having a right entitles one to special standing. (§§41–44)
- (2) *The argument from contract law.* Cornell's argument: elements of contract law, in particular unconscionability doctrine, show that one can be a right holder but lose special standing in virtue of complicity or hypocrisy; so it is possible to have a right but lack special standing to hold a trespasser accountable. My response: as above, the fact that a right-holder may lose elements of her special standing does not undermine the claim that her having a right entitles her to special standing. (§§45–47)

Against Necessity:

- (1) *Contractual cases involving third parties.* Cornell's argument: if a third party is the intended beneficiary of a contract, then that third party has standing to complain about non-compliance, but there is not always a basis for the third party to be owed a duty; so it is possible to have special standing without being owed a duty; such a person can have special standing to complain while lacking a right. My response: there is a general principle that one party may not be enriched at the expense of another without reason, and this often supplies

a non-contractual basis for thinking that an intended beneficiary is owed a duty with respect to the promissory arrangement. What distinguishes the position of the intended beneficiary from that of the promisee is that it is the non-receipt of the benefit that provides a potential basis for complaint, rather than non-performance by the promisor; and the intended beneficiary does not have the sort of discretion with respect to the promisor's performance that the promisee has. (§§48–50)

- (2) *The puzzle of the beneficiary's bargain.* Cornell's argument: in order to make sense of the enforceability of a second contractual undertaking made to the intended beneficiary of a first contractual undertaking, we must think that the first contract assigns special standing to the intended beneficiary, but no claim; so we can make sense of someone having special standing though they are not owed a duty. My response: it is enough to solve the puzzle if we think that the intended beneficiary is assigned a duty but no right; and this is a better solution since it provides a better explanation of who gets special standing under contract law, and why. (§§51–53)
- (3) *Non-contractual cases involving apparent third parties, and general considerations about the nature of moral relationships.* Cornell's argument: some cases appear to involve third parties who have special standing but are not owed duties; if we did not assign special standing to them we would assign accountability too narrowly, but if we assigned rights to them we would make deliberation too demanding; so we should see special standing as diverging from being owed a duty. My response: these cases are well explained once we drop the Hohfeldian entailment from duties to rights; the third parties are owed duties but do not have rights; this preserves an illuminating nexus of accountability and deliberation, and there is a good explanation in each case as to why we would assign a duty but no right. (§§54–57)

Against Sufficiency (1): the argument from pre-emptive forgiveness.

§41. The possibility of pre-emptive forgiveness. Forgiveness is typically thought of as a response that occurs after wrongdoing, and for good reason. In order to forgive, there must surely be something to forgive.³ Not only must the one being forgiven have done something wrong, but apology is thought to play a particularly important role in making forgiveness possible and appropriate.⁴ And forgiveness is often understood as involving the withdrawal of resentment, where resentment is a response to a wrong or an insulting action.⁵ In light of these common assumptions, it may

³ John Horsbrugh, "Forgiveness" *Canadian Journal of Philosophy* 4(2) (2 1974) 269, p. 269.

⁴ Novitz (n 21); Pamela Hieronymi, "Articulating an uncompromising forgiveness" *Philosophy and Phenomenological Research* 70(3) (3 2001) 529.

⁵ Murphy and Hampton (n 34).

well be thought that pre-emptive forgiveness is at best inappropriate; and at worst unintelligible, perhaps a confused reference to some other performative, such as condonation.

But consider Cornell's example of a wounded soldier forgiving his comrade:

Patrol. 'Two soldiers are on patrol, when an explosive device wounds one of them. Although the camp is only a few miles away, the wounded soldier is unable to get up the steep hillside, even with the other soldier's help. They are able to call for assistance, but they are informed that it will be several hours before aid can be dispatched to their location. The unharmed soldier promises that he will stay by the wounded soldier's side until help comes. But after an hour of sitting in the cold rain, the unharmed soldier is visibly shivering and the gunfire is approaching. The wounded soldier says, "I forgive you if you leave me." The soldier leaves.'⁶

Some elements of the case should be clarified. The unharmed soldier (I will call him 'Earnest') leaves at some point *after* the wounded soldier (I will call her 'Wanda') has granted forgiveness. We may even think that Wanda is unable to forgive Earnest at the point that he leaves; perhaps she has grown so weak that she is unconscious. And let's suppose that Earnest doesn't leave because of a fear for his own life that is sufficiently legitimate that it excuses his action. He is morally weak, and leaves even though someone with an ordinary level of bravery and loyalty would be capable of keeping to a similar commitment. We can also suppose that Wanda doesn't *know* that Earnest will leave; one might worry otherwise that in order for Wanda to know this much, Earnest must have already done something that counts as a wrongdoing, and that this is what Wanda forgives.

So what could it mean that Wanda forgives Earnest in advance of Earnest actually have done a wrong? One thought is that instead of forgiveness, Wanda is really granting permission, releasing Earnest from a promissory obligation that it would be cruel to hold him to. Or it could be that Wanda is expressing a merciful attitude, telling Earnest that he is not the sort of person who would sanction Earnest in these circumstances. These are certainly performances that it would make sense for Wanda to make, and it is also quite plausible that in our ordinary talk we confuse notions like forgiveness, mercy, and condonation.⁷ But we can simply stipulate that this is not what Wanda intends. For she might say to Earnest: "It would be wrong of you to leave me, but I forgive you if you do so." And if Earnest were to ask what she means by this, she could respond: "It's not just that I won't punish you for your wrongdoing. I will not hold it against you."

That is perhaps intelligible from the perspective of the traditional conception of forgiveness as a withdrawal of resentment. We can understand Wanda's statement as promise that she will not harbor resentment against an action which she nonetheless regards as wrong. But, like other emotional reactions, resentment is a relatively involuntary response to a judgment about a situation, namely the judgment that an action wrongs one. So is it really possible to promise that one will not feel resentment? The answer to this question is not entirely straightforward, as the voluntariness of the judgments involved in emotional reactions is not a straightforward matter. But

⁶ Cornell, "The possibility of pre-emptive forgiveness" (n 2) p. 252.

⁷ Murphy and Hampton (n 34) pp. 20ff.

we can make sense of someone who has forgiven but does feel resentment nonetheless refraining from the behavior that normally accompanies resentment: complaining, seeking redress, refraining from interactions with the wrongdoer, and so on. It makes more sense to think of forgiveness as altering one's judgments about the *appropriateness* of resentment and the behavior that typically accompanies it. This view makes sense of Wanda's performance, though at the risk of rendering it inappropriate. She is saying that although she thinks Earnest's abandoning her would be wrong, and without excuse, she nonetheless thinks that it would be inappropriate to resent him for it. But how could that be an appropriate stance to take in advance of anything Earnest does to repair the damage that makes resentment appropriate?

A similar problem may arise for Cornell's conception of forgiveness as the waiving of standing to complain, certainly if we think of complaint as a judgment that an action is wrong. As in the case of resentment, one cannot easily forswear such a judgment, but perhaps waiving standing to make the judgment means rendering the judgment inappropriate, even if one does make it. But in Wanda's case it is not clear what reason Earnest gives her to render her judgment of wrongness inappropriate, given the assumption that she does not release him from the promise. In any case, by talk of standing to complain, Cornell has in mind that the one doing the forgiving has *special* standing to complain—so by 'complaint' he cannot simply mean the judgment that the action is wrong. There must be some other way of making out the thought that forgiveness involves the waiving of standing to complain.

§42. The significance of forgiveness. In Chapter 2 I resisted the thought that special standing to hold someone accountable can be understood, as the Blame Theory proposes, in terms of special standing to blame or complain. The argument took the form of a dilemma. On the one hand, it is simply not true that the addressee of a duty is unique in having standing to complain. On the other hand, while there may be a sense in which the addressee is special in having a special sort of complaint, one associated with resentment rather than indignation, it is hard to say what this special sense is if we limit ourselves to the language of complaint. I also argued against the Strawsonian version of the Blame Theory, which characterizes special standing to blame in terms of the appropriateness of resentment rather than indignation. I doubted that we can say how resentment differs from indignation without invoking the idea of a directed duty.

But none of this was meant to show that it is false to say that an addressee has special standing to complain; and I will not argue that forgiving does not result in the giving up of standing to complain. Rather, the argument in Chapter 2 was intended to show that special standing must be understood in terms of the extended sequence of exchanges that go beyond complaint and aim at moral repair. The result is that the addressee's special standing is seen to have a complexity that goes beyond being entitled to complain. In fact, the Repair Theory, which looks at the structure of the performances of apology and forgiveness that follow wrongdoing and complaint, can be seen as providing a way to characterize what is special about the addressee's complaint. According to the Repair Theory it is the addressee to whom apology and redress must be made, and from whom forgiveness may be sought. So, while the content of the addressee's complaint is the same as any third party's, it is different in that it is appropriately situated in a bilateral exchange of responses that include apology and forgiveness.

§43. Special standing survives forgiveness. If we characterize special standing to complain in this way, then we can make sense of the thought that forgiveness involves the waiver of standing to complain, for we can make sense of what that waiver means beyond its making it inappropriate for the addressee to judge an action wrong. Indeed, it is not just complaining and feeling resentment that are rendered inappropriate by forgiveness. The seeking of apology and redress are also rendered inappropriate. Yet it would be an exaggeration to describe forgiveness as the giving up of an addressee's special standing. For standing to resent, complain, and seek apology and redress are but elements of that special standing. I will argue now that the addressee retains the power of forgiveness, even after forgiving; and that the addressee remains the one who is entitled to apology and redress, even if it is now inappropriate for her to seek those performances. My conclusion will be that the addressee remains the one to whom the wrongdoer is accountable, even if she has waived specific powers that normally go along with that special standing.

Consider first my claim that the addressee remains the one entitled to apology and redress. It would be inappropriate for Wanda to demand an apology from Earnest after forgiving him, or to seek compensation for damages resulting from the broken promise. But suppose Earnest were to come to be remorseful about his decision to abandon Wanda—a perfectly reasonable attitude given that Wanda had not released him from the promise. A reasonable way to deal with this remorse would be to incur the costs of a suitable apology and redress. For example, hearing that Wanda is now recovering from trauma and injury incurred after he abandoned her, Earnest might put all his savings into her medical care, and take valuable time off from being with his own family to visit her and tell her of his remorse. Wanda is likely to say that none of this is necessary, since she has forgiven him. But it is not inappropriate for Earnest to do what he does. In fact there is a fittingness to it, and it would be quite cruel of Wanda to prevent him from making these amends, since that would close off a natural and straightforward way for him to overcome his guilt. It would not be the same for Earnest to put his savings into someone else's medical care, or to take time off his family to visit another injured soldier. That might help him feel better about himself in the way that benevolent acts are generally capable of doing, but it would not count as making apology and redress to Wanda, and so it would not play the same role in Earnest's coming to terms with his wrongdoing and doing what he can on his part to restore his relationship with her.

Consider next that the addressee who forgives retains the power of forgiveness. Surely when one forgives one thereby loses the power to forgive? That is true only on a narrow understanding of what it is to have a power. A judge who dismisses a case does not thereby lose the power to dismiss the case. It is true that it is impossible for her to dismiss the case for a second time, but that is because the case has already been dismissed, rather than because she has lost the power to do so. In fact, if some problem with the first dismissal surfaces, then the judge may indeed dismiss it the second time around, because of her power of dismissal. Similarly, if one forgives but the performance fails in some way—perhaps the wrongdoer did not hear the utterance properly the first time, or the forgiveness was premised on some condition which, it is later learned, had not been fulfilled—one may well forgive again; or not. The second performance is not simply a repetition or completion of the first, but is once again an exercise of the addressee's power to forgive, and this power may be exercised with all the discretion of the original performance.

So it is perfectly intelligible that an addressee forgive a wrongdoing, but the performance of forgiving fails because the wrongdoer does not hear the forgiveness, and for the addressee to then have second thoughts and decide not to forgive the wrongdoer. This scenario makes sense because the addressee retains the power of forgiveness. If we thought that the first forgiveness exhausts the addressee's power, or more generally waives her special standing, then it would be difficult to understand this scenario. Alternately, perhaps we should think that the first performance does not count as forgiveness, but only a failed attempt, and so it does not result in a waiver of special standing. But that places the success of forgiveness too much in the hands of the wrongdoer—one can forgive a wrongdoer who is at a distance, or who is dead. Perhaps what this shows is that forgiveness is primarily a shift in attitude, and does not require any performance. But then Cornell's argument would be a non-starter: an addressee's attitudes could shift away from resentment and then back again, and this should not automatically count as a mistake, rather than as a retraction; whereas on Cornell's view one lacks the power to forgive after the initial forgiveness, and any change of mind is wrong in the light of the initial forgiveness.

Another way to see that the addressee retains some special standing is to consider the interaction of third parties and addressee in the wake of wrongdoing. Suppose an addressee has forgiven a wrongdoer, though the wrongdoer has not made full redress—perhaps the addressee has pre-emptively forgiven the wrongdoer. Then it is at least questionable whether a third party can demand that the wrongdoer make redress. It would certainly be intelligible and not inappropriate for the wrongdoer to raise the addressee's forgiveness in response to a third party demand. (I doubt that there is anything more of a general nature to be said than this about situations of this sort—whether the third party's demand is appropriate or not, and whether forgiveness can be raised as a successful defense, seems to rest on the details of the case, including the reasons for the addressee's forgiveness, the nature of the wrong, the wrongdoer's relationship with the addressee, and his attitude toward her.) But why should the addressee's forgiveness have any such effect on third party demands? It is not that it is a sign that the wrongdoer has made amends—we are assuming that he has not. Rather, it is an indication that the addressee has special standing to hold the wrongdoer to account. Clearly, then, the addressee continues to have that special standing after forgiving the wrongdoer, since her attitude continues to be relevant to third party assessments of what the wrongdoer must do in service of moral repair.

Stepping aside from the intricacies of what special standing includes, there is a more general point that can be made here. Having special standing to hold others accountable means having a special normative status in our practice of accountability. That status comes with certain powers and entitlements, and since powers and entitlement are often accompanied by the power to waive them, it is unsurprising that an addressee should have the power to waive them. But that does not mean that the addressee has the power to alienate or change her status as the one with special standing, and as the one who originally has these powers and entitlements. In fact, by waiving certain powers and entitlements she simply confirms that she has special standing, since that is what grounds the power of waiver.

§44. Pre-emptive forgiveness and recognition. I have been arguing that the possibility of pre-emptive forgiveness does not undermine the Repair Theory's analysis of directed duties, since the

fact that an addressee may release the wrongdoer from the requirement to make suitable redress does not amount to a termination of the addressee's special standing. Another defense of the Repair Theory begins with the account of Importance, that is, that directedness enables us to stand in valuable relations of recognition with each other. The fact that an addressee may release a wrongdoer from the requirement of redress does not undermine this claim about Importance, and it does not undermine the fact that human beings are owed duties in virtue of the fact that they reasonably have interests in recognition. So even if it made sense (as I think it does not) to say that pre-emptive forgiveness results in an addressee lacking special standing to hold offenders to account, we can hold on to the idea that it is the addressee's interest in recognition which structures the practice of accountability in this case. That special standing can be waived is an indication that the addressee herself has decided not to stand on her interest in recognition. But it is still her position on this interest that is determinative.

This fact brings us to a further question about pre-emptive forgiveness: given that pre-emptive forgiveness is intelligible, is it nonetheless generally appropriate? Cornell correctly thinks that pre-emptive forgiveness is conceptually unproblematic, but that it may be morally problematic. Indeed, I suspect that it is the fact that it is morally suspect that tempts one to think that it is unintelligible or incoherent. And it is the Repair Theory, rather than Cornell's view, that allows us to see why it is morally problematic. It is true that there may be good reasons to pre-emptively grant forgiveness, and Cornell has described several which I will not question (though they deserve further interrogation): it is the best one can do to release a duty-bearer from the burden of a duty that cannot be waived; it is useful where one will be unable to forgive after the wrongdoing; it can be a gesture of goodwill; it can relieve a duty-bearer from excessive attention to their duty; and so on.⁸ But despite these considerations, I want to draw attention to a way in which pre-emptive forgiving may remain regrettable in the Patrol case.

To begin, let's set aside circumstances in which pre-emptive forgiveness is clearly regrettable. Sometimes an addressee will waive repair because he doesn't care about the other's attitude toward him, or has given up on the wrongdoer and prefers not to have anything to do with him than to hope for future reparative overtures. That may be necessary as a last resort but otherwise displays a regrettable loss of hope in the ability of another human being to make moral progress. And it would be very cynical, perhaps apathetic or arrogant even, to consistently waive repair because of one's low expectations of others.

Similarly, pre-emptive forgiveness is regrettable if it is a way of taking pity on the wrongdoer's moral ineptitude. In cases in which the ineptitude is sufficiently severe, the right stance is to exempt the wrongdoer; as Strawson puts it, we take up the objective attitude rather than the participant attitude toward them, and exclude them from the normal range of emotions that constitute our interpersonal relationships.⁹ There is an interesting gray area here. An infant should be exempted from blame for actions that cause harm and disregard others' interests. But as the child grows in moral maturity, the right approach may be not exemption, but pre-emptive forgiveness. A young teenager has sufficient grasp of moral reasons that he cannot be straightforwardly exempted from

⁸ Cornell, "The possibility of pre-emptive forgiveness" (n 2) pp. 255–60.

⁹ Strawson, "Freedom and resentment" (n 22) pp. 9ff.

blame, and his moral education involves holding him to moral expectations, as Kadlac's story about the brothers makes vivid. But it may be unreasonable, even pedagogically unsound, to respond to his wrongdoing by severing one's relationship with him or adopting all of the actions and attitudes associated with full-fledged blame. Pre-emptive forgiveness on the part of a parent may well strike the right balance of indicating that the parent will respond to wrongdoing with judgment and even anger, but not avoidance or a demand for full redress.¹⁰

That pre-emptive forgiveness is so apt in the case of teenagers and individuals who fall short of full moral maturity shows why it might be particularly regrettable, even tragic, for Wanda to pre-emptively forgive Earnest in the Patrol case. I noted in Chapter 3 that certain cases of wrongdoing, such as murder, are tragic because they eliminate the possibility of apology and moral repair. Pre-emptive forgiveness does not go that far, but it does make apology seem obsequious and unseemly. And though apology is hardly rendered impossible, it pre-empts the wrongdoer's role in moral repair and makes that process seem unnecessary to the addressee. So, despite good intentions, pre-emptive forgiveness infantilizes the wrongdoer by taking away some of the esteem that goes with holding him to moral expectations and putting him in the position of the morally immature teenager. But it also takes away his authoring role in the process of moral repair, making it difficult for him to find relief from the anguish of remorse. There is tragedy in this, in the sense that an attempt to secure a relationship by circumventing our normal practice of accountability may have the effect of weakening that relationship.¹¹

¹⁰ If the parent feels anger, has there really been pre-emptive forgiveness? I think it possible to genuinely forgive and still feel anger, though the forgiver should think that the anger is not *fully* appropriate. So it may be that the parent elects to give in to their instinctive anger, knowing that it will have some disincentive or expressive function, while planning to work toward getting the anger to dissipate on its own, in the knowledge that this anger is not warranted in the light of his forgiveness. So even if there is some sense—the disincentive or expressive sense—in which the parent thinks that anger is appropriate, what marks the fact that he has forgiven the son is that he does not insist on the procedure of moral repair as he would with another mature moral agent.

¹¹ Niko Kolodny suggests that what is really problematic in cases of pre-emptive forgiveness is that forgiving someone but not releasing them from the obligation when one could do so is passive aggressive. That does strike me as a plausible account of the psychology of a pre-emptive forgiver. I understand the passive aggressive person to be one who harbors ill feelings toward or negative judgments about another but refrains from expressing these directly. She may even help to put the other person in a situation where he will be negatively judged or affected, while denying any responsibility for doing so. Certainly pre-emptive forgiveness can come close to such behavior if, for instance, the forgiver relishes the thought that the wrongdoer will be judged harshly by others, or by himself, but the forgiver wishes to say that she has done all in her power to avoid that situation. What is objectionable here is the forgiver's disingenuousness: she has not in fact done everything in her power to relieve the wrongdoer of the burden of blame if she could have released him from the obligation. She should either release him, or express her true feelings through blame and demanding apology and redress.

But I wonder whether we should really count the would-be forgiver as engaging in genuine forgiveness in this sort of case. It seems inappropriate, and maybe even incoherent, to forgive someone while taking comfort in the thought that they will continue to be blamed by others. In any case, there is something that remains problematic in cases where the forgiver does not act out of passive aggressiveness, but genuinely thinks that they are doing the right thing by pre-emptively forgiving the wrongdoer but not releasing him from the obligation (perhaps because she does not realize that it is open to her to release him, or because it isn't open to her to do so). In that case, as I have been arguing, the problem is that the pre-emptive forgiveness undermines the role that the wrongdoer would otherwise have in moral repair.

Against Sufficiency (2): the argument from contract law.

§45. Unconscionability doctrine. The doctrine of substantive unconscionability allows a court to refuse to enforce a contractual term that is deemed exploitative or substantively unfair.¹² What is the basis for doing so? I will consider Cornell’s proposal next—it is relevant to our discussion because it entails that one can be owed a contractual duty without having special standing. But first let us consider some desiderata for evaluating such a proposal. There are three features of the unconscionability doctrine that we would like to explain, and the first two may appear surprisingly weak insofar as we think that the doctrine is aimed at preventing exploitation. (i) It is the exploited promisor who decides whether to rescind or rely upon the contract. It would be odd for the exploiting promisee to rescind the contract on the basis of his attempted exploitation.¹³ (ii) Unconscionability is a shield rather than a sword. What that means is that an exploited promisor may approach a court and ask for the contract not to be enforced against her; but she may not approach the court for restitution if she has already performed under the contract, nor may she seek damages for loss resulting from having entered into an unconscionable contract.¹⁴ (iii) The unconscionability doctrine is available against substantive unfairness rather than procedural unfairness of the sort we find in cases of fraud, duress, and mistake. But it’s not clear what the exact scope of unconscionability is. Drafters’ memoranda to the codes indicate that the target of the doctrine is contracts that are excessively ‘one-sided’ or ‘oppressive.’¹⁵ A good account of unconscionability doctrine would consider the way these terms have been understood by the courts, and would supply a justification that can exist in reflective equilibrium with the doctrine’s application. That

¹² See the Restatement (Second) of Contracts §208, and the Uniform Commercial Code (U.C.C.) §2-302. For a helpful list of examples of use of the doctrine, see Seana Valentine Shiffrin, “Paternalism, unconscionability doctrine, and accommodation” *Philosophy & Public Affairs* 29(3) (3 2000) 205, pp. 205–206. My discussion focuses on US law, but there are similar judicial and legislative principles in other legal systems: in the UK, for example, see *Lloyds Bank Ltd v Bundy* 1975 QB 326; cf. *National Westminster Bank Plc v Morgan* [1985] 1 All ER 821.

¹³ This is not a principle that can straightforwardly be drawn from the case law, given the oddity of an exploiting promisee coming to court on this basis. But see Cornell, “A complainant-oriented approach to unconscionability and contract law” (n 2) p. 1156 note 108 for a helpful discussion of judicial *dicta* that make clear that unconscionability is understood to be relative to the exploited party, rather than relative to the contract.

¹⁴ *Super Glue Corp v Avis Rent A Car Sys, Inc* 132 AD 2d 604 at 606, 517 NYS 2d 764 (2d Dep’t 1987). See also Shiffrin (n 12) p. 229; Cornell, “A complainant-oriented approach to unconscionability and contract law” (n 2) p. 1157.

¹⁵ The memorandum to U.C.C. §2-302 says that

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise and not of the disturbance of allocation of risks because of superior bargaining power.

is beyond the scope of the current discussion. But we can at least evaluate accounts on the basis of whether they say enough to provide some theory of the scope of the doctrine.

§46. The complainant-centered approach. Cornell proposes a complainant-centered approach to the unconscionability doctrine in terms of which an exploiting promisee lacks standing to complain about breach of the promise because of complicity or hypocrisy.¹⁶ This borrows from the thought, recounted in Chapter 2, that a person who has been wronged may nonetheless lack standing to blame because of his complicity or hypocrisy.¹⁷ But it adds a further claim: that standing to complain and being owed a duty can come apart, so that in the case of an unconscionable contract an exploiting promisee may still be the addressee of a promissory duty, but lack standing to complain.

This approach meets the desiderata just described.¹⁸ Consider a schematic case: Ed promises to ϕ in exchange for Inge promising to ψ , but the exchange unconscionably takes advantage of Ed. Then Ed has a duty to Inge to ϕ , and Inge has a duty to Ed to ψ , but whereas Ed has standing to complain about Inge's non-performance, Inge lacks standing to complain about Ed's non-performance because of the unconscionability. Then:

- (i) It is Ed who decides whether to rely upon the contract, since Ed is still owed performance by Inge and may complain if Inge fails to perform. Although Cornell doesn't make this perfectly explicit, it seems that this result rests on Ed continuing to owe Inge a duty. That is because each promise in a contract must be supported by consideration: that is, it must be made in exchange for some benefit on the part of the promisor or detriment on the part of the promisee. So in this case, if Ed wishes to endorse the exploitative contract, he gets to rely upon the duty Inge owes him because it is supported by consideration in the form of the duty he owes her—even though she cannot complain about non-performance.
- (ii) Suppose Ed, the exploited promisee, performs. Then he has performed in compliance with a duty that he has, and so he cannot claim that Inge has been enriched by a mistaken transfer, or that she has no legal grounds to retain the performance. So we get the right result: he cannot recover performance, but Inge cannot insist on performance.

¹⁶ Cornell, "A complainant-oriented approach to unconscionability and contract law" (n 2) pp. 1148ff.

¹⁷ Cohen (n 19); Wallace, "Hypocrisy, moral address, and the equal standing of persons" (n 19).

¹⁸ Cornell claims in this regard that it does better than Seana Shiffrin's account in terms of which courts decline to enforce unconscionable contracts because of 'a self-regarding concern not to facilitate or assist harmful, exploitative, or immoral action.' Shiffrin (n 12) p. 224. For example, if courts don't want to facilitate exploitative contracts, then it is not clear why they would allow only the exploited promisor and not the exploitative promisee to rescind. And Shiffrin's approach provides very clear guidance as to the scope of the doctrine. But I doubt that these are fatal flaws. Shiffrin's account could be elaborated to explain when and why the state won't step in. And what is appealing about the state-regarding account—besides the fact that it doesn't rely on the claim that special standing and directed duties come apart—is its acknowledgment that contract law adds to the morality of promising the institutional fact of state enforcement, and that there are normative questions that are not already answered by the morality of promising about how this enforcement should be deployed.

- (iii) Since standing to complain is undermined by hypocrisy and complicity, we get very clear guidelines as to the scope of unconscionability: it covers all and only those cases involving hypocrisy and complicity. Much needs to be said about whether that accurately explains the case law or not, but the test here is simply whether it says something about the scope of the doctrine.

§47. Does the promisor lose special standing? Cornell's complainant-regarding theory relies on the idea that an exploiting promisee may be owed a duty by the exploited promisor, but lack standing to complain if the promisor refuses to perform. As discussed in the previous section and in Chapter 2, this notion of standing to complain is obscure. What is relevant in this context is the promisor's standing to enforce the contract in a court of law, but Cornell's discussion suggests that this power to enforce rests on an underlying standing to complain as a matter of morality.¹⁹ This is a further reason that standing to complain cannot simply mean standing to judge wrong: that would spread the power to enforce a contract too widely, if Cornell is right that this power tracks the promisor's moral standing. But then what is standing to complain? I have been arguing that we should understand it as special standing to hold the promisee accountable, including entitlement to apology and redress and the power to forgive.

Can we make sense of Cornell's proposal once we adopt this conception of special standing? Is it correct that an exploiting promisor loses standing to hold the promisee accountable because of the unconscionability of the terms of the promise? If it is, then unconscionability doctrine provides a deeper challenge to the Repair Theory than does pre-emptive forgiveness, since it is not just that special standing is waived as in the latter case. Rather, the promisee simply lacks special standing from the beginning. But this cannot be right, if we are to satisfy the first two desiderata for a successful account of the unconscionability doctrine.

- (i) If Inge lacks special standing, it is not clear what is left of her being owed a duty. But then it's not clear what counts as consideration for Ed's promissory duty, and so it's not clear that we get the result that Ed can hold Inge to the contract.
- (ii) If Inge lacks special standing, then she lacks an entitlement to apology and redress if Ed fails to perform. That seems plausible until we consider the fact that Ed cannot recover if he does perform. Recall that the doctrine is a shield and not a sword, and that the exploited promisor may not seek restitution of her performance once she has complied with the terms of the contract. That would preclude seeking restitution of anything paid to make up for initial non-compliance.

The scenario is similar to that we find in cases of hypocrisy and complicity. Cornell explicitly draws on the thought that the hypocrite loses standing to blame others for what she herself has done. But in that situation the hypocrite doesn't completely lose her special standing in our practice of

¹⁹ This is evident from his insistence that on his view, the law of contracts and the morality of promising converge—Cornell, “A complainant-oriented approach to unconscionability and contract law” (n 2) p. 1165 and generally.

accountability: even though the hypocrite cannot insist on an apology from one who wrongs her, it is still appropriate for the wrongdoer to apologize to her. Suppose Stephanie breaks her promises to everyone else, and I now break my promise to her. It would be unseemly for her to be very angry with me, especially when I point out her own track record, or for her to demand an apology. But I have made a promise, and I should keep it—there is still a promissory duty. What is more I owe it to her to keep it, and if I don't, I should apologize to her because I set back her interests and disrespect her in just the way I would any other disappointed promisee. I might feel resentful that I am making the effort to apologize for an act that she has never seen the need to apologize for. Still, I don't apologize for the sake of fairness, but for the sake of recognizing Stephanie, and that she is worthy of recognition even if she is a hypocrite.

Even if this is not compelling, and it turns out that someone like Inge does lack special standing because of her exploitative behavior, it is nonetheless possible to save the Repair Theory in another one of the ways described in the section above on pre-emptive forgiveness: since, but for the unconscionability, Inge would have had special standing. The Repair Theory does not aim to give a definition of directed duties, but to characterize them in terms of their normative upshot. So it would not be fatal for the theory to think that in some cases the normal consequences of being owed a duty are overridden by other considerations.²⁰

Against Necessity (1): contractual cases involving third parties.

§48. The lottery case. I intimated in Chapter 2, in my discussion of apology to and forgiveness by apparent third parties, that in such cases the third parties can often be construed as addressees of duties once we consider how such parties stand to be hurt. This issue comes up most clearly in contractual cases in which some third party stands to benefit from a promise by one contractual party to the other. The case discussed in Chapter 1, in which Jane promises Diana that she will look after Timmy, is of such a kind. In that chapter I focused on explaining why Jane owes her promissory obligation to Diana rather than to Timmy; but that was not to deny that she might owe a duty to Timmy as well. That duty would not be a promissory duty; but why think a duty is owed at all? In response to cases like this, Cornell claims that a third party beneficiary of a contract such as Timmy stands to be wronged, and has standing to complain if Jane fails to keep her promise, but that he is not owed any duty by her.

It can be hard to believe Cornell's claim about Timmy, since we can imagine bases for a duty to Timmy. If Diana is not around at all and Timmy must spend the night alone, then Jane puts

²⁰ The situation is similar to one in which we have characterized some phenomenon, say being a judge, in terms of its normative status, say having the power to decide a case; and then we notice that in a certain scenario the judge lacks this status because of some overriding consideration (say, the judge fails to have fit and proper character). This is very different from the claim that some person who is a doctor would have been a judge had the world been a little different. Though it's hard to know how to articulate this difference, in the first case we can still make sense of the claim that the judge is a judge, at least until impeached.

him at risk of harm and denies him the benefits of companionship and guardianship. Or if Timmy is particularly excited about Jane looking after him, then by breaking her promise she disappoints him. It may even be that Timmy comes to rely on Jane's being around, so that when she breaks her promise she also violates a duty owed to him in virtue of his reliance interest.

But consider the following case, which purports to give stronger support for the claim that someone can be wronged, and therefore have standing to complain, but not have a right and not be owed a duty:

Lottery. '[A son] 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.'²¹

I think it clear that you have been wronged in this case, and that it would be legitimate to feel angry about X's behavior. But Cornell thinks that is the most we can say, and that you lack a right to the money; and that means, given the Hohfeldian Analysis, that you are not owed a duty either. But do you lack a right to the money? I assume there is no contract, and that the scenario is not one in which you purchase a lottery ticket in exchange for a chance of winning the prize. So you have no contractual right to the prize, nor has anything been promised to you. Perhaps the son has made an announcement and this leads to some sort of expectation on your part, but winning is hardly the sort of thing that you could rely upon in making your plans, and so I assume there is no duty based on your reliance interest. Cornell also denies that the grievance is based on a property interest; that is, he denies that X counts as having stolen a prize that is yours. That is because at the time that X absconds, ownership of the prize is anticipated, but has not yet vested.²²

Still, some principle must explain our sense that X has done something wrong, and that you are the one who is injured by his wrongdoing. Cornell's answer is that there is a contract in the picture, namely that between the son and X, and that you—as the person in the position of winning the lottery—are an intended beneficiary of the contract. On this analysis, the question is whether an intended beneficiary of a promise made in a contract is owed a duty by the promisor, and whether he has a right under the contract. Cornell denies that in the Lottery case there is any reason to think a duty is owed merely on the basis of being an intended beneficiary of the contract. As he puts it, the relationship between you and the son in this case is too 'flimsy':

²¹ Cornell, "Wrongs, rights, and third parties" (n 12) p. 118.

²² If you don't yet own the prize, are you really wronged? We are supposed to imagine that the prize is 'all but yours'—that it is because of a mere technicality that the right has not yet vested. Perhaps it would help to imagine that the prize is a motor vehicle and that the formalities of a transfer of ownership have not been complied with, though there is fulfillment of all the conditions of the arrangement that make it the case that ownership should be transferred to you.

The son might only have wanted to give the money away for a tax benefit or as a public relations stunt—that you benefit might have been insignificant to him. The example relies on a confluence of your interests with the son’s rights, but that confluence could be entirely incidental.²³

As I understand it, the concern here is that you are an intended beneficiary of the contract in only a very loose sense—since you are intended to benefit in virtue of being the lottery winner, not in virtue of any other identifying feature that you have. As Cornell puts it, the son ‘did not really intend you as his beneficiary as much as he intended whoever it was whose name got pulled out of the lottery.’²⁴ And given this looseness, you don’t really have much expectation of benefiting, or any other basis for being owed a duty.

But there is something puzzling about this line of thinking. For if we agree that you have some basis for complaint—and that the complaint is a distinctive one, rather than a complaint on behalf of the promisee—then why is this not also a basis for being owed a duty? Perhaps Cornell thinks that for a duty to be owed there must be a way in which the promisor has you specifically, in some more thickly identified way, in mind when he made his promise. This is an issue to which I will return after considering the other cases which are taken as evidence against Necessity. For now, what I hope to do is sketch a principle that serves as a basis for thinking that you have been aggrieved in the Lottery case, and show that this principle is enough to support the claim that you are owed a duty despite not being thickly identified by the contract.

§49. Unjustified enrichment. The question facing us is whether there is any principle granting a non-promissory duty to an intended beneficiary in a contract, even in circumstances where the identity of the intended beneficiary is specified in such a way that no expectations may arise on the part of potential beneficiaries before performance. This qualification regarding the identity of the beneficiary excludes any duties based on a reliance interest on the part of the beneficiary, and in many cases it will exclude duties based on a special relationship between the promisor and the beneficiary. I propose that there is such a principle, one that is reminiscent of the law of unjust enrichment, which prevents the enrichment of one party at the expense of another where there is no remedy in contract, tort, or property law.²⁵

There is much debate about the scope and structure of the law of unjustified enrichment. The central question is: when should enrichment be regarded as unjust and grounds for restitution? A fault-line dividing common law systems such as English law from civilian legal systems such as German law is whether the availability of restitution depends on there being unjust factors surrounding the enrichment or there being a lack of legal grounds for the enrichment.²⁶ But across

²³ Cornell, “Wrongs, rights, and third parties” (n 12) p. 119 note 22.

²⁴ *ibid.*, p. 119.

²⁵ For overviews, see Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989); David Johnston and Reinhard Zimmerman (eds), *Unjustified Enrichment* (Cambridge University Press 2004); Charles Rickett and Rickett Grantham (eds), *Structure and Justification in Private Law* (Hart 2008).

²⁶ Sonja Meier, “Unjust factors and legal grounds” in David Johnston and Reinhard Zimmerman (eds), *Unjustified Enrichment* (Cambridge University Press 2004).

these systems what is characteristic of the law of unjustified enrichment is the way in which its remedies differ from those of other areas of the law of obligations—contract law and tort law—by focusing on the enrichment of the defendant rather than the loss of the complainant.²⁷ Naturally, what counts as an enrichment at the expense of another is a difficult matter. It is not simply the acquisition of a benefit, nor even of a benefit relative to others—the fact that T becomes better off relative to S does not signal that T is enriched at the expense of S. Nor is it enough that there is a transfer from S to T—or else we would be in danger of prohibiting donations and certain exchanges and incentive schemes. It is also not the case that S must become relatively worse off than she is in order for T to be enriched at her expense. Rather, what seems to matter is that one party is enriched relative to the entitlements that are expected or agreed upon. That suggests a basic principle that would go some way to explaining the cases on which the common law and civil law overlap:

- U. T is unjustifiably enriched at the expense of S if
 - (i) S and T know of the legitimacy of a legitimate arrangement in terms of which someone in S’s position is to acquire a benefit, and
 - (ii) T acquires that benefit through a chain of events that also has the result of S not acquiring the benefit, and
 - (iii) T’s acquisition of the benefit is not based on a competing legitimate arrangement.

The idea is that where T knows that a benefit is ‘meant for’ S, but acquires that benefit instead of S, T is enriched relative to S, and unjustifiably enriched relative to S if there is no sense in which the benefit is ‘meant for’ him. Much must be done to flesh out and defend this principle, especially setting out what ‘legitimacy,’ ‘legitimate arrangement,’ and ‘competing legitimate arrangement’ mean; and it may be that an even broader principle can be defended. All I hope to do here is show that the principle is a plausible one, and that it gives rise to a directed duty in the Lottery case. First, as to its plausibility, consider a representative case involving a valid promise, something all would agree should count as a legitimate arrangement: J promises S that J will have his intermediary T hand over a benefit to S. As an aid to thinking, consider the following instance of such a case.

Spring. Suppose I know a place, not far from where I live, where a limited quantity of fresh spring water bubbles up everyday. Nobody else knows about this spot, and so I don’t have to share my enjoyment of that water with anybody. I am leaving the country next month, and I want Stephanie to enjoy that water, so I draw a map and place the map in a sealed envelope, and since I won’t be seeing her before I leave, I give the envelope to Termain to pass on to her. But Termain opens the envelope, and keeps the map to himself, and gets to enjoy the spring water whereas Stephanie does not.

²⁷ David Johnston and Reinhard Zimmerman, “Unjustified enrichment: surveying the landscape” in David Johnston and Reinhard Zimmerman (eds), *Unjustified Enrichment* (Cambridge University Press 2004) pp. 9–10.

What sort of complaint does Stephanie have against Termain for behaving in this way? If I have asked Termain to promise to hand over the envelope without opening it, then he has clearly broken his promise to me. But let's suppose he did not make that promise, so that we can focus on the relationship between Termain and Stephanie. I assume that I have no ownership right in the spring, and so there is no theft of the resource. Could we not say that Termain stole my map? Perhaps, but he did not steal it from Stephanie, and in any case Stephanie's situation would not be put aright by giving her an identical copy of the map, or by Termain giving her his copy of the map once he has already located the spring. After all, insofar as Stephanie has a complaint, it is that the exclusive use of the spring water was meant for her, rather than Termain, and that she now must either forgo using the spring, or share it with Termain.

Why would Stephanie's complaint be reasonable? If I promised that I would get her the map, then she may well have relied upon getting the map, or sought assurance from my promise. But it's not as if Termain made any such promise to her, and so this complaint would not be directed at Termain, though that is true of the most natural complaint she does have. Indeed, she might have known in advance that Termain is an unreliable intermediary, and so lacked any confidence that she would get the map from him. Yet she would still have the reasonable complaint that he is getting to benefit from the spring when it is she who is meant to. It is this last thought, that Stephanie is *meant to* enjoy the benefit, that is crucial, though difficult to further articulate. Note that Stephanie's complaint would fall flat if Termain had merely chanced upon the spring. What counts here is that Termain knowingly participated in an arrangement that aimed at Stephanie's benefit, but acted in a way that he got the benefit instead of her. Such an arrangement gives rise to what we might call 'legitimate expectations' on the part of its participants—but the emphasis must be on 'legitimate' rather than 'expectation.' What matters is not whether anyone places reliance on the scheme, or is assured by it, but their agreement to it, or acquiescence in it, or whatever gives rise within them to the commitment to the propriety of the scheme's distribution of benefits and entitlements. And we might defend principles aiming to protect such an arrangement by pointing out the benefits of being able to make them, and of being able to avoid the disputes that would arise in their absence.

There are two things to note about a complaint of this sort. (i) *It grounds a directed duty, owed by T to S.* Where there is a legitimate arrangement that is common knowledge among J, S, and T, with S as the intended beneficiary, it is the fact that S is the intended beneficiary that grounds a complaint against T's taking a benefit that is supposed to go to S. *Intended beneficiary* is a representative role with respect to the kind of case we are considering, and S has a complaint against T's action in the sense that it is grounded in her role as intended beneficiary. But according to the account of direction given in Chapter 1, the addressee of a directed duty is the person who occupies the representative role whose complaint grounds the duty. So in the Spring case, since Stephanie occupies that role, Termain owes it *to Stephanie* to refrain from taking the benefit that is supposed to go to her.

(ii) *The identity of the beneficiary need not be specified at the time that the legitimate arrangement is formed.* The complaint that arises from principle U is framed in terms of the intended beneficiary of a legitimate arrangement, and does not rely on any further specification of the identity of the beneficiary. Furthermore, U relies on knowledge of the arrangement, but not on knowledge of

the particular identities of the parties. It certainly does not require that T know who S is, only that T know that the benefit is supposed to go to someone in S's position. That does not prevent T from owing the duty to S, since that fact about the direction of the duty rests only upon S's occupancy of the role, not on any knowledge on the part of T or even J. If S were to come to occupy the role of intended beneficiary late, say after T has arrogated the benefit for himself, she would still be the one to whom T owed it not to do so.

In the Spring case, our judgment that Termain has unjustly enriched himself at the expense of Stephanie would remain the same even if Termain were not aware that it was Stephanie to whom he was supposed to hand the envelope. Perhaps he knew only which mailbox he was to leave it in. Or perhaps, only at the very moment he was to hand it over, would he receive my text that it was Stephanie to whom he should give it. Still, if he absconds with the map, it is Stephanie he wrongs, since he owes it to the intended beneficiary not to make off with the benefit, and the intended beneficiary turns out to be Stephanie in our case. Nor would Stephanie's complaint be undermined if her identity were determined, even at the last moment, by a lottery. When she comes to occupy the role of intended beneficiary, she thereby becomes the one who is wronged by Termain's action.

§50. Directed duties without rights. Does an intended beneficiary gain a right correlative to the non-enrichment duty generated by U? That is what the Hohfeldian Analysis entails. But the case we have been considering gives us reason to resist this analysis. I answer this question because, as we will see in the next section, accepting the Hohfeldian Analysis puts pressure on us to reject the Repair Theory in certain contractual cases. The scenario we have been considering provides a good opportunity to start building a case against the Hohfeldian Analysis.

Consider what it might mean to give Stephanie a right against Termain in the Spring case. Of course, if that is simply a way of saying that Termain owes Stephanie a duty, then I can have no complaint. But more is often expected of rights: (i) that a right trumps other considerations, (ii) that the right-holder has the power to waive or release the duty-bearer from their duty, (iii) that the right-holder has the power to assign the right to others, or (iv) that only a right-holder may enforce the right. But we should resist the conclusion that any of this is true of Stephanie's normative position.

- (i) Suppose Una acquires a property right in the spring. If there are property rights on the scene sufficiently early then our arrangement may not have been legitimate, but let's suppose that is not the case, say because Una originally acquires the property right only after Termain has absconded with the map. Then Stephanie still has a complaint against Termain: he shouldn't have done that to her, even if now nobody (but Una) gets to enjoy the benefit. Still, it is not as if Stephanie's complaint trumps Una's entitlements as owner. For example, Una might bar Termain from bringing Stephanie onto her property in order to reveal the location of the spring, even though this would be a way for Termain to approach compliance with his duty to Stephanie.
- (ii) If Stephanie had a power of release, it would mean that she could release Termain from his duty to her to hand over the benefit intended for her in terms of our scheme. But she may

not do that unilaterally. I may have wished that if Stephanie doesn't learn the whereabouts of the spring, then nobody will. That may be part of a grander plan that I have, or it may be of great sentimental value that things work out this way. So it is not for Stephanie to now alter the plan. The fact that she is a beneficiary in terms of our arrangement does not mean that she has any discretion to alter the arrangement.

- (iii) The same goes for assignment: given that we have made the arrangement, it is not for Stephanie to now unilaterally alter it by transferring her standing as beneficiary. If my wine club votes for a member of the year, a status which entitles the winner to an extra bottle of wine each month as well as a featured place on our website, and we vote for Stephanie, she cannot now transfer the status of member of the year to Tracey, given that we may dislike Tracey and not want her to represent the club on our website. Of course, Stephanie may acquire rights as part of her benefit. Presumably she acquires ownership of the extra bottles of wine, and may give them to Tracey. But that is not because she has a right as intended beneficiary, but rather because the benefit includes an ownership right.
- (iv) It's hard to know what to make of the thought that only Stephanie has the power to enforce a right in the context of a non-legal right. It cannot mean that only she has the standing to blame Termain for what he has done; anybody could criticize his behavior and take a dim view of him. Could it mean that only Stephanie can demand that he transfer the envelope to him? That too seems to be something which anybody could insist upon; certainly I could do so, especially if I had also made Termain promise me that he would do this. Perhaps we must give 'standing to enforce' the legal or quasi-legal meaning that only Stephanie could initiate coercion against Termain aimed at securing transfer of the envelope. But that would not be true if I held a contractual right against Termain because of an agreement with him. And even supposing Stephanie is not a right-holder, it does not seem that there are any moral reasons to prevent her from initiating whatever measures of legal enforcement are available in this case, though of course there may be various prudential concerns in favor of limiting access to these legal measures.

It is worth emphasizing one aspect of this discussion: giving Stephanie a right in a case like this would grant her discretion that could undermine the point of the initial arrangement. So there is good reason not to count her as having a right. Nonetheless there is good reason to count her as being owed a duty, since she is one to whom Termain is accountable for non-performance. What we observe is that considerations in favor of someone having some special standing to hold others accountable for not ϕ ing do not perfectly coincide with considerations in favor of their having discretion as to whether others ϕ or not.

Against Necessity (2): the puzzle of the beneficiary's bargain.

§51. The puzzle. A puzzle arises when we consider whether, and why, a second contract made with the intended beneficiary of a first contract is binding. Cornell calls this ‘the puzzle of the beneficiary's bargain.’²⁸ Consider the following example:

Clearinghouse. A securities broker hires a clearinghouse to purchase stock in the name of a client and deliver that stock to the client. The clearinghouse purchases the stock but requires that, prior to delivery, the client pay a delivery fee not mentioned in the original contract between the clearinghouse and the broker, and the client accepts. Thus there are two contracts; the delivery will count as performance under each of them, and, moreover, the client was already the intended beneficiary of the first contract.²⁹

The question that arises in contract law with respect to a case like this is: what legal effect does the second contract have? And that is dramatized by the principle of contract law that a contractual performance must be undertaken for *consideration* i.e. some value in exchange. When the clearinghouse requires that the client pay a delivery fee, what exactly is offered in exchange? That is, what consideration is given in return for the delivery fee? It is tempting to think that it is the duty to purchase and deliver the stock, except that this is something the client is already owed. So what is added by the second contract? That is the puzzle of the beneficiary's bargain, and we dramatize it by asking: what new thing is offered by the promisor (the clearinghouse) as consideration in the second contract?

It is widely accepted in US law that a ‘successive contract’—a contractual undertaking by a promisor to perform as he has already undertaken to perform under a prior contract—is binding.³⁰ This is in keeping with our moral judgments about promising: if I promise Stephanie that I will help her move, and then promise Talya that I will help Stephanie move, both Stephanie and Talya can hold me to account for not keeping my promise, and even if Stephanie forgives me for not helping, Talya might not. In fact, the notion of a directed duty helps us to see how these promises are different. Under the first promise I owe a duty to Stephanie to help her move. Under the second I owe a duty to Talya to help Stephanie move. Though the promised performance is the same, the duty differs in its direction. This fact about direction is what settled a dispute among legal scholars about the enforceability of successive contracts: what a promisor offers a successive promisor as consideration is a *directed* duty, one that is owed to the promisee under the second contract, rather than the promisee under the first contract.³¹

²⁸ Cornell, “The puzzle of the beneficiary's bargain” (n 2).

²⁹ This is adopted from *ibid* p. 77, who bases it on *Flickinger v Harold C Brown & Co* 947 F2d 595 (2d Cir 1991).

³⁰ Restatement (Second) of Contracts §73 cmt d; Samuel Williston, *A Treatise on the Law of Contracts* (Richard A Lord ed, Lawyers Cooperative Publishing 2008) §7: 40.

³¹ Arthur Corbin, “Does a pre-existing duty defeat consideration?” *Yale Law Journal* 27(3) (3 1918) 362. For a history of this dispute and its resolution, see Cornell, “The puzzle of the beneficiary's bargain” (n 2) pp. 88–93.

What then should we say about a case like Clearinghouse? The contract between the clearinghouse and the client is a kind of successive contract, since the performance promised by the clearinghouse is the same performance promised by the clearinghouse under the first contract with the broker. The promissory obligations have different directions, since under the first contract the clearinghouse's purchase and delivery of the stock is owed to the broker, and under the second contract it is owed to the client.

But here an interesting complication arises. The client is an intended beneficiary of the first contract, and in US law this is sufficient to establish a duty on the part of the clearinghouse and owed to the client: 'A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.'³² If the clearinghouse already owes its performance *to the client* under the first contract, then what serves as consideration for its promise to the client to purchase and deliver the stock under the second contract? This question about consideration and the validity of contracts helps us focus on a more basic question that can be raised about cases like Clearinghouse as well as more ordinary cases: how does the position of a promisee differ from that of an intended beneficiary of a promise?

§52. Cornell's solution. Cornell resolves the puzzle of the beneficiary's bargain by weakening the normative position of the intended beneficiary of the first contract. Rather than being owed a duty by the promisor, Cornell claims, the intended beneficiary simply has standing to complain about the promisor's non-performance. But the second contract does create a duty on the part of the promisor and owed to the intended beneficiary, now the promisee. Moreover, since Cornell endorses the Hohfeldian Analysis, the second contract confers a right on the intended beneficiary. That is what counts as consideration supporting the contract, and what distinguishes the normative position of the intended beneficiary under the second contract compared to the first contract. In the Clearinghouse case, for example, the client acquires standing to complain about the clearinghouse's non-performance under the first contract, but acquires a right to the clearinghouse's performance under the second contract.

Recall that this solution, and therefore the puzzle, is supposed to threaten the Necessity element of the Accountability Analysis, which holds that rights are necessary for special standing. Here we find a party who has special standing, namely the client under the first contract, who nonetheless lacks a right under that same contract. We could make this out as a threat to my theory in the following way, invoking the Hohfeldian Analysis to substitute in 'being owed a directed duty' for 'having a right': it cannot be the case that special standing is all that characterizes a directed duty, because here we find a party with special standing who is nonetheless not owed a duty. I have shifted, in characterizing this threat, from Cornell's talk of 'standing to complain' to my talk of 'special standing'—but I suspect he would endorse this translation, and it only strengthens the threat to my theory.

Let us set aside for a moment Cornell's claim that the intended beneficiary gets a right under the second contract but not the first, and focus on the claim that he is owed a duty under the second contract but not the first. Cornell characterizes the difference between standing to complain and

³² Restatement (Second) of Contracts §304.

being owed a duty in the following way: special standing concerns a backward-looking moral relationship of accountability, while being owed a duty concerns a forward-looking moral relationship of respect.³³ These relationships needn't coincide, and we will see that Cornell thinks there is reason for them not to. If you as an intended beneficiary have special standing with respect to me as a promisor, but are not owed a duty by me, then you can hold me to account for breaking my promise, but I do not need to give you special place in my deliberation about what to do.³⁴

But it simply is not plausible that an intended beneficiary who is entitled to hold a promisor accountable for non-performance should not have a special place in a promisor's deliberation. Here we encounter an old issue: what exactly does it mean that the addressee of a duty should have special place in one's deliberation? Cornell suggests that what is meant is that the duty is action-guiding in the sense that it gives one reasons of a special kind—'perhaps especially pressing or second-personal or exclusive of others.'³⁵ I have raised doubts about whether we have a clear understanding of the concept *second-personal*.³⁶ So suppose that what is meant by giving someone special place in deliberation is simply shorthand for saying that the duty owed to that person is one that has special force, in the sense of being pressing or excluding consideration of reasons to do otherwise. One problem for evaluating this claim is that it is difficult to imagine a situation in which an individual T has standing to complain about some J's failure to ϕ but there is no duty at all on J's part to ϕ . All of the cases which Cornell raises against Necessity are ones in which J already owes a duty to S, and then some third party T appears to have special standing with respect to J without being owed a duty by J. In all of these cases, then, J's duty to ϕ already has the special force that it would have if he owed a duty to T to ϕ . So we cannot tell, on this conception of 'special place in deliberation,' whether the fact that J does not owe T a duty subtracts from the way his deliberation should be structured.

But there is another way to test whether it makes sense to say that T has special standing but is not owed a duty. The fact that someone has special place in deliberation will often have the effect (I stop short of saying that *it means*) that I take their interests into account in considering how best to act. For example: suppose I promise Stephanie that I will look after her garden while she is away. Due to unforeseen water restrictions, I cannot water the whole garden, and must choose between watering her hydrangeas and watering her agapanthus. What I do next depends on my knowledge of her interests. If she is preparing the hydrangeas for an important flower show, then I should water those. If she especially cares for her agapanthus because they remind her of her deceased father then I should water those. It is precisely because my action is influenced in this way by facts about Stephanie that it makes sense that she is the one to whom I am accountable. Suppose that instead of making the choice whether to water her hydrangeas or water her agapanthus I decide that I will use her water for my own garden. Then I should apologize to her for breaking my promise and make amends. Now suppose I decide to make amends as I should, and I am faced with a

³³ Cornell, "Wrongs, rights, and third parties" (n 12).

³⁴ The converse possibility holds as well, Cornell claims. In the case of an unconscionable contract in which I am the exploiting promisee, and you are the exploited promisor, you should give me special place in your deliberation about whether to keep the promise or not, but if you do not then I may not hold you accountable for your non-performance.

³⁵ *ibid* p. 127.

³⁶ See Chapter 2.

question about which flowers are most important to replace. Again, that will depend on whether it is the hydrangeas that she cares about most, or the agapanthus.

Insofar as an intended beneficiary can hold me to account for not doing my duty, she has this sort of place in my deliberation as well. For example, suppose I promise I will teach Stephanie's child Arabic, but Stephanie leaves it open whether I teach her modern or classical. One way to proceed would be to consider Stephanie's interests, since she is the promisee. But it would certainly be intelligible for me to take into account the interests of Stephanie's child, especially if Stephanie does not have strong feelings about the matter. If I learn that her child wants to be able to read Arabic literature, then I had better teach her classical. This is not just because that is what she wants, but because as an intended beneficiary of my promise I have a duty to her—not a promissory duty, but a duty to give her the benefit that has been promised.³⁷ A similar issue could arise under the first contract in the Clearinghouse case. Suppose the client had ordered a certain portfolio of stocks x and y , but when the clearinghouse went to purchase these there were not enough of stock x to fulfill the client's order, and there was no way to contact the client. Should the clearinghouse now buy more of stock y , altering the composition of the client's desired portfolio, or should the clearinghouse buy fewer stocks altogether but retain the same portfolio composition? The promise has been made to the broker, so in the first instance the clearinghouse should consider what best advances the interests underlying the promissory duty to the broker. But if that doesn't further decision-making, it would be appropriate for the clearinghouse to consider what is in the best interests of the client as beneficiary of their promise.

§53. A non-Hohfeldian solution. I have been arguing that it makes little sense to say that an individual has special standing to hold a promisor to account, but does not have place in that promisor's deliberation in the way that accompanies being owed a duty by the promisor. But if special standing and being owed a duty do go together, as I am urging, then what is to be said about the puzzle of the beneficiary's bargain? What is it that the intended beneficiary gains under the second contract, even though he is promised the same performance he was to receive as a benefit under the first contract?

The answer appears from my discussion of the position of intended beneficiary in the Spring case. There I argued that Termain owes it to Stephanie to give her the benefit that their arrangement grants her, but that Stephanie does not have a right to the benefit. The main consideration against granting her a right is that it having a right that $T \phi$ is commonly understood as having some discretion as to whether $T \phi$ s—but that it is not appropriate for a mere beneficiary to have that sort of power over the carrying out of the arrangement.³⁸ Rather, it is the parties who are responsible

³⁷ There are cases in which the existence of a promissory duty and the existence of a duty to a beneficiary of that promise can come apart: for example, I promise Stephanie that I will make her garden into a rock garden, and give all the hydrangeas to Talya. But I just go and uproot all the hydrangeas and give them to Talya. I haven't kept my promise, but Talya has no basis as an intended beneficiary for complaint.

³⁸ Am I hereby giving an account of what a right is? Surely not a compelling one, especially given that some theorists, in particular interest theorists, would insist on the possibility of rights that do not give their holders powers of release, waiver, or assignment, or any similar discretion with respect to the fulfillment of the right. I would resist the claim that these are central instances of the notion of a *right*, but the debate may seem terminological at that point. So let me

for the arrangement—the contractual parties, or promisor and promisee—who have that sort of power by default. Now, it may be denied that a right does entail that sort of discretion, in which case perhaps the Hohfeldian Analysis can be retained. But the point stands: if Termain promised me that he would give the map to Stephanie, then there is a difference between the normative position of a mere beneficiary like Stephanie, and a promisee like myself. I have the discretion to release Termain from his promise, or agree with him to alter the identity of the beneficiary, or of the benefit. Stephanie cannot do those things.

By the same reasoning, it would be odd if, in the Clearinghouse case, we were to give the client some sort of discretion over the performances undertaken by the broker and clearinghouse under the first contract. He is merely a beneficiary, and while he may perhaps refuse to take transfer of the stocks when the clearinghouse attempts to deliver, he cannot unilaterally release the clearinghouse from its promissory obligation to purchase and deliver the stocks. What is gained under the second contract, then, is the discretion that goes along with being a promisee rather than a beneficiary. We may say that what is acquired is a right, conceding that the Hohfeldian Analysis's insistence that a directed duty entails a correlative claim-right doesn't fit the facts. But we needn't do that in order to resolve the puzzle of the beneficiary's bargain, since we have spelled out the difference in normative positions under the first and second contracts without relying on Hohfeldian terminology.

Now, setting aside that I have called what is gained a 'right,' the concern may arise that the difference in normative positions is actually trivial, and not worth counting as consideration for the purpose of underwriting a binding agreement. After all, what practical benefit does the client gain under the second contract when he gains what I have been calling a 'right'? It is not as if he can actually release the broker from all obligation to purchase and deliver—for even if he does waive his claim, the broker is still bound by the duty to the clearinghouse under the first contract. But while this power may be inconsequential in ordinary circumstances, it is not inconsequential always. If there had been no second contract, the fact that the clearinghouse waives its claim would be determinative of the broker's normative situation with respect to performance, since the client's claim as intended beneficiary would fall with the clearinghouse's claim; this is even more clearly so if the first contract fails for reasons of non-compliance with formalities, or fraud or other impropriety on the part of the clearinghouse, or simply because the parties alter the terms of the contract. But where such circumstances obtain and there is a second contract, it is not just the case that the client is still owed a duty because of the second contract; now the client's power over the broker's normative situation is determinative, and that is surely worth something.

accept that there is some terminological play here, and concede that in the text 'having a right' may be only shorthand for 'being owed a duty and having discretion with respect to the fulfillment of that duty, such as the power of release.' This will not affect my argument.

Against Necessity (3): Non-contractual cases involving apparent third parties, and general considerations about the nature of moral relationships.

§54. *Donoghue v Stevenson*. We should now consider cases in which an agent's action has some harmful or injurious effect on an apparent third-party, with no contractual or other relationship to the third party. The question then will be whether we can say that this apparent third party is wronged although not owed a duty by the agent. We find this sort of scenario in the fact pattern of the following well-known English case:

Donoghue v Stevenson. While sitting in a café in Paisley, Donoghue orders a ginger beer, which has been manufactured by Stevenson. After drinking some of the ginger beer, Donoghue discovers a decomposed snail in the bottle, and later falls ill.³⁹

One of the problems that arose for the law in this case was the lack of a contractual relationship between Donoghue and the manufacturer (Stevenson). There was contractual privity between Donoghue and the café owner, and between the café owner and Stevenson, but contractual privity is not transitive. So the question was: on what basis could Donoghue hold the manufacturer liable for the harm she suffered because of his defective product? But that is our question too, because we can ask it in a moral register. I will assume that the manufacturer caused harm to Donoghue through a negligent oversight, and that he was wrong to act with such negligence. Yet can we really say that he owed a duty to Donoghue, whom he did not know and could not have known would be a consumer of his product?

I suspect that Cornell would say that Donoghue was not owed any duty by the manufacturer, but that she was nonetheless wronged by him, and had standing to complain about his negligence. That is his response to the well-known *Palsgraf* case, in which a bystander, Palsgraf, had been injured by the negligent actions of a railroad company employee. The employee had been helping a passenger board a train, but negligently caused the passenger to drop his package, which contained explosives. The resulting explosion caused a metal scale to fall on Palsgraf, who was standing at some distance on the station platform. Palsgraf sued the railroad company for damages despite the lack of a contractual relationship with it.⁴⁰ Cornell says of this case that Judge Cardozo

³⁹ *Donoghue v Stevenson* [1932] UKHL 100.

⁴⁰ *Palsgraf v Long Island RR Co* 162 NE 99 (NY 1928). Although the fact pattern of this case is of exactly the sort that we want, I do not discuss it further since the interpretation of the majority opinion by Judge Cardozo is both contentious and central in debates about structure of tort law. I do not want to give the impression of weighing in on those disputes here. One difference between *Palsgraf* and *Donoghue* is that the relationship between plaintiff and defendant was more tenuous in the former case than in the latter. It is a substantive question for an account of duties of care whether the relationship in *Palsgraf* was so tenuous that, as Judge Cardozo decided, the railroad owed no duty of care to Palsgraf. I suspect that Cardozo was correct here, and that there is no sense in which the railroad company wronged Palsgraf, even though the action of its employee did result in harm to her.

explained—correctly, I think . . . [that] the law could not say that the railroad employee owed a duty to Mrs Palsgraf. Cardozo inferred, however, from this point about directional duties, that Mrs Palsgraf could not assert any complaint of her own. That is, because she was not a rightholder, she had no basis for complaining that she had been wronged. This inference is premised on precisely the principle that I mean to challenge. Cardozo’s reliance on this assumption, I think, was incorrect.⁴¹

This stance challenges the Repair Theory, for it supposes that a person can have standing to complain despite not being owed a duty. Again, the notion of *standing to complain* is not one I fully understand, but Cornell’s objection is only strengthened if we understand it along the lines of the version of special standing invoked by the Repair Theory. The concern then is that someone like Donoghue has standing to hold the manufacturer to account, and is in particular the one to whom apology and redress should be made, even though she is not owed a duty.

§55. Generic reasons and duties of care. The law’s response in cases like *Donoghue v Stevenson* has been to find that someone in Donoghue’s position is owed a duty by the manufacturer—a *duty of care*, based to some degree on the foreseeability of the harm, but also (depending on jurisdiction) other factors such as the significance of the harm, the availability of other actions, and the fairness of imposing liability. I will now suggest that this legal response accords well with how contractualist deliberation would treat such cases.

Before setting out the approach of contractualist deliberation in a little more detail, it is worth diagnosing why Cornell balks at the thought that a duty is owed to someone like Donoghue. One explicit concern is that, on account of the Hohfeldian Analysis, Donoghue would also have a right, and there is a danger of rights proliferating. I will address that concern later. Another concern, I suspect, is related to the thought that a directed duty gives its addressee special place in an agent’s deliberation. But how could the manufacturer, who had never met Donoghue and doubtless did not know of her existence, have foreseen that *she* would be the one to sit down in a café in Paisley and drink that bottle of ginger beer? The worry is that if the manufacturer had to keep Donoghue in mind, a person as unknown to him and remote from him as any other, then he would surely have to keep everyone in mind; and that is too demanding, and in any case makes nonsense of the idea that *some* people should have special place in his deliberation.

This line of thinking may be rejected once we recall the characterization given in Chapter 1 of contractualist deliberation and the meaning of special place in deliberation. When an agent engages in moral deliberation, he does not think so much about the complaints had by specific individuals as such. He does not consider the contingent way in which Mrs Donoghue in particular will or will not be affected by his carelessly allowing a snail to decompose in his beer. Rather, moral deliberation is concerned with the generic reasons someone like her may have for complaint, and these reasons are grounded in her representative role with respect to the agent’s carelessness. That is because the reasonableness of his action has to do not with the way in which it happens to affect someone like Mrs Donoghue, but with the way in which it might affect someone in her position.

⁴¹ Cornell, “Wrongs, rights, and third parties” (n 12) p. 123.

Taking this approach, contractualist reasoning is likely to produce a principle grounding duties of care that is much like that developed by the common law: perhaps, that a manufacturer should be sensitive to the complaint that a consumer of its product would have because it is harmed by an action or omission that the manufacturer could have reasonably foreseen and that could reasonably have been avoided. This sort of principle is not grounded in the particular complaint of a specific individual, and so it does not require that the manufacturer keep this specific individual in mind when going about his business. It does however require that he think about the complaint that a consumer as such might have. The identity of the complainant need only be specified insofar as she is a consumer of the manufacturer's product in order for the reasonableness of the complaint to be assessed. That is also enough to ground a directed duty: a duty that is owed to Donoghue, once she steps into the role of consumer, even though her identity need not be known to the manufacturer.⁴²

§56. Cases involving relatives. Let's consider a different kind of case, one in which it may seem odd to propose that there is a duty of care. That is where an agent harms another, and thereby causes harm to, or insults, a relative of the victim. Consider the case of a drunk driver who kills a child. Here, Cornell thinks, the mother of the child is wronged by the drunk driver:

This is not because the parent has a right that the drunk driver not be negligent toward his or her child. And the parent is not wronged because the drunk driver should have taken due care to be sure that anyone he might kill not have caring family. The parent is wronged even though there is no right of his or hers that has been violated.⁴³

What is the parent's complaint? There are two options here. One is to consider that the mother has whatever standing she has in virtue of being the child's mother, that is, in virtue of her special relationship with her child. That is still a mysterious way of putting things, but perhaps we are to understand the mother as a kind of proxy or representative for the child, complaining and seeking apology and redress on its behalf. That accounts for some of the power of the scenario, in which it really does strike us as quite appropriate for the mother of the child to seek apology and redress. For, first of all, a child is the sort of person who often needs someone to stand up on its behalf, even in moral matters. And second, we have imagined that the child is now dead, and could not in any case seek redress. So it is doubly appropriate for the mother to stand up for the child. But that should not convince us that the mother has been wronged, for standing as a proxy for the complaint of another is just an instance of the general fact, remarked upon in Chapter 2, that in moral matters

⁴² Is it reasonable for a railroad company to foresee the possibility that the negligence of one of its employees will cause a customer's baggage to explode and thereby harm a distant customer of a different railroad company? I doubt that it was reasonable to expect this sort of foresight in the milieu of the *Palsgraf* case, and so I doubt that Cornell is right in saying that Palsgraf was wronged by the railroad company. Certainly I doubt that the railroad company *employee* wronged Palsgraf. This is the sort of case about which we are taught to say, when we are young, that 'it was an accident.' But I am given pause by the fact that the legal case concerned not whether the employee wronged Palsgraf, but whether the railroad company should be held liable for the harm to Palsgraf. In this legal register, I suspect that there are further considerations at play, such as the relative efficiency and justice of requiring a company, as opposed to an individual, to insure against the risks that arise in the context of the company's operations.

⁴³ Cornell, "Wrongs, rights, and third parties" (n 12) p. 127.

all may complain on behalf of a victim. And so, if this is how we are to think of the mother's complaint, we do not yet have a case in which the mother is wronged but is not owed a duty.

The second way to think about the mother's complaint is as grounded in the harm that the mother experiences: the loss of a loved one and all the emotional trauma that goes with it.⁴⁴ But now it is unclear why we cannot apply an analysis parallel to the one given in Donoghue's case. Surely it just is the sort of thing that you should think about when considering undertaking a potentially harmful act—that it might have not just direct consequences, but harm people indirectly. And the fact that we have loved ones is so central a part of our lives that it is hardly unforeseeable that our actions have such knock-on effects. Indeed, this is the sort of the thing one might say to a friend who is considering driving home drunk: 'What if you took someone's life? How would you face their parents?'

But Cornell worries that this response makes deliberation too demanding. That worry is enhanced by his endorsement of the Hohfeldian Analysis, since if the drunk driver owes a duty to the mother, then it must be that the mother has a right against the drunk driver. But rights play a special role in deliberation, and we should be careful not to ascribe them too widely. In fact, doing so might have counter-intuitive results, as the following case illustrates:

Fireworks. 'Suppose that as a hobby you engage in recreational pyrotechnics. That is, you enjoy spending your Saturday afternoons setting off various elaborate explosives and fireworks. There is a secluded plot of land where you and other local enthusiasts often practice. This is legally permitted, and there are signs notifying people to beware. There is, however, an obligation to broadcast a loud warning message before detonating any device. One day, you go out to the park and set up an elaborate explosive display. The display is on a timer to allow you time to get safely away from it. For some reason, today it slips your mind to broadcast the 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.'⁴⁵

Cornell argues that both children have the right to be saved, and that both have an equal right to be saved. Certainly, it should strike one as a hard decision (insofar as one gets to make a decision here) whom to save. But this fact about our judgments makes trouble for the thought that parents can have rights against others not to harm or kill their children. For if that were true, then there would be two additional rights on the side of the boy with loving parents, namely the rights of his parents, and we would find trivial a decision that is in fact difficult. This problem, Cornell has it,

⁴⁴ This, in particular the emotional harm, is how Cornell in fact understands the basis of the wrong—Cornell, "Wrongs, rights, and third parties" (n 12) pp. 127–28 note 35.

⁴⁵ *ibid.*, pp. 128–29.

is avoided if we think that the parents of the boy are wronged when he is killed by your fireworks, though you do not owe them a duty to protect their child.

In fact, the problem can be dispensed with quite easily, and without rejecting the Repair Theory. It helps to clarify exactly what duties might be at play in this scenario. As stated in the set-up, you have a duty to sound a warning before you set off your explosives. Presumably this is an aspect of a more general *precautionary duty* to take the necessary precautions for avoiding harm to others. That duty is distinct from the duties that arise when you notice that two children are endangered by your device. At that point there may arise a *duty of rescue*, if you are uniquely in a position to save the children and the relative risk to you does not undermine the need to assist. But there is more at stake in this case. Since you have created the danger, and failed to take the necessary precautionary steps, you have something approaching a *remedial duty* to make sure that you minimize the consequences of the dangerous situation for which you are responsible. This is not a duty to redress—even if you have acted wrongly, you have not yet caused determinate harm, so it is not yet clear who to make redress to. Rather, it is a duty to come as close to compliance with your duties as you can when you have, through your own action, made full compliance impossible.

Duties of all three sorts are owed to the girl and boy who find themselves imperiled. Insofar as each kind of duty is owed to each of the boy and the girl, their situations are in fact equal. But I think these duties also explain your situation with respect to the parents. It is not a duty of rescue that you owe them, but the precautionary duty to take the necessary steps to avoid harming others. When the boy's parents confront you, they will not demand to know why you did not save their boy instead of the orphan girl—at least, they could not make this complaint in a moral register. But they will be upset that you were not sufficiently careful about the foreseeable dangers of your activities. But this duty does not tip the balance when it comes to deciding whether to rescue the boy or the girl. The precautionary duty is a duty to take precautionary steps, and not to rescue someone. In fact, this possibility that an arbitrary number of relatives might tip the balance is exactly why we should think a duty to rescue is owed to the person whose life is in danger but not to their relatives. It is the endangered person who may complain that you did not lift a finger to help them though you were situated to do so, and the cost to you would have been trivial relative to the danger they faced. Now suppose that a representative endangered person A had such a complaint, and that B is the relative of another person in a similarly endangered position. B has a serious complaint, facing as he does the deprivations of losing a loved one, but A's complaint is more serious still, since the loss she faces is that of her life. Moreover, A may object to weighing B's complaint against hers, since that opens her serious complaint to being outweighed by an accumulation of relatively more minor complaints such as B's, just as we may object to a promisee's complaint being outweighed by the accumulation of relatively more minor complaints of those who would stand to benefit if the promisor did not keep his promise.

What about the remedial duty, which arises in part because you have violated your precautionary duties, including the one you owe to the boy's parents? That remedial duty cannot be a duty to prevent all the harm that your dangerous situation is capable of, for it is unlikely that you are in a position to do that, and very likely that you will have to make choices. Thinking about the generic scenario in which you create a dangerous situation by failing to comply with duty, it seems most reasonable to require that you minimize the damage done by the situation. So even if a remedial

duty is owed to the boy's parents, it is not a duty to save him. Now, on the assumptions Cornell has made, saving the boy rather than the girl would minimize damage since it would eliminate the parents' emotional trauma. But on different assumptions, you should save the girl because she has a musical talent that the boy lacks. In any case, you are unlikely to be in an epistemic position to make this sort of decision, and if you are, it is not a decision to be made on the basis of right, but rather on the basis of a calculation of harm.

§57. The nexus of justification and accountability. Cornell has a very general theoretical argument for distinguishing having special standing from being the addressee of a duty. First, he claims that special standing has to do with the backward-looking moral relationship of being able to justify one's action to another, while being owed a duty has to do with the forward-looking moral relationship of respect for another, which is to say, giving someone their proper place in one's deliberation.⁴⁶ Second, he worries that on the one hand we tend to ascribe accountability too narrowly, underestimating the number of wrongs for which we are accountable. By tying wrongs to directed duties, and so (by the Hohfeldian Analysis) to rights, we produce an 'atomistic and adversarial' vision of accountability and 'carve up the entire moral landscape into mutually exclusive spheres of influence.'⁴⁷ On the other hand, if we say that there is a right wherever there is a wrong, we will tend to ascribe rights too widely, overestimating the number of individuals to whom we must give special place in deliberation:

The cost of positing rights to explain how third parties are wronged is giving up the idea that rights are action-guiding. But part of the appeal in thinking of morality in terms of directed duties is that it captures the sense that we owe our attention to a particular person. Rights describe the ways that others are normatively significant in shaping how we should act. When one posits artificial rights as a placeholder for potential wrongs, one loses this idea.⁴⁸

I am partly sympathetic with these concerns, especially when it comes to the worry about a conception of the moral landscape that sees it only in terms of rights. But that concern falls away when we weaken the Hohfeldian Analysis in the way I have been suggesting in this chapter. The conception of a right as granting an individual a little moral fiefdom is on the right track, but it leads us to observe not only that rights do not exhaust the moral landscape, but that rights involve discretion and power of the sort that are not essential to directed duties.⁴⁹ Hohfeld may have been correct that wherever there is a right there is a correlative directed duty, but we have now see cases, such as that of the intended beneficiary of a contract, in which it makes sense to say that a directed

⁴⁶ Cornell, "Wrongs, rights, and third parties" (n 12) p. 139.

⁴⁷ *ibid.*, p. 135.

⁴⁸ *ibid.*, p. 133.

⁴⁹ Again, certain theorists, in particular interest theorists, may wish to resist the idea that all rights involve this sort of discretion, pointing at rights that cannot be waived or assigned. But the point still holds that whatever narrower notion of a right is involved when we talk of a right-holder having such discretion, it is that notion that threatens to make the moral landscape into a field of fiefdoms, and it is that threat that can be averted without detaching accountability from justification.

duty is owed to the beneficiary, but that she has none of the discretion that would distinguish her as a right-holder.

The claim that I want to reject is that we should not posit a directed duty wherever we find a wrong—which is to say, wherever we think someone has special standing to hold the wrongdoer to account. There are two serious difficulties with detaching accountability from duties in this way, and so too from the form of deliberation that is required in the presence of a duty.

The first difficulty is knowing how to distribute accountability relations in the absence of the link to duty. Part of the point of giving an account of Direction, as I did in Chapter 1, was to show that directed duties gain their direction in virtue of the way that they are justified. Given the account of Practical Difference, we are then given a clear understanding of who has standing to hold the wrongdoer accountable. Setting the detail of this picture aside, the resulting conception of accountability is one on which accountability is guided by interests in the first instance, but interests that rise to prominence because of the contractualist procedure, which is itself an idealization of moral deliberation. That procedure provides a way of constraining the proliferation of accountability relations that would result if one were accountable to every person who stood to be harmed in any way or have their interests, no matter how minor, set back by one's actions. Perhaps there is some story other than contractualism that could be proposed to show whose interests are the ones that ground our duties. Still, something of that kind would be needed in order to show why we are accountable only to some people, rather than to everyone. That is especially evident if we understand accountability in the way that Cornell recommends, as justifiability to others. Then all I am arguing is that whether an action is justifiable to another depends upon whether they have the right sort of connection to the justification of one's action. On the story I have been presenting, that connection is a matter of having a position, relative to the action, that grounds a complaint that is serious relative to the complaints that lie against alternative actions. But having that sort of position just is grounds for being owed a duty, and for having the sort of place in deliberation that accompanies being owed a duty.

Cornell does suggest an alternative story: when I violate a duty, I am accountable to anyone who has 'a major stake' in my wrong action.⁵⁰ This partly gets the cases wrong, and insofar as it gets them right, is a concession to my own view. Not everyone who has a major stake in some action should be able to hold the agent to account. Suppose I promise Stephanie that I will buy certain stock from her, and that I have enough of a presence in the market for this stock and am buying enough of this stock that the price will surely be affected by whether I keep my promise. I don't keep my promise, and the price of the stock drops. This decrease in price causes the company to shutter their offices in a foreign country, which in turn leads to the unemployment of a certain clerk, and the result is that this clerk's daughter, Thandi, must forfeit her dreams of going to college. Thandi has a major stake in my action, but I need not apologize to her for failing to keep my promise. She does not have the right sort of place relative to the promise between me and Stephanie, a fact that is best explained in terms of the unforeseeability of the particular way in which my action affects her.

⁵⁰ Cornell, "Wrongs, rights, and third parties" (n 12) p. 139.

In contrast, Cornell suggests at times that once an agent has violated a right, he is on the hook for all harm that his wrongdoing causes no matter how unforeseeable. He does not support this claim.⁵¹ In fact, there is reason to think that some line must be drawn around accountability in a case like Thandi's. For suppose that we were to get together and, in the most rational and open-minded manner possible, decide upon rules by which we could live together and which none of us could reasonably reject. In deciding on these rules, we should take into account the facts that we are limited creatures, that one of those limitations is epistemic and makes it reasonable that many of the consequences of our actions are unforeseeable, and that it would be unreasonable to make a person pay for all of the consequences of his wrong action, especially if those consequences were not so easy to imagine that they were not supposed to guide his conduct in the first place.

The second problem with detaching accountability from deliberation is that it threatens a very appealing Strawsonian account of the incidence of blame. That account, which is an important strand in contemporary compatibilist thinking about responsibility, holds that blame and the accompanying reactive attitudes of resentment and indignation aim at the quality of an agent's will.⁵² In particular, blame appraises an agent as not having been sensitive to moral considerations bearing on the alternative actions available to him.⁵³ So this Strawsonian account rests on the idea that our practice of accountability is a response not simply to the quality of an agent's action, but to the attitudes that shaped his deliberation. That seems to require that the considerations in favor of holding someone accountable for performing some action are the same considerations that counted against doing that action. In that light, it would be odd to hold someone accountable on the basis of some consideration but not think that he should have been sensitive to that consideration in his deliberation.

More than this, it would be unfair to do so. In saying this, I am persuaded by Wallace's claim that the question whether an agent is morally responsible for an action is best understood as the question whether it is appropriate (in a non-epistemic sense) to hold the agent accountable for the action, and in particular, whether it is fair to do so.⁵⁴ So, for example, it would be unfair to hold an infant, who lacks the capacity to grasp moral reasons, accountable for its action even though there are good moral reasons not to perform that action. Something analogous can be said for whether an agent should render apology and redress to a patient of his action. That he should do so is only fair if the patient's complaint is one that should have weighed with him when he was considering whether to perform the action. But it is not fair that an agent, though he did wrong, be compelled to make a remedial performance to one whose complaint did not properly weigh with him in deliberation. That is because, as I have already observed, our actions cause harm in ways that are unforeseeable and indefinite, and it is unreasonable to make an agent accountable for all the harm he causes just because he does wrong. Earlier I noted that this is because a reasonable set of moral principles should take into account our epistemic limitations. Now I want to emphasize that

⁵¹ Aside from enigmatic quotations from Kant and Anscombe: Cornell, "Wrongs, rights, and third parties" (n 12) pp. 121–22 note 26.

⁵² Strawson, "Freedom and resentment" (n 22).

⁵³ Wallace, *Responsibility and the Moral Sentiments* (n 15) pp. 118–53.

⁵⁴ *ibid.*, generally.

ignoring these limitations could create unfairness when it comes to accountability. A wrong may be of a trivial sort—I may fail to keep my promise to meet a friend for lunch—yet result in harm of the most dire sort—my friend may be so upset that she is distracted while driving and causes a fatal accident. It is a familiar experience that in such cases I would regret in response to the role that I played in the event, especially once I notice that I shouldn't have acted in the way that I did in the first place. But insofar as this regret verges on guilt about the accident it is not warranted, for the wrong action was my failure to keep a promise, and not my causing a car accident. Certainly it cannot be that by failing to keep my lunch appointment I am now liable for the fatal accidents, distant conflicts, and all the other tragedies that are causally connected to my failure. That is a punishment that goes far beyond the seriousness of my moral failing.

5

What Do We Owe to Corporations (and Other Collectives)?

§58. The question and its importance. Do we owe moral duties to corporations? This is an aspect of a more general question: do we owe moral duties to collectives of individuals (including nations, tribes, families, churches, and clubs)? And that question is in turn an aspect, I think the most interesting aspect, of a very general question: to what kinds of entities do we owe moral duties? It is safe to say that we owe moral duties to human beings. But do we owe any moral duties to animals? Artificial intelligences? The unborn? The earth? The question whether we owe moral duties to collective entities is particularly tricky because they are made up of creatures, human beings, to whom we do owe moral duties. So we must be careful to distinguish owing a moral duty to the collective as such, and owing it to the members of the collective. I will defend a negative answer: we owe nothing to collectives as such, though sometimes we owe it to members of collectives to respect those collectives.

Related questions have been asked with increasing urgency in the legal domain: are collectives such as corporations capable of having rights? Are they persons? Note the distinctness of the question I am asking: are collectives capable of being owed *moral duties*? But there is a connection. In Chapter 4 I accepted one direction of the Hohfeldian Analysis: if C has a claim-right against S that ϕ , then S owes it to C that ϕ . But that means that if (as I will argue) collectives cannot be owed moral duties, then they cannot have moral rights. This does not mean that collectives cannot be owed legal rights. We frequently enjoy legal rights where morality has little to say; for example, one has a right as a matter of California traffic law to turn right on a red light, though I very much doubt that one has any such right purely as a matter of morality. Still, the fact that collectives lack moral rights will undermine some of the argument for their enjoying certain legal rights, such as rights to free speech and freedom of conscience, particularly where these legal rights are thought to protect moral entitlements rather than reflecting institutional arrangements aimed at the general welfare.

Do these claims have any influence on whether we think the collective is a person in law or morality? I will avoid discussing the question of personality, since I fear that this way of framing

things too easily leads to the conflation of distinct issues, in particular the question whether a collective can have rights and the question whether a collective can be held responsible.¹

§59. The argument strategy. How shall we answer our question? We could ask, on a case by case basis, whether it makes sense that we owe a particular duty to a particular collective. That is the kind of strategy that some theorists have praised as a shift from an overly metaphysical approach to a pragmatic approach that foregrounds political and moral questions.² But while it makes sense to adopt a pragmatic approach in asking about whether particular duties are owed to particular entities, we should not deny that there is a general question whether certain collectives qualify at all for being owed duties. That question is not an idle classificatory question about whether some collectives belong together with the other entities we call ‘persons.’ Instead it is a normative question of a very general sort that asks about the situation of collectives in the moral landscape, in particular their proper place in our deliberation and practice of accountability.

I pursue an answer to that general question by arguing (in Section I) that the account of directed duties I have been defending imposes constraints on which entities can intelligibly be owed a duty. In particular, an entity must have an interest in recognition if there is to be any reason to see it as being owed a duty. This entails a weak condition: the entity must be capable of having interests in order to be capable of being owed duties. Collectives may in fact fail the weaker condition, but I will suggest that they do not, and that in any case it is more interesting to see why (as I argue in Section II) they fail the stronger constraint that appears from my theory: that is, that an entity must have an interest in recognition in order to be capable of being owed duties.

My claim is that collectives do not have an interest in recognition and so are not owed duties, whereas an individual does have an interest in recognition and is owed duties in virtue of that interest together with her other interests. A critic of this approach will worry that it does not adequately defend certain interests that individuals have by virtue of being members of collectives. I consider this objection in Section III and argue that no extra protection is given by a duty owed to a collective that is not already given by duties owed to individual members. But is there a merely semantic difference between owing a duty to a collective and owing that duty to its members? No, given the way I have characterized directedness in terms of the justification of duties and the structure of our practice of accountability. Since duties are owed to individuals, they must ultimately be grounded in the interests of individuals rather than the interests of collectives, assuming there are such interests. And wrongdoers are accountable to individuals, rather than to collectives. These facts are the practical face of a deeper fact: that our moral practice enables us to stand in relations of respect with other individuals, but not with collectives as such.

¹ An apparent example of this is found in Peter A French, “The corporation as a moral person” *American Philosophical Quarterly* 16 (1979) 207. French’s seminal paper moves, without explicit defense, from the claim that a corporation counts as a person if it is a bearer of rights, to the claim that a corporation is a person because it can sensibly be held responsible for its actions.

² Amy J Sepinwall, “Denying corporate rights and punishing corporate wrongs” *Business Ethics Quarterly* 25 (2015) 517, pp. 524ff; Elizabeth Pollman, “Reconceiving corporate personhood” *Utah Law Review* 2011 (2011) 1629; Brandon L Garrett, “The constitutional standing of corporations” *University of Pennsylvania Law Review* 163 (2014) 95.

The constraints I have mentioned are conditions on whether it makes sense that we owe duties to collective entities. But *making sense* is meant in a normative sense; that is, the issue is whether there are moral reasons to think that collectives are owed duties. I do not argue that it is logically or semantically unintelligible that we owe duties to collectives. In fact, it should be obvious that it is logically intelligible from the fact that we owe *legal* duties. This leads to the objection that if it makes sense (in the normative sense) that we owe legal duties to collectives, then it also makes sense that we owe them moral duties. I defuse this objection in Section III by characterizing the continuities and discontinuities of directed duties in law and morality, and arguing that the account I have been defending gives us a sensible way of determining when legal duties are owed to collectives.

I. Can collectives have interests?

§60. Two conditions on the intelligibility of being owed duties. Chapters 1 and 2 have been concerned to set out the normative-functional role of directed duties: what circumstances ground the fact that a duty is owed to someone in particular, and what difference it makes that the duty is owed to that person. That role can be characterized in the following terms:

Direction. If J owes it to S to ϕ , he owes it to S (rather than T) because S is the one whose interests ground the duty. In particular, S occupies the representative role with respect to ϕ ing which grounds the complaint that justifies J's duty to ϕ .

Practical Difference. The difference made by J's owing it to S to ϕ is that: (i) S has special place in J's deliberation, in the sense that it is appropriate for him to think that his actions should be determined by S's interests; (ii) S has special standing to hold J to account, in the sense that she is the one to whom J should apologize for not ϕ ing, and she is the one with power to forgive him for not ϕ ing.

Once we have a characterization of a normative-functional role, it is possible to ask why it is important that we have that role. For example, once we characterize a chess piece in terms of its starting position and its permissible moves, we can ask why the game should include such a piece. Indeed, an answer to that question can help to understand what underlies and unifies the norms and statuses that characterize that role. Consider the hypothesis that strategic complexity in chess is enhanced by having pieces that range in value. Since the value of a piece is related to its range of permissible moves and its scarcity, a hypothesis about the importance of having a piece such as a pawn helps to unify a characterization of the piece that sets out its permissible moves and starting positions: it helps to explain what point there is in having a piece with that combination of permissible moves and starting places. Similarly, an account of the Importance of directedness serves to unify the characterization of directedness in terms of Direction and Practical Difference. That account is as follows:

Importance. A community that failed to acknowledge the directedness of duties would lose out on ways of establishing and maintaining valuable relations of recognition with each other;

where recognition means something quite precise:

Recognition. J recognizes S if J acknowledges that (i) S has interests which are sufficiently important that J should act in a way that is sensitive to their importance; and (ii) that S's interests include a second-order interest in knowing that J aims to act in a way that is sensitive to her interests.

The unifying thought is that Direction serves to pick out someone whose interests matter in such a way that acting in the way prohibited by duty would fail to recognize them; and Practical Difference shows how recognition of such a person could be effected both in advance of and in the wake of wrongdoing. Given the centrality of recognition to this account of directedness, I will call it 'the Recognition Theory.'

What follows from the Importance aspect of the Recognition Theory is a thesis about when it makes sense to think of an entity being owed a duty: J owes S a duty to ϕ insofar as S has an interest in J's ϕ ing, as well as a second-order interest in knowing that J aims to act in a way that is sensitive to her interests. This places two necessary conditions on the kind of thing S must be in order to be intelligibly owed a duty. First, S must be capable of having interests. Second, S must be capable of having a second-order interest in knowing that others aim to act in a way that is sensitive to its interests—let's call this an 'interest in recognition.' So to answer our target question we must determine whether a collective is the kind of thing that can have interests, and whether it is the kind of thing that can have an interest in recognition.

It might be thought that further conditions emerge also from Direction and Practical Difference: that S must be capable of complaining, receiving apology, and forgiving. Given that these are all speech acts, it might be inferred that what the Recognition Theory shows is that an entity must be capable of communication if it is to be capable of being owed duties. But this is not entirely convincing. Consider that some individuals, such as babies and deceased persons, are owed duties despite their incapacity to complain, receive apology, and grant forgiveness. What this highlights is that Direction and Practical Difference describe directedness in terms of normative statuses, rather than in terms of communicative acts. A deceased may intelligibly be the one with the power to forgive in the sense that, were they able to exercise that power, they would be the one who appropriately does so, though they are in fact not able to do so. What this shows is that there are tragic cases, such as murder, or the breaking of a promise owed to a deceased person, in which no moral repair is available since the one to whom apology should be made and from whom forgiveness is to be requested is neither capable of receiving apology nor granting forgiveness. It is true that the deceased person is not in a position to have her interest in recognition satisfied, since she cannot know whether others aim to act in a way that is sensitive to her interests. But that does not undermine the fact that she has such an interest, as is evident from the fact that if she were in a position to observe and assess her situation, she would think that things go better for her deceased self insofar as others do recognize her deceased self.

§61. What are interests, and which things have them? I have an interest in being able to drink clean water whenever I want, and so I have an interest in the quality of the pipes that bring water into my neighborhood. I have an interest in being able to use the computer on which I do my work. I have an interest in my graduate program maintaining its high quality. While my parents continue to live in Rondebosch, I have an interest in knowing that the area is clean and safe. And so on: I have an indefinite number of interests, connected to each other and the interests of others in complicated ways. But what, at the most basic level, do these interests have in common?

One commonality is that if I have an interest in *x* obtaining, then *x* is in some sense good for me. It may be good for me in the way that a fancy dinner is, stimulating my palate and my sense of wonder without having any overly negative effect on my health. Or it may be good for me in the way that dentistry is: uncomfortable and painful but with a positive effect on my health and appearance. Both fancy dinners and dentistry make my life go better; and so does readily available clean water, unrestricted access to the tools of my work, the reputation of institutions that further my career goals, and the safety and health of my loved ones.

Another commonality, continuous with the fact that the *x* I have an interest in makes my life go better, is that I may intelligibly take an interest in *x*. It makes sense for me to: attend to the condition and availability of *x*, and the surrounding factors that impact on that condition and availability; strive for it to obtain or to ensure that conditions are met that make *x* available to me; protect *x* from diminution and harm; feel sadness or anger when *x* is threatened, and joy and even pride when *x* does well.

The first observation implies that for *S* to have an interest, *S* must be the sort of thing for which things can go better or worse. Human beings meet this condition, even human beings that lack various cognitive capacities. A baby's life goes better if it has ready access to medicine, even though this is not something it thinks about or strives for, or that it is even capable of thinking about or striving for. But we would certainly say that the baby has an interest in access to medicine. If this were all that was required for being capable of having interests, then we could say that my palm tree has an interest in a sunny environment, since it makes sense to say that things go better for it when it is placed in a sunny environment—it flourishes, quite visibly. But there is room for skepticism about this sort of claim. Joel Feinberg points out that while the flourishing of a plant is the basis of our metaphors for human thriving, [n]othing is gained by twisting the botanical metaphor back from humans to plants.' When we cause a plant to flourish, it is not the plant's interest that is advanced but

rather the gardener's interest in the production of new flowers and the spectator's pleasure in aesthetic form, color, or scent. What we mean in such cases by saying that the plant flourishes is that our interest in the plant, not its own, is thriving.³

This bears on whether it makes sense to say that collectives have interests. We certainly do say things like 'it is in China's interest to control its trade routes,' and 'it is in Exxon's interest to have

³ Joel Feinberg, "The rights of animals and future generations" in *Rights, Justice, and the Bounds of Liberty* (Princeton University Press 1980).

its erstwhile CEO in the cabinet.’ But Feinberg’s strategy of re-framing might be applied here too. When we say that control of its trade routes is in China’s interest, what we mean is that it is in the interest of some human being or other that China control its trade routes. It is not hard to fill out that thought: it is in the interest of Chinese citizens that China control its trade routes. Similarly, it is in the interest of Exxon shareholders that its erstwhile CEO join the cabinet. Are there collective interests that cannot be re-framed in this way? That would depend partly on whether it makes sense to say that a collective is flourishing though it is in no individual’s interest that it thrive. We can make sense of that idea: consider the cult which expands as it draws people in, though its members and everyone else suffers because of this growth. But Feinberg’s basic concern is still relevant here. When we say that the collective flourishes or thrives we comment on its condition, much as we do in talking about the plant. But why is this of any normative significance, if there is nobody who wants or derives any benefit from this growth?

One way to put the concern about the cult is that nobody—including the cult—could take an interest in the cult’s growth. This recalls my second observation: if I have an interest in x, then it is something I may intelligibly take an interest in. Perhaps the problem with the cult, and the plant, is that they are not the sorts of things that can take an interest in any state of affairs. In the case of the cult, if it cannot take an interest in its growth, and nobody else does either, then there is no reason to say that any interest is advanced by its growth.

§62. The relevance of collective structure. But can we say that the cult is not the sort of thing that can take an interest in its growth? Recall the list of behaviors that accompany taking an interest in some x: attending to x, striving for it, protecting it from endangerment, having emotional reactions to its enhancement and diminution. These are the sorts of behaviors that only certain entities are capable of: but which ones? Some philosophers have demarcated the interested entities from the non-interested ones in terms of their mindedness: they are sentient or are capable of sentience;⁴ or they are capable of suffering;⁵ or they are capable of beliefs and desires.⁶ This is a plausible stance, given that some of the verbs on our list—attending, striving, emotionally reacting—are paradigmatically mental. But other philosophers have insisted that behavior of much the same kind is available to all entities that have a biological function, or can otherwise be described as goal-directed.⁷ That set of entities may not be co-extensive with the mentally capable entities, particularly if we think that an entity that is given a goal (such as the quarter-detecting slot of a laundry machine) can be properly described as goal-directed.⁸

In the case of collectives, the situation is interestingly complicated by the fact that not all collectives are created equal. Some collectives—corporations are paradigmatic—have a relatively sophisticated organizational structure that affects not only how it is typical for the collective to

⁴ Aaron Simmons, “Do embryos have interests?” *Bioethical Inquiry* 9 (2012) 57; Bonnie Steinbock, *Life Before Birth* (Oxford University Press 1992) pp. 10–41; cf. Tom Regan, “Feinberg on what sorts of beings can have rights” *Southern Journal of Philosophy* 14 (1976) 485.

⁵ Peter Singer, *Animal Liberation* (revised, Ecco 1978) p. 8.

⁶ Feinberg, “The rights of animals and future generations” (n 3); RG Frey, *Interests and Rights* (Clarendon Press 1980).

⁷ Gary E Varner, *In Nature’s Interests?* (Oxford University Press 1998) pp. 55-76.

⁸ Daniel C Dennett, “Evolution, error, and intentionality” in *The Intentional Stance* (MIT Press 1987).

act and react, but also suggests criteria for the appropriateness of the collective's actions and reactions. For example, a corporation has a constitution that appoints a chief executive officer to make certain decisions, and those decisions are implemented by functionaries and agents of the collective, whose actions are owned or disowned to the extent that they comply with the constitutionally prescribed decision-making procedure. That leads Peter French to argue that this kind of sophisticated internal decision-making establishes substantive and procedural criteria for what counts as the corporation's decision, and as its reasons for deciding—much like Hart's idea of a legal system's rule of recognition⁹—and so allows us to ascribe intentions to the corporation, on the basis of which we may hold it responsible for its actions.¹⁰ If French is right, then it may be argued that the corporation has something approaching mental states of the sort required for taking an interest in certain states of affairs: intentions, and reasons for acting, and perhaps beliefs and desires too. But there would be something surprising about this conclusion, for it would mean that only some collectives have interests—corporations and maybe churches and clubs with constitutions; but not more loosely organized community organizations, tribes, and family units. That may not yet seem like a problem. But consider that corporations have the sophisticated decision-making decision they do because of contingent facts about the legal system of their time and place and the process of incorporation. That means that, on French's view, the capacity to have interests depends on contingent facts about an organization that may not be the product of neutral historical circumstances.

This worry points to a more important fact about ascribing interests to entities. Whether we do so is importantly related to whether we ascribe moral status to that entity and deem it worthy of moral consideration. But it is not clear that the fact that an entity has interests is prior to the fact that it is morally considerable.¹¹ If we make this assumption, it is easy to think of the question about interests in the way that French does, as a metaphysical question that is purely about the internal structure of the entity. But we can ask a different question that doesn't ignore facts about internal constitution, but asks instead the normative question whether it would be in some way unfair or unjust or unreasonable to deny treating the entity as worthy of moral consideration, and as having interests worthy of moral consideration, in light of its internal constitution. That would mean making explicit the question whether the contingency of legal recognition of certain sorts of collective organization should impact our treatment of a collective as morally considerable.

I raise these issues in order to highlight the complexity of deciding whether an entity is capable of having interests or not, but I don't intend to make any proposals here about which things can have interests. Instead, I plan to assume that collectives *can* have interests, and argue instead that even given interests they would nonetheless lack an interest in recognition. This strategy is not beyond the powers of imagination. In light of the discussion so far, there are several strategies for imagining what it would be for a collective to have an interest: perhaps the collective's existence gives rise to a collective intention in virtue of which we can say whether things go better or worse for the collective; or perhaps the collective is of such great value to its members that it would be

⁹ HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) pp. 100–123.

¹⁰ French (n 1).

¹¹ For the assumption that it is, see for example Steinbock (n 4) pp. 10–41.

unreasonable to deny consideration of its distinctively collective interests. What is more, this will turn out to be the more illuminating strategy to adopt here. Demarcating those entities that could have an interest in recognition from those that could not will allow us to spend a bit more time exploring the nature of recognition; and it will tell us more about the distinctive moral status of collectives. It will tell us more, because I will argue that collectives could not have an interest in recognition, which is to say that even if they were worthy of moral consideration, they would still not be the sorts of things we could owe duties.

II. Do collectives have interests in recognition?

§63. What does it take to have an interest in recognition? Even if having an interest does not require any mental states, having an interest in recognition does. Recognizing another involves acting in a way that is sensitive to their interests, including their second-order interest in knowing whether one aims to act in a way that is sensitive to their interests. It is this second-order interest that I am calling an ‘interest in recognition.’ But it is not the fact that it is a second-order interest that makes it depend on mental states.¹² Rather, it is the fact that the interest in recognition is an interest in knowing what others’ attitudes are.

The knowledge referred to needn’t be explicit knowledge. I care about the attitudes of others even when I don’t make it an explicit topic of my conscious thought. I may feel a prick of annoyance when someone cuts in front of me at the coffee shop, even though I am too engrossed in the news to consciously register the thought that he should get behind me, or any thought at all. Holmes recognized that ‘even a dog distinguishes between being stumbled over and being kicked’;¹³ and we may add that the dog probably lacks explicit thoughts. Yet Holmes’s claim rests on the assumption that a dog cares about how it is treated, and if we add to that the claim that a dog is capable of having interests, then we are close to an argument that a dog can have an interest in recognition and is capable of being owed duties.

But it may be thought that a collective, and certainly the corporation with the complexity of its dealings and planning, has an interest that is very close to the interest in knowing about others’ attitudes toward it. For a collective that must interact repeatedly with others in order to reach some goal, and can make decisions that either do or do not rely on how others will respond, would surely benefit from being able to rely on the actions of others, and that reliance can often be grounded in knowledge about their attitudes. The ability to act in reliance is a way in which the internal decision-making structure of a corporation, which makes use of all the mental sophistication of its individuals members, marks it off from a tree, and even from a dog which is aware of the difference between being kicked and being stumbled over.

¹² If a goal-directed thing can have an interest in some state of affairs S that helps it reach a goal G, it can also have an interest in states of affairs that are about its interest in S—for example, those which ensure that pursuing S in order to reach goal G does not undermine its pursuit of other important goals.

¹³ Oliver Wendell Holmes, *The Common Law* (Belknap Press 2012) p. 5.

Still, an interest in reliance is not the same as an interest in recognition. Suppose I promise Stephanie that I will help her move, and she relies on my keeping the promise, refraining from making other arrangements even though her work schedule stands to suffer if she does not have help. I have assumed that promissory obligation is grounded in the promisee's interest in assurance, and that a promise reasonably assures the promisee that a morally motivated promisor will perform.¹⁴ So one reason she may have for relying on my keeping the promise is that she thinks that I am morally motivated, which in this case means that I am moved by a sensitivity to her assurance interest. But it would also be intelligible, and really quite ordinary, for her to rely on my keeping the promise for other reasons. Stephanie may know that I have a strict religious code that bids me keep my promises; or that I have strong prudential reasons for doing what I have said I would do; or that I am controlled by a third person who has Stephanie's interests in mind. These factors may be strong enough to warrant as much reliance as the fact that I am morally motivated—or more. But Stephanie could be forgiven for being disappointed if she learned that I did not keep my promise because of thoughts about her interests. So I may very well act in a way that advances Stephanie's interest in reliance, but fails to recognize her.

We care about recognition because, as social beings, we care about the attitudes others adopt toward us.¹⁵ That was the argument of Chapter 3. This concern for recognition goes beyond the sorts of prudential concerns involved in reliance interests—though of course one's concern for reliance can be worked up into a concern for recognition because one cares about whether others are sensitive to one's concern for reliance; that is why one might feel insulted by the breaking of a promise one was relying upon. But the interesting difference between caring about reliance and caring about recognition is marked by this possibility of insult, which involves an affective appraisal of the other person's attitude. My life might go better because of my ability to rely on another, without needing to go through any such affective appraisal. That is the case when I coordinate my behavior with another's, as in the case where we must row a boat together. Failure to coordinate may result in disappointment or frustration, but it needn't involve anything like the experience of insult. But the fact that my life goes better when I am recognized by another rests

¹⁴ Notice that assurance is itself quite different from reliance. As Scanlon remarks, someone may seek a promise that you not divulge certain information about him, even though he can have no interest in relying on non-divulgence. Part of his concern may be for the 'peace of mind' that comes with knowing you won't divulge the information; but part of his concern is just for your not divulging it. Scanlon, *What We Owe to Each Other* (n 15) p. 303. It's hard to articulate what this last concern involves, except by pointing out that something is left over once we've set aside concerns about reliance and what Scanlon describes as 'purely experiential' aspects like peace of mind. It is an interesting question what sorts of entities would be capable of having an interest in assurance. If assurance were a largely experiential affair, then I doubt collectives as such could have an interest in it.

¹⁵ Martin Jay raises the crucial question whether it makes sense to regard individuals but not collectives as the primary locus of moral considerability once I have insisted that human beings are by nature social beings. Continuing this line of thought, one may ask whether it even makes sense to abstract the notion of *an individual* from our experience of human life. This gets to the core of my project. I am suggesting that human social life, and so morality, is best understood in terms of the relationships in which human beings can and do stand with respect to each other. Once we look at things in this way, the need to give collectives as such some central philosophical place falls away. To be a social being is not to be a constituent of some further entity, a group or a collective; rather, it is to stand in social relationships with other beings of one's kind.

on the fact that I positively appraise them for that attitude. Their recognition will no doubt indicate other benefits for me, such as that they will reliably act in ways that are sensitive to my interests. But there remains a distinctive interest in recognition that I have because of the availability to me of affective appraisals like resentment, indignation, praise, and gratitude.

It is at this point that the problem for collectives arises. Even granting that a collective has goal-directedness and decision-making sophistication such that we can ascribe to it pursuits and reasons for action and intentions and so on, it fails to have the kind of emotional entanglement that grounds our human relationships and which is at the core of the interest in recognition. Of course the members of a collective will have the normal range of human emotions and responses to the attitudes of others. But a collective *as such* is incapable of these reactions, and so is incapable of caring about recognition by others. So there is no reason to think that a collective as such is owed any duties.

I have argued in Chapter 3 that it is a person's interest in recognition that makes sense of the directedness of apology: apologizing *to* someone is distinctive and intelligible because it constitutes recognition of that person in a way that a public statement of remorse does not. But does this raise a problem insofar as denying that a collective has an interest in recognition seems to amount to denying the intelligibility of apologizing to the collective? Does it not make sense to apologize to a collective, as when Prime Minister Kevin Rudd apologized to the Indigenous peoples of Australia? In fact, that apology is better construed as an apology to individual Indigenous Australians, living and dead.¹⁶ They are the ones whose interest in recognition makes sense of the need for an apology in the first place. That is not to say that we can't make sense of an apology addressed to a collective as such. We know what it is to address an apology to an individual and why one would do so; and we can make sense of replacing the references to an individual with references to a collective as such. But it would be a mistake to think that the apology can be addressed to the collective for all the same reasons that it can be addressed to the individual. In particular, there is no interest on the part of the collective as such that the apology can satisfy. The situation is much like that of the anthropomorphizing pet lover who apologizes to his dog, perhaps momentarily blinded by concern to the fact that the apology cannot serve its ordinary function (though in the dog's case this is more because it is incapable of understanding the speech act than because it lacks an interest in recognition.)

III. Temptations to grant collectives moral standing

§64. Individuals identify with collectives. We should not lose sight of the fact that the members of collectives continue to have interests in recognition even though collectives as such do not. But

¹⁶ That is consistent with the language used by the apology. In the one place in which it is explicitly addressed to anyone, it is '[t]o the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities ...' Commonwealth of Australia Parliamentary Debates. House of Representatives. 13 February 2008, p. 167. <http://parlinfo.aph.gov.au>.

the lives of collectives and the individuals who comprise them can be difficult to disentangle. This may be so in the case of corporations, clubs, and churches; it is especially so in the case of families, neighborhoods, and tribes. If someone insults my ethnic affiliation, it is difficult not to take it as an insult aimed at me, individually, for the historical tribulations and cultural ways of my ethnic group are among the things which have most deeply shaped who I am. And if someone mistreats my brother on account of his family name, then I take this as an attack on *my* honor, since I take my family name to be an asset for not just my family, but for *me*. What is more, such actions set my interests back, and I have corresponding interests in the welfare of my ethnic group and family as collective entities. Indeed, that individuals are willing to sacrifice themselves for affiliate groups such as the nation shows the potential depth of feeling for such groups, and the potential for believing that life would not be living if one's affiliate group were not allowed to flourish and accorded due respect.

This entanglement of individual identities with the collectives to which individuals belong may tempt us to think that we should recognize collectives as having interests, and that the recognition of individuals can depend on the recognition of collectives. And while focusing on the internal organization of a collective led us to treat the corporation as the best candidate for moral standing in our earlier discussion, the focus on the entanglement of interests and identities leads us to treat less organized but more meaningful groups as paradigms: families, nations, and ethnic groups are entities which give rise to some of our most urgent and difficult questions about justice and morality, and the urgency is due in no small part to the fact that an injury to such a group is felt as an injury by the individual, even while (and sometimes because) others urge that we should loosen these entanglements in order to better get on with each other. In complaining about an insult to my ethnic group, I will not only say that I should not be insulted, and that an insult disrespects me. I will add to this that my ethnic group should not be insulted, and that an insult disrespects the group. But that sort of complaint is ambiguous: do I mean that the group as such has been insulted, or that the members of the group have been insulted as members of the group? That sort of question may strike some as metaphysically nice, but I think it is easier to see what is at stake when we frame it as a normative question about recognition: should we see the insult as a failure to recognize the entity that is my ethnic group, or as a failure to recognize its members? My proposal is that we adopt the latter approach, since a group as such is incapable of caring about recognition. Nothing is added by saying that it is the group as such that is insulted, or in any other way has moral standing. In fact, there is the danger of forgetting that we care about the insulting behavior because of the way that it ultimately affects the individual by way of their group affiliation.

This may leave the concern that we are neglecting the great importance of collectives in individuals' lives. In particular, individuals do seem to care that their collectives are treated in certain ways, and some of these forms of treatment may be best understood as respect for the group as such. An example of such treatment would be a politician's decision to give all the members of a certain tribe political office, where such political office would improve the wellbeing of each individual, but make it impossible for the tribe to continue certain traditions. If we were to point out the oversight involved in this arrangement, we might do best to say that it disrespects the tribe as such, even if the arrangement is intended to have utmost respect for the tribe's members. But who is wronged by such disrespect? Clearly the tribe as a unit is threatened, but for the reasons

I have been giving I think this grounds at most an impersonal duty not to do what the politician is doing. There is the possibility though that it is the tribal members who are wronged, because their individual interests include the unity and perpetuation of the group that is such an important constituent of their identity, and it is those interests that are set back by the arrangement. And that seems the better understanding; for recall the cult that we considered in discussing the possibility of collective interests. Suppose that the politician's arrangement advanced the interests of the cult's members but undermined the cult's thriving. The politician would not wrong any of the cult's members, by supposition, and we should not be detained by the thought that he might nevertheless be wronging the cult.

§65. Collectives are owed legal duties. Clearly the law recognizes duties owed to collectives, such as contractual duties to corporations. But the intelligibility of this does not mean that it must be true that moral duties can be owed to collectives. I want to suggest briefly that it can be important to give an entity standing in that institutional practice even though it lacks moral standing, and that it can be important to do so in order to better respect the interests of those who do have moral standing.

My starting point is that directed duties in morality and law are continuous (since both kinds are directed) but also discontinuous (reflecting differences in moral and legal practice). They are continuous in the following way: duties of both kinds can be understood to have the practical effect of giving their addressees special standing in a practice of accountability. In both the legal and moral cases, to owe it to another is for them to have special standing to hold you to account. But our legal and moral practices of accountability are distinct. Moral accountability is an interpersonal practice that has its roots in certain cultural and perhaps natural responses, and takes place through exchanges of blame, excuse, justification, apology, and forgiveness. Legal accountability is an institutional and positive practice, a reflective social artifact that takes place primarily through litigation and through seeking the remedies made available by the legal system. So even if we think that these practices of moral accountability and legal accountability have the same aims, we can imagine that the legal practice diverges from moral practice in how it distributes standing because of institutional considerations: available resources, expressive effects of certain ways of structuring the practice, epistemic concerns of the kind that ground the doctrine of precedent, and so on.

The question of what our legal practice does aim at is a complex one and not to be addressed here. But suppose that parts of it, say those concerned with contract and tort, aimed only at the facilitation of moral accountability; that is, that the point of private law were to facilitate our standing in the relations of recognition that we find important in our moral lives.¹⁷ Even this

¹⁷ For advocacy of this sort of approach, consider the corrective justice theories of Jules L Coleman, *Risks and Wrongs* (Cambridge University Press 1992) pp. 197ff, Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press 2012), and Arthur Ripstein, "Private order and public justice: Kant and Rawls" *Virginia Law Review* 92 (2006) 1391; as well as the approaches crafted as responses to corrective justice theory, such as Benjamin C Zipursky, "Civil recourse, not corrective justice" *Georgetown Law Journal* 91 (2003) 695, John CP Goldberg and Benjamin C Zipursky, "Torts as wrongs" *Texas Law Review* 88 (2010) 917, and Andrew S Gold, "A moral rights theory of private law" *William and Mary Law Review* 52 (2010) 1873. I find it very unlikely that there is absolute convergence of morality and private law,

would not entail that legal duties can only be owed to entities that can be owed moral duties. For, as I have suggested, it may well be that it is in the recognition interests of the individuals who make up a collective that the collective be treated in a certain way. More concretely, consider that certain interests can flourish only if individuals are allowed to associate in such a way that their association is treated as a stable entity that persists through changes in membership. Then there is good moral reason to treat their association as such a stable entity. And the availability of a legal practice allows us to do that without thinking that there is a new moral person on the scene. What we can do is think of the association as such as a locus of legal rights and duties, and as an entity that has standing in our legal practice of accountability. But what is notable is that we do this ultimately because of a wish to stand in relations of recognition with the individuals who participate in that association. So our grant of legal standing to the entity (what we might call ‘legal recognition’) is derived from, and potentially tempered by, our wish to recognize its members as well as other individuals.¹⁸ So the Repair Theory gives us a framework for understanding what we in fact find in the law: that corporations and other collective entities can be owed duties, but that there is controversy about certain duties that would be unproblematically owed to persons, since it is controversial how granting such duties would affect the interests of individuals.

given the reasonable diversity of doctrine we find in actual legal systems, and the way in which private law doctrine interacts with other legal arrangements such as procedural rules about standing and permissible redress, and statutory governance of commerce and technology. More conceptually, consider the ways in which fault and liability diverge, and the importance for arrangements aimed at efficiency, such as agency, surety and hierarchy, that we are able to impose strict liability on those who are not at fault. On this divergence, see Joel Feinberg, “Collective responsibility” *Journal of Philosophy* 65(21) (21 1968) 674. Of course, the question what we should expect from a theory of tort law such as corrective justice theory—including the question to what degree it should provide a positive account of existing tort law—is a difficult one that I am unable to address here.

¹⁸ This is in keeping with the approach to the most controversial issues around corporate standing suggested by Sepinwall (n 2).

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