

# *A Hybrid Theory of Claim-Rights†*

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**Abstract**—In this article, I propose and defend a new analysis of claim-rights. My proposal is a hybrid of the two best known analyses, the Will theory and the Interest theory. For good reason, the debate between these theories is often regarded as a stand-off. That is because the Will theory has had no satisfactory answer to the Interest theory's best objections (inalienable rights and incompetent right-holders), while the Interest theory has likewise had no satisfactory answer to the Will theory's best objection (third party beneficiaries). After reviewing these various objections and criticizing some recent attempts to meet them, I introduce my hybrid alternative and explain how it provides a satisfactory solution to all of these objections.

## 1.

The language of rights is pervasive. As commonly used, however, it is also 'indiscriminate' and 'loose', as Wesley Hohfeld complained long ago.<sup>1</sup> In a celebrated effort to forestall confusion, Hohfeld distinguished various senses of 'a right', which he regimented in terms of four jural equivalences or correlatives. Of these, he himself regarded the equivalence in which rights are correlative with *duties* as regimenting rights 'in the strictest sense':

if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If, as seems desirable, we should seek a synonym for the term 'right' in this limited and proper meaning, perhaps the word 'claim' would prove best (Hohfeld, p. 38).

Now few dispute that Hohfeld's 'claim' at least marks a central and important sense of 'a right'.<sup>2</sup> Indeed, it is perfectly standard to define claim-rights, as they are more often called, on the model of Hohfeld's equivalence:

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<sup>1</sup> W. N. Hohfeld, *Fundamental Legal Conceptions*, W. W. Cook (ed.) (New Haven: Yale University Press, 1919), 36.

<sup>2</sup> Some dispute that rights have 'a' strictest sense. See, e.g. L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), ch 2.

X has a *claim-right* against Y that Y  $\phi$  if and only if Y is under a duty toward X to  $\phi$ .<sup>3</sup>

So defined, one person's possession of a claim-right is equivalent to someone else's possession of a duty—a duty, moreover, with the same content.<sup>4</sup>

But neither this fact nor anything else Hohfeld says, for that matter, tells us how we are to identify the relevant *pair* of persons. If I have a claim-right to some land, then someone else has a duty to stay off the land. But *who* has this duty exactly? Similarly, if I have a duty to pay my taxes, it may be asked *who*, if anyone, holds the correlative claim-right. In certain cases, we may think this is easy to say. As far as my claim-right to land goes, for example, we may think the bearer of the correlative duty is *everyone*. But other cases will not be so easy. How, in general, are we to identify the bearer of the duty that correlates with a given claim-right? Or the holder of the claim-right that correlates with a given duty? If a correlation between the right-holder and the duty-bearer belongs to the nature of claim-rights, as the standard definition suggests, an adequate understanding of claim-rights requires an understanding of the basis of this correlation.

Rival accounts of the correlation are offered by two well-established theories of rights, the Will theory and the Interest theory.<sup>5</sup> Yet neither theory, it seems to me, is ultimately satisfactory. To begin with, I shall present each theory, together with the main problems it faces. In my view, the best objection that each theory wields against the other is unanswerable. More constructively, I shall then suggest a hybrid of the two theories. I shall argue that it solves the main problems confronting the Will and Interest theories. We should therefore prefer the hybrid theory.

## 2.

Let me begin with the Will theory.<sup>6</sup> The following rough statement will serve our purposes:

(WT) Suppose X has a duty to  $\phi$ . Y has a claim-right against X that X  $\phi$  just in case Y has some measure of control over X's duty.

<sup>3</sup> See, e.g. J. Feinberg, *Social Philosophy* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1973), ch 4; J. Waldron, 'Introduction' to his (ed.) *Theories of Rights* (Oxford: Oxford University Press, 1984), 8 [hereinafter referred to as *TR*]; Sumner, 25–27; J. Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), 41–43; M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights* (Oxford: Clarendon Press, 1998) [hereinafter referred to as *DR*].

<sup>4</sup> In Hohfeld's example, the claim-right and the duty share the content 'that Y stay off X's land'. To preserve idiom, we could also say, alternatively, that they share a content that is satisfied by 'Y's staying off X's land'.

<sup>5</sup> In presenting the debate between these theories in terms of their account of the correlation between claim-right holder and duty-bearer, I follow Waldron, *TR*, 8–9, and Sumner, 24 and 39–45. While there are other ways to frame the debate, I do not think the choice of frame affects the argument at any point. My choice is based on independent grounds, which I discuss in a companion paper, 'Duties and their direction'.

<sup>6</sup> Throughout the discussion, I shall ignore the distinction between moral rights and legal rights. That is, I shall not pay special attention to it. While this will sometimes involve me in (minor) infelicities, it conveniently enables me to concentrate on the core features of a claim-right, which hold in common between law and morals.

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

- (i) the power to waive X’s duty or not;
- (ii) the power to enforce X’s duty or not, given that X has breached it;
- (iii) the power to waive X’s duty to compensate, which is consequent upon his original breach.<sup>7</sup>

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

I think it is fair to say that our clearest paradigms of a claim-right are the claim-rights recognized in property and contract law. The Will theory bases itself closely on these paradigms. Indeed, it holds, in effect, that they present the necessary and sufficient conditions for claim-right holding. It therefore stands to reason that, in property and contracts, the duties that correlate with claim-rights are duties over which the claim-holder typically has the full measure of control encompassed by the powers (i)–(iii).

It is the signal advantage of (WT) that Y’s having the full measure of control over X’s duty to  $\phi$  gives a readily comprehensible sense to the statement that X’s duty is *owed to Y*, and so to the statement that it is Y who holds the correlative claim-right against X. Lesser measures of control can be accommodated as approximations to the case of full control. Thus, as Hart says, ‘duties with correlative rights are a species of normative property belonging to the right holder, and this figure becomes intelligible by reference to the special form of control over a correlative duty which a person with such a right is given by the law’ (‘LR’, p. 185).

But (WT) confronts two serious objections. One concerns inalienable rights.<sup>8</sup> Sometimes a claim-right holder is disabled from waiving the duties that correlate with his claim-right. Typically this is done for the right-holder’s own good and protection. Moreover, as Neil MacCormick observes, the protective disability is typically also seen as *strengthening* the claim-right. A dramatic example is the claim-right not to be enslaved. Less dramatic examples include the claim-right not to be operated upon without *informed* consent;<sup>9</sup> and the claim-right not to be employed in unsafe working conditions. (In some ways, the less dramatic examples are actually more important, since they exhibit the fact that inalienable

<sup>7</sup> H. L. A. Hart, ‘Legal Rights’ in his *Essays on Bentham* (Oxford: Clarendon Press, 1982), 183–84 [hereinafter referred to as ‘LR’].

<sup>8</sup> See D. N. MacCormick, ‘Rights in Legislation’ in P. Hacker and J. Raz (eds.), *Law, Morality, and Society* (Oxford: Clarendon Press, 1977), 195–99 [hereinafter referred to as ‘RL’].

<sup>9</sup> The inalienable claim-right here, to be precise, is the claim-right to receive a standard disclosure prior to consenting (to an operation or other medical treatment). In US law, this claim-right may not be inalienable, since it seems that a physician’s duty to disclose can actually be waived. See J. W. Berg, P. S. Appelbaum, C. W. Lidz and L. S. Parker, *Informed Consent: Legal Theory and Clinical Practice* (New York: Oxford University Press, 2nd edn, 2001), ch 4. But given the standard analysis of the requirements of informed consent—on which they include *understanding* the standard disclosure—a patient’s having the power to waive the physician’s duty to disclose is incoherent. On the standard analysis, therefore, the claim-right is inalienable.

claim-rights need not be correlated with extremely *weighty duties*. Hence, the strength added by a protective disability is distinct from the weight, in that sense, of the original claim-right.<sup>10</sup> In any case, we likely do not wish to deny either that Y has a claim-right against X that X not enslave Y or that Y has a claim-right against X that X not employ Y in unsafe working conditions. It is worth emphasizing that the crucial question here concerns the *possibility*, rather than the fact, of inalienable claim-rights. (WT) makes inalienable claim-rights incoherent in principle.

A second criticism concerns incompetent adults.<sup>11</sup> Say Y is incompetent to exercise any of—and therefore lacks, in the relevant sense—the powers (i)–(iii) because, for example, Y is in a coma. Do we wish to say that Y no longer has a claim-right against X that X not assault Y or steal from Y? Or that X no longer owes Y duties not to assault or steal from Y? Presumably not. But (WT) implies that someone with no measure of control over a duty lacks the correlative claim-right.

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

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

By way of illustration, let us consider Nigel Simmonds' recent response to the inalienability objection.<sup>12</sup> Simmonds discusses partial and complete inalienability separately. In the partial case, the agent lacks (i) the power to waive a duty, but retains (ii) the power to sue for enforcement and (iii) the power to waive compensation. In the complete case, the agent has no control over the duty whatever. Here Simmonds' discussion concerns criminal law prohibitions against murder and assault.

Simmonds argues that the Will theory does, in fact, vest agents in the partial case with a correlative claim-right, since they retain a residual measure of control over the duty, of precisely the kind Hart describes. Furthermore, he denies that this reduction from the full measure of control is inconsistent with strengthening

<sup>10</sup> The second of the less dramatic examples also makes it clear that what the protective disability protects need not be the *autonomy*, specifically, of the claim-right holder.

<sup>11</sup> A better known variant of this objection concerns children. But I think this variant is liable, with reason, to greater controversy.

<sup>12</sup> N. Simmonds, 'Rights at the Cutting Edge' in *DR* at 225–32.

the claim-right, on the ground that it is over-simple to identify the strength of someone's claim-right with the measure of her control over the correlative duty. To handle the case of complete inalienability, Simmonds invokes the distinction between legal rights and moral rights. On the legal side, he is content to affirm (WT)'s implication that the criminal law confers no claim-right against murder or assault. On the moral side, he is content to insist that the duties not to murder and not to assault really can be waived.

Neither of these replies withstands scrutiny. It is true that (WT) vests agents who have even a residual measure of control over a duty with a correlative claim-right. But it cannot seriously be maintained that reducing the right-holder's measure of control is consistent with strengthening her claim-right, at least not on the Will theory's conception of a claim-right. Someone with only a residual measure of control over my duty to  $\phi$  lacks the ability to exert her will in certain ways—notably, to make it the case that my failure to  $\phi$  does not count as a breach of my duty. How can this not weaken her ability to exert her will, and so not weaken her claim-right on (WT)?

Simmonds' second reply is beside the point. In either law or morals, one might debate whether or not a certain claim-right is completely inalienable. Let the example be one's favourite. For present purposes, it is simply irrelevant to insist that one position or the other in the resultant debate is correct. The question is whether the debate itself is *coherent*; and the very fact that Simmonds can engage in the debate shows that it is. But this contradicts (WT), which excludes the coherence of asserting that any claim-right is completely inalienable.

### 3.

Let me now introduce the Interest theory. The following rough statement will serve our purposes to begin with:

(IT) Suppose X has a duty to  $\phi$ . Y has a claim-right against X that X  $\phi$  just in case Y stands in a sanctioned relation to benefiting from X's  $\phi$ -ing.

This formulation is slightly odd. But it allows (IT) to cover a number of subtle variations in the basic structure of the Interest theory. For now, we can think of '*standing to benefit from X's  $\phi$ -ing*' and '*being intended to benefit from X's  $\phi$ -ing*' as the sanctioned relations. (IT) also gives a comprehensible sense to the statement that X's duty is *owed to* Y, and so to the statement that it is Y who holds the correlative claim-right against X: namely, the duty is for Y's benefit.

(IT) is more general than (WT) in two important respects. First, it extends the notion of a claim-right to a wider range of cases than (WT) does. In particular, (IT) extends the notion to the cases of inalienability and incompetence that motivated the objections to (WT). On the plausible assumption that X's enslaving Y or employing Y in unsafe working conditions or assaulting a comatose Y sets Y's

interests back, (IT) yields the verdict that X's duties not to perform any of these actions are still *owed to Y*, and so that Y still holds the correlative claim-right.

Second, (IT) is associated with a more general account of the *justification* of claim-rights. On the account associated with (WT), the justification for empowering Y to waive the duty correlative to her claim-right, and so for vesting her with the claim-right, lies in the fact that so doing serves Y's interest in autonomous choice.<sup>13</sup> In the paradigm cases, empowering Y to waive this duty also advances her interests on balance. By contrast, on the account associated with (IT), the justification for the structure of Y's normative standing, as we might put it, lies in the more general fact of what advances Y's interests on balance. It is not tied to the more specific fact of what advances Y's interest in autonomous choice.<sup>14</sup> When these facts coincide, as they do in the paradigm cases, (IT) yields the same results as (WT) (cf. MacCormick, 'RL', pp. 207–8). But when they diverge, as they do in the cases motivating the objections, (IT) classifies duties that advance Y's interests as *owed to Y*, even if Y has no measure of control over them, as long as Y's disability with respect to these duties advances her interests on balance.

At least one serious objection can be raised against (IT). This concerns the problem of third party beneficiaries.<sup>15</sup> In simple form, the problem is as follows. Suppose you promise your brother to pay your sister £100. Ordinarily, we would say that your brother now has a claim-right against you or that you now owe a duty *to your brother* to pay your sister £100. Hart questions whether (IT) yields this verdict.<sup>16</sup> However that may be, (IT) certainly yields the verdict that your duty to pay your sister is (also) *owed to your sister*, and so that your sister (also) has a claim-right against you, since she benefits from the £100. Hart also maintains that this verdict is incorrect.<sup>17</sup> However that may be, it would certainly be the wrong verdict if your duty to pay your sister were also *owed to your sister's child*, on whom—let us say—she will spend the £100, so that her child had a claim-right against you. But (IT) clearly appears to yield that verdict as well.

<sup>13</sup> Hart, 'LR' at 188–89. On some versions of the Will theory, it would be objectionable to characterize the justification of Y's power to waive in terms of her *interest in* autonomous choice. But nothing turns on this formulation, at least not for my purposes. I could as well describe the justification associated with (WT) as 'appealing in some fashion' to the value of (individual) autonomy. The formulation in the text makes the greater generality of the justification associated with (IT) explicit on the surface of the two accounts. However, the facts about which account is more general hold independently of this formulation (see the following note).

<sup>14</sup> The justification of claim-rights associated with (IT) can let *whatever it is about the value of (individual) autonomy* that grounds the justification associated with (WT) weigh in favour of empowering Y to waive X's duty to  $\phi$ . Its greater generality consists in the fact that it *also allows other factors*—to wit, aspects of Y's well-being that are independent of her autonomy—to weigh against empowering Y to waive this duty. It is irrelevant to this claim whether advocates of (WT) would assign justificatory weight to these other factors, so long as you and I do.

<sup>15</sup> See, notably, H. L. A. Hart, 'Are there any natural rights?' [1955] in Waldron, *TR* at 81–2; and 'LR', 187–88.

<sup>16</sup> *Ibid.* Some interest theorists reply by affirming that your brother *has an interest in* your fulfilling your promise to him, in which case (IT) will vest him with a claim-right against you. See, e.g. D. Lyons, 'Rights, Claimants, and Beneficiaries' [1969] reprinted in his *Rights, Welfare, and Mill's Moral Theory* (New York: Oxford University Press, 1994), 42–44; and M. Kramer, 'Rights Without Trimmings' in *DR* at 79–80.

<sup>17</sup> See above, n 15; cf. H. Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994) at 61–62. Kramer protests that it begs the question to deny that your sister has a claim-right against you (*DR* at 66–68). Cf. Lyons at 37–41.

More generally, the objection is that, intuitively, there is a limit to the number of people to whom duties are owed, and so to the number of claim-rights that arise, under a third party promise or contract. Indeed, for many duties, there is an intuitive limit to the number of people to whom the duty is owed. It is therefore a condition of adequacy on (IT) that its generalization of the notion of a claim-right suitably limit the number of people it classifies as correlative claim-holders. For the most part, however, this condition of adequacy has not been met.<sup>18</sup>

By way of illustration, let us consider a promising defence of the Interest theory recently offered by Matthew Kramer.<sup>19</sup> To his credit, Kramer confronts the central problem head on, explicitly acknowledging that

we have to distinguish the relevant beneficiary from other people whose well-being may be advanced by the execution of the contract. . . . [Must the Interest theory] ascribe a right to anyone who might benefit from the carrying out of the contract? If the answer here were 'yes', then the Interest Theory would merit no further consideration as a serious theory of rights (*DR*, pp. 80–1).

The theory Kramer defends is somewhat different from (IT). In particular, it offers different sufficient conditions for holding a claim-right. Kramer adapts his preferred sufficient conditions from Bentham's test for the assignment of rights under a law, as glossed by Hart ('LR', pp. 177–9). According to Hart, Bentham's test identifies holders of a claim-right correlative to a given duty by asking what findings are *necessary* to establish a breach of that duty by the duty-bearer. In particular, it asks whether detriment to the candidate right-holder is necessary to establish a breach. Kramer adapts the test by substituting 'sufficient' for 'necessary' (*DR*, pp. 81–2).

Thus, on Kramer's test, if detriment to X is *sufficient* to establish a breach by the duty-bearer, then X holds a correlative claim-right and otherwise not (*DR*, p. 81). In terms of our example, we are to ask what findings are sufficient to establish that you have breached your duty to pay your sister £100. Since proof that *your sister* suffered the detriment of 'not having been paid £100 by you' suffices to establish that you breached this duty, it follows on Kramer's test that she holds a claim-right correlative to your duty. By contrast, proof that *her child* suffered the detriment of 'not having been given a £100 present' does not suffice to establish a breach of your duty. Hence, the child does *not* hold a correlative claim-right. So Kramer's test certainly rules some beneficiaries out as claim-right holders; and may even seem to draw the line in the right place.

Appearances, however, can be deceiving. To begin with, we should ask how, on Kramer's test, your brother—the promisee—qualifies as a claim-right holder.

<sup>18</sup> McCormick replies that the third party objection can also be re-modelled to tell against the Will theory, and thus proves too much ('RL' at 208–9). As it happens, his re-modelling is not effective. But even if it were, it would still not show that (IT) had itself satisfied the condition of adequacy.

<sup>19</sup> M. Kramer, 'Rights Without Trimmings' in *DR* at 66–68 and 79–84.

Presumably, it is because of his interest in seeing his wishes fulfilled (cf. *DR*, pp. 79–80). The idea is that proof of your brother's detriment of not seeing his sister get her £100 will suffice to establish a breach of your duty. But it is not clear that this will do the trick. Imagine that your grandmother has an interest in seeing her grandchildren behave themselves, get benefits, and so on. Will proof of the detriment to her—of not seeing her granddaughter get her £100—suffice to establish a breach of your duty? If so, your grandmother will also hold a correlative claim-right.

An adequate test of claim-right holding should draw the line between your grandmother and your brother. Yet it is not clear how Kramer's test can exclude the former without also excluding the latter. I can make out three options, none of them satisfactory. First, your grandmother may be excluded because she is not a party to the promise. But this fails to distinguish her from your sister, who is said to hold a correlative claim-right. Second, your grandmother may be excluded because her interest is parasitic—it smuggles in reference to your sister's detriment. But this fails to distinguish her from your brother, who would otherwise fail to hold a correlative claim-right.<sup>20</sup> Third, your grandmother may be excluded because her interest is not important enough. But the one clear way of interpreting this option is not available to Kramer. One might require the detriment to be so important that proof of it is necessary to establish a breach of the relevant duty. However, this would be to adopt precisely the structure of Hart's gloss on Bentham's test, which Kramer explicitly rejects.

Furthermore, if we examine the notion of what 'suffices to establish' a breach a little more closely, a different sort of trouble soon emerges. Consider the special case where your brother waives your duty to pay your sister.<sup>21</sup> In this case, your sister's detriment is not 'sufficient to establish' a breach of your duty. Having once seen this, we should then recognize that her detriment does not *suffice* even when your brother does not waive your duty, since he might have done.<sup>22</sup> In fact, even *your brother's* parasitic detriment does not really suffice to establish your breach, since detriment on his part does not, strictly speaking, entail that he did not waive your duty. Kramer's test therefore fails to vest the one uncontroversial claim-right holder—the promisee—with a claim-right against you.<sup>23</sup>

<sup>20</sup> Changes in the description of your brother's interest can be mirrored by changes in your grandmother's interest. In principle, the description of his interest should not explicitly refer to the breach or fulfilment of your promise, since this would make Kramer's test vacuous (cf. n 23). For that matter, however, your grandmother may also have an interest in promises to her grandchildren being kept.

<sup>21</sup> This case is also discussed by H. Steiner, who makes somewhat different use of it. H. Steiner, 'Working Rights' in *DR* at 285–86.

<sup>22</sup> Kramer later mentions, but does not resolve, a related issue about when a given proof is sufficient (*DR* at 90–91).

<sup>23</sup> Kramer does sometimes slip in the qualification 'unexcused detriment' (e.g. *DR* at 82–83), which might be exploited to cover cases where the duty is waived. But this makes his test vacuous. Compare the equivalent notion of a 'detriment in breach', which explicitly drains the test of content.



## 4.

One version of the Interest theory is plausibly regarded as exempt from the third party beneficiary objection. I think Joseph Raz's version may be seen as having solved the problem, which is somewhat ironic, since as far as I know he does not discuss it.<sup>24</sup> Still, let me briefly adapt his definition of rights to this end (*MF*, p. 166):

(RZ) Y has a claim-right against X that X  $\phi$  just in case, other things being equal, an aspect of Y's well-being (his interest) is a sufficient reason for holding X under a duty to  $\phi$ .

The threshold requirement that Y's interest must itself suffice, other things equal, to justify X's duty may be regarded as formidable enough to set a suitable limit on the number holding a claim-right correlative to X's duty to  $\phi$ . Is your nephew's or niece's interest in the £100, for example, itself sufficient to ground a duty on your part, other things equal, to pay your sister? Probably not.

So far, so good. However, Raz's account faces another problem, as he himself concedes.<sup>25</sup> I believe Raz's solution to this other problem is objectionable. Moreover, it is arguable that he is forced into the objectionable aspect of that solution by the structure of his solution to the third party beneficiary problem. Thus, while (RZ) avoids the objection against (IT), the price it ultimately pays for its solution is unacceptably high.

The problem Raz admits he faces is that of explaining the apparent mismatch between the weight of many rights and the weight of the right-holder's corresponding interest. The weight of the claim-right—that is, the weight of its correlative duties—is often, so it seems, much greater than the weight of the right-holder's interest. Consider, for example, a journalist's claim-right to withhold the names of her sources (cf. *MF*, pp. 247–48). We may suppose that the duties that correlate with this claim-right—duties that protect the freedom of the press—have great weight. By contrast, the interest an individual journalist has in protecting her sources is often, if not always, comparatively slight. But it is unclear how this can be, given that on (RZ) the journalist's interest is meant to be *sufficient* to justify the correlative duty (not to require journalists to disclose their sources).

Raz's solution may be described, in a nutshell, as a piggy-backing solution: He allows that, sometimes, the importance of an individual's interest can, for the purposes of assessing its contribution to the justification of someone else's duty, be *augmented* by taking the interests of third parties into account. Specifically, it can be thus augmented just in case the interests of the third parties are served precisely by serving the relevant interest of the individual in question. That is, the importance of the individual's interest can be augmented just in case the

<sup>24</sup> J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) [hereinafter referred to as *MF*].

<sup>25</sup> See J. Raz, 'Rights and Individual Well-being' in his *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 45 (cf. *MF* at 187). My discussion in the remainder of this section refers to this article.

third parties' interests can piggy-back on it; and then its importance is augmented by crediting it with the weight of the piggy on its back.

Applied to the case of the journalist, Raz's solution is to allow the general public's interest in a free press—including its interest in living in the kind of society made possible by freedom of the press—to weigh in favour of the journalist's claim-right; and to do so just because the public's interest is served precisely by securing the journalist's own interest in protecting her sources. More generally, Raz argues, the great weight of many fundamental civil and political rights is to be explained by the fact that the distinctive common goods of a liberal culture are riding piggy-back on the individual interests that correspond to these rights.

My objection to this solution is that it instrumentalizes the individual's status as right-holder.<sup>26</sup> By using the individual to enable others to grace their cause with the banner of right-holding, Raz's solution fails to take the *status* of right-holder seriously enough. Assignments of this status—that is, the vesting of an individual with a given claim-right—should reflect nothing apart from the *intrinsic* standing of the individual who is to possess it.<sup>27</sup> Consequently, if claim-rights are vested on the basis of the *weight* of an individual's interest, as they are on (RZ), then the individual's interest has, for these purposes, to be weighed simply on its own. In the case of the journalist, that is to say: if her claim-right to protect her sources is to prevail in the social calculus, and prevail *on account of the journalist's status* as a right-holder, that must be because the journalist's *own* interest has sufficient weight to defeat the interests others have in learning the identity of her sources.<sup>28</sup> If the journalist's interest lacks this weight, then either she has to reveal her sources or, more plausibly, freedom of the press will have to be regarded as (at least, largely) a matter of net social utility, *rather than* as a matter of individual rights.

Notice that insisting that the status of right-holder reflect only the intrinsic standing of the relevant individual leaves it entirely open what significance that standing actually has. In particular, it remains open whether an individual's own interest (always) has sufficient weight to prevail against the onslaught of the social calculus. Perhaps no individual's interest can be worth *that* much. I do not know—that is

<sup>26</sup> Compare Simmonds, *DR* at 195–200; and Thomson at 152.

<sup>27</sup> At a minimum, this requirement is a *desideratum* for a theory of claim-rights, one that derives from the aim of preserving the connection between the language of rights and liberal individualism. In its weakest version, my argument against (RZ) is that it fails this *desideratum*, whereas (as we shall see) my hybrid alternative satisfies it. I actually believe, more strongly, that the requirement stated in the text is a condition of adequacy on a theory of claim-rights. But I shall not argue for this here.

<sup>28</sup> The interest of the journalist that must have sufficient weight here is her interest as an individual *person* (albeit, one who is a journalist). As an anonymous referee has observed, the individual journalist might also be thought to have interests as the occupant of a certain office (i.e. that of journalist), interests that are *independent* of her interests as a person and that reflect—by *definition* (of the office), rather than by instrumental alignment—the interests third parties have in a free press. We need not decide whether this alternative analysis provides a better account of the freedom of the press. Even if it does, the account it provides either makes no appeal to the journalist's *status as a right-holder* (as distinct from her status as an office-holder) or else it, too, makes assignments of that status reflect something in addition to the journalist's intrinsic standing as an individual. In the first (more likely) case, the account on offer is not enough like Raz's account to help him; and, in the second case, too much like it to satisfy our *desideratum*.

another matter. But if it is not worth that much, we should not pretend that individual claim-rights have as much weight as we ordinarily suppose they do.<sup>29</sup> Moreover, a theory of rights should not vindicate that pretence on the underside of a piggy.

(RZ) avoids the objection confounding (IT) because of its requirement that Y's interest *suffice*, other things equal, to justify X's duty in order for Y to hold the correlative claim-right. However, given the mismatch between the great weight ordinarily attached to the duties that correlate with certain claim-rights and the limited weight that can be justifiably accorded to any one individual's interests, an account with (RZ)'s structure faces a dilemma. *Either* Y's interest is weighed strictly on its own *or* it is not. If it is, then X's duty must itself have limited weight, which contradicts our ordinary assumption in certain important cases. If it is not, then the correlation of X's duty with Y's claim-right is due to an instrumental—albeit non-fortuitous—alignment between an individual's interests and those of certain third parties. Raz appears to embrace the second horn of this dilemma. But neither strikes me as very comfortable.

## 5.

It seems to me, then, that we lack a satisfactory solution to the debate between the Will theory and the Interest theory. We therefore lack a satisfactory understanding of the correlation between the right-holder and the duty-bearer that is constitutive of claim-rights. I should like to propose a new understanding. The account I propose is a hybrid of the Will theory and the Interest theory. I shall first present a rather crude hybrid, which is nevertheless adequate to meet the objections faced by (WT) and (IT). Then I shall refine my proposal, and explain how it avoids the objection I made to (RZ).

Consider a *Simple Hybrid* model of claim-rights.

(SH) Suppose X has a duty to  $\phi$ . Y has a claim-right against X that X  $\phi$  just in case:

*either* Y has the power to waive X's duty to  $\phi$

*or* Y has no power to waive X's duty to  $\phi$ , but (that is because) Y's disability advances Y's interests on balance.

This model has various advantages over (WT). First, (SH) can handle classical inalienable rights—for example, a claim-right not to be enslaved or a claim-right not to be subject to unsafe working conditions. In these cases, Y's disability is imposed to secure Y's own position on balance and is standardly taken to strengthen Y's claim-right. Second, (SH) can handle various forms of incompetence to waive a duty without having to dissolve the correlative claim-right. Here, again, the disability to waive the relevant duties secures the person's own

<sup>29</sup> Either that or we should reject (RZ)—we should deny, that is, that claim-rights are vested on the basis of the sufficiency of an individual's interest to justify the correlative duty. But this option is not open to Raz.

position on balance. In both cases, Y qualifies as a claim-right holder under the second disjunct.

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

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

There is also a generic advantage to (SH), that is, an advantage with respect to both the Will and the Interest theories. (SH) gives us some independent purchase on the question of whether there are individual *claim-rights* under the criminal law. This question is standardly treated as a matter of bare judgement. Those who think there obviously are claim-rights under the criminal law treat their judgement as a basis for criticizing the Will theory,<sup>30</sup> whereas those who think there plainly are not claim-rights under the criminal law, at least not for the most part, treat their judgement as a basis for criticizing the Interest theory.<sup>31</sup> On (SH), the answer turns on the reasons for vesting control over criminal law duties in the public prosecution service. If the public prosecutor has this control because that is what best secures the interest of individual members of the public, then criminal law duties do correlate with individual claim-rights. But if the justification for vesting control with a public prosecutor is, for example, to secure consistency in the administration of justice, then criminal law duties do not correlate with individual claim-rights.

What if both justifications apply? Then we should consider whether a given justification would itself be sufficient to overturn an opposite verdict from the other. Say, for example, that individuals' interests in security are best advanced by vesting individuals with the power to waive criminal law duties, but the administration of justice is best advanced by vesting that power in the public prosecutor instead. In this case, which justification would prevail? If the latter would prevail, then even if individuals' security and the administration of justice are

<sup>30</sup> For example, MacCormick in 'RL' and Kramer in 'Rights Without Trimmings'.

<sup>31</sup> For example, Hart in 'LR'.

both advanced by vesting control in the prosecution service, the latter justification is what settles the question. According to (SH), therefore, criminal law duties do *not* correlate with individual claim-rights, since individuals are not disabled from waiving those duties *because* it advances their interests on balance.

Notice that, on this view, the *weight* of the relevant duties is irrelevant to the question of whether they correlate with claim-rights (at least, it is not a sufficient condition). There is no incongruity, it seems to me, in saying that weighty duties that are not owed to individuals do not correlate with individual claim-rights.

Let us now consider a series of pair-wise comparisons between (SH) and various complications on it that serve to identify defects in (SH) upon which we can improve. The variations from (SH) appear in bold face.

*Variant A.* **Suppose X is duty-bound to  $\phi$ .** Y has a claim-right against X that X  $\phi$  just in case:

*either* Y has the power to waive **a duty of X's** to  $\phi$

*or* Y has no power to waive **a duty of X's** to  $\phi$ , but (that is because) Y's disability advances Y's interests on balance.

(SH) may suggest or imply either that X can only have one duty with a given content—for example, to  $\phi$ —or that, in order for X to owe Y a duty to  $\phi$ , Y must have the power to bring it about that X has no duty to  $\phi$  at all. By contrast, we ordinarily suppose that someone can owe duties with identical contents—even identical non-indexical contents—to different people. For example, I can owe both my fiancée and my mother a duty to make it to the church on time. Variant A makes clear that X's owing Y a duty to  $\phi$  does not exclude X's also owing Z a duty to  $\phi$ . Likewise, Y's waiving X's duty to  $\phi$  need not bring it about that X has no duty to  $\phi$ . It may well be, for example, that X still owes Z a duty to  $\phi$ . This 'limit' on Y's power to waive a duty of X's to  $\phi$  does not prevent Y's power from making it the case that at least one of X's duties to  $\phi$  is owed *to* Y; and so does not prevent Y from holding a correlative claim-right.

*Variant B.* Suppose X has a duty to  $\phi$ . Y has a claim-right against X that X  $\phi$  just in case:

*either* Y has **some measure of control** over X's duty to  $\phi$

*or* Y has no **control over** X's duty to  $\phi$ , but (that is because) Y's disability advances Y's interests on balance.

Recall that Hart distinguishes three levels of control in the 'full measure' of control over a duty recognized by the Will theory. (SH) fixes narrowly on the first level of control, whereas variant B ranges more widely. On (SHB), the primary non-contractual beneficiary of a contract—C in my earlier example—may also qualify as a right-holder if he or she has the power to enforce the duty, even if he or she lacks the power to waive the duty itself (cf. Hart, 'LR', p. 187).

*Variant C.* Suppose X has a duty to  $\phi$ . Y has a claim-right against X that X  $\phi$  just in case: either Y has the power to waive X's duty to  $\phi$  or **Z has the power** to waive X's duty to  $\phi$ , but (that is because) **so empowering Z** advances Y's interests on balance.

When Y is competent to waive X's duty, but nevertheless disabled from doing so, (SH) allows Y to qualify as a right-holder under its second disjunct as long as Y's disability secures her own position on balance. In these cases, Y's position is secured, on balance, by preventing her from exercising this power to her own detriment. When Y is *incompetent*, there is no need to *prevent her from* exercising any such power. (SH)'s second disjunct is trivially satisfied, and so functions simply to preserve Y's correlative claim-right. But (SH) thereby appears to assimilate cases of incompetence to those of inalienability, by making no provision for X's duty ever to be waived. This leaves open the case in which Y is incompetent to waive X's duty, but where Y's interests are advanced on balance by vesting some third party, Z, with a power to waive X's duty. (SHC) makes it explicit that powers of waiver can be exercised in trust and that those on whose behalf they are placed in trust can still qualify as claim-right holders.<sup>32</sup>

*Variant E.* Suppose X has a duty to  $\phi$ . Y has a claim-right against X that X  $\phi$  just in case:

**Y's power (or disability) to waive X's duty to  $\phi$  matches (by design) the outcome (having the power or not) that advances Y's interests on balance.**

This has two advantages over (SH). First, it tidies up the disjunctive formulation. The parenthetical reference to design is meant to preserve (SH)'s sensitivity to the justification underlying Y's position. Second, the one small change in content effected by the tidying is actually an improvement. On (SH), possession of the power to waive X's duty to  $\phi$  suffices to qualify Y as a claim-right holder, *regardless* of whether having that power advances Y's *own* interests on balance. By contrast, on (SHE), having the power to waive X's duty qualifies Y as a claim-right holder *only if* having it advances Y's own interests on balance (and that is what justifies Y's power). Thus, someone who exercises a power of waiver *in trust* for someone else—for example, either a surrogate decision-maker in clinical care or a parent—will thereby count as a claim-right holder on (SH), but not on (SHE). In preferring (SHE), I assume that the surrogate or parent is vested with a power of waiver in order to advance *someone else's* interests on balance—namely, those of the incompetent patient or minor. (SHE) has a further advantage over (WT), which will agree with (SH) here.

Although the change in content introduced by variant E is no doubt an improvement, it also mildly complicates the hybrid theory's solution to the third

<sup>32</sup> We might also consider a *variant D*: the same as (SHC), except that 'Z' is interpreted to cover both third parties and the *null party*, i.e. 'no one'. (SHD) would extend the rationale in (SHC) to cover the case in which Y's interests are advanced on balance when no one at all has the power to waive X's duty to  $\phi$ .

party beneficiary problem. I shall explain the point simply in relation to the status of the promisee (i.e. the second party). In discussing (SH), I said we could assume that the promisee has the power to waive the promisor's duty to fulfil the promise. Since the warrant for this assumption is that it reflects a standard feature of promising as ordinarily understood, I shall continue to regard it as an assumption we are entitled to make. As previously explained, the assumption suffices, on (SH), to qualify the promisee as a claim-right holder. However, it does not suffice on (SHE). On (SHE), as we have just seen, the promisee (like anyone else) qualifies as a claim-right holder *only if* her power to waive the promisor's duty advances her own interests on balance (and is justified on that basis).

The mild complication, then, is that the adequacy of variant E's solution to the third party beneficiary problem depends on the justification for empowering the promisee to waive the promisor's duty; and this, in turn, will depend upon our preferred theory of promising. To avoid having to enter into that subject here, let me re-state the complication as follows: Variant E constrains the theory of promising (or contracts) to empower the promisee to waive the promisor's duty *because* the promisee's own interests are advanced on balance by having that power. I describe it as a *mild* complication because it seems to me that any plausible theory of promising will plainly satisfy this constraint.<sup>33</sup>

## 6.

We can now roll the Simple Hybrid model and its variants (SHA)–(SHE) into an omnibus formulation, or *Complex Hybrid* model:

(CH) Suppose X is duty-bound to  $\phi$ . Y has a claim-right against X that X  $\phi$  just in case:

Y's measure (and, if Y has a surrogate Z, Z's measure) of control over a duty of X's to  $\phi$  matches (by design) the measure of control that advances Y's interests on balance.

I maintain that (CH) avoids Raz's problem of instrumentalizing the status of claim-right holder. To see this, we should first notice that (CH) treats the question of whether a given duty correlates with an individual's claim-right as *strictly independent* of the question of what justifies the given duty.<sup>34</sup> In particular, the question of correlation—and hence, assignment of the status of right-holder—is independent of what justifies either the existence *or the weight* of the given duty.

Having disconnected these questions, (CH) then confines the trade-offs affecting whether an individual is empowered to waive a given duty to the sphere of that same person's interests. The balance of interests that settles this question

<sup>33</sup> Or, more precisely, either the correct theory of promising will satisfy this constraint or it will license us to abandon the ordinary assumption that the promisee has a claim-right against the promisor. Notice that the constraint says nothing about how the *promisor's duty* has to be justified. In relation to the central burden of a theory of promising, then, it is no constraint at all.

<sup>34</sup> Indeed, all the versions of my hybrid begin with some such formulation as 'Suppose X is duty-bound to  $\phi$ '. This is meant to signal that the justification for the duty to  $\phi$  is taken as given.

is nothing but a balance of the individual's *own* interests. Thus, the trade-offs that affect an individual's *status as a claim-right holder*, as someone to whom a particular duty is owed, do not have to be aligned with the interests of third parties. Nor need they be aligned with any other aspect of the larger trade-offs inherent in the social calculus. The perils of instrumentalization are thereby avoided.

Of course, the nature of a particular duty's justification will inevitably constrain whether a given individual can *justifiably be empowered* to waive the duty in question. Thus, Y will be justifiably empowered to waive X's duty to  $\phi$  only if two further conditions are both satisfied:

- (i) the justification of X's duty to  $\phi$  is consistent with X's not  $\phi$ -ing; and
- (ii) Y is a good judge of whether condition (i) holds in any given case.

(If we want Y to be uniquely empowered to waive X's duty, then we have to add:

- (iii) Y is the *only* person who is a good [enough] judge of whether condition (i) holds in any given case.)

Now there are various cases in which these further conditions may be satisfied. The most familiar case is where the decisive consideration in the justification of X's duty to  $\phi$  simply *is* what advances Y's interests on balance. Given the traditional liberal dogma that an individual is the best judge of what advances his or her own interests, Y will easily satisfy condition (ii). Indeed, Y will also satisfy the additional condition (iii), and hence be uniquely empowered to waive X's duty.

A second case in which conditions (i) and (ii) may be satisfied is where third party interests play a significant role in the justification of X's duty to  $\phi$  (for example, in explaining its great weight), but where these third party interests are served precisely *by advancing Y's interests on balance*. We might call this the 'constrained piggy-back scenario' because it describes a sub-set of Raz's piggy-back cases—namely, those that also satisfy constraints (i) and (ii). Strictly speaking, this is simply a subtle instance of the previous case.<sup>35</sup> It therefore avoids concerns about instrumentalizing the individual's status as right-holder, since the decisive balancing of interests for vesting Y with control over X's duty remains a balancing of Y's own interests. Notice that, here, the *weight* of X's duty to  $\phi$  depends on the interests of third parties, but Y's status as a claim-right holder according to (CH) does *not*. Y's status is independent of any alignment with the interests of third parties.

Finally, there may be cases where the justification of X's duty to  $\phi$  has nothing to do with Y's interests, but where conditions (i) and (ii) nevertheless hold on account of Y's excellence in judgement. Y may be a superb judge of social utility, for example. These cases may well raise concerns about instrumentalizing

<sup>35</sup> In this case, the decisive considerations *justifying* X's duty are the third party interests. *Ex hypothesi*, however, these decisive interests are served precisely by serving the balance of Y's own interests. That makes the balance of Y's *interests* decisive for justifying X's duty, which is why this is actually an instance of the previous case. See also the discussion below of the artist's right of integrity.



Y in some fashion. However, we need not worry about them, since they are *not* cases in which (CH) vests Y with a correlative claim-right.

It may be useful to consider an example of the constrained piggy-back scenario. For technical reasons,<sup>36</sup> the journalist's case discussed earlier is not really suitable to examine in this context. So let us consider a structurally similar case instead—say, the claim-right of artists to the integrity of their work.<sup>37</sup> The right of integrity correlates with a duty not to distort, dismember, or misrepresent a work of art. It was violated, for example, by the owner of a refrigerator, bought at a Paris charity auction, on six panels of which Bernard Buffet had painted a composition. Although Buffet considered the six panels to be a single work (and had signed only one of them), the owner offered one of the panels for sale at another auction half a year later. (Buffet sued to prevent the separate sale of the panel and won).

There are various interests served by the right of integrity. Clearly, these include the interests of individual artists, such as their interests in communication and in reputation. But the right of integrity also serves significant third party interests. In addition to audience interests, these third party interests importantly include collective social interests—for example, the interest in preserving a culture's artistic heritage.<sup>38</sup> Together, the common good of an artistic heritage and the audience interests ride piggy-back on the individual artist's interest, since they are served precisely by protecting that individual's (e.g. Buffet's) own interest in communication and reputation.<sup>39</sup>

Does the right of integrity illustrate the *constrained* piggy-back scenario, more specifically? It depends, in the first instance, on whether the common good of an artistic heritage or the audience interests are consistent with individual artists' *waiving the duty* protecting the integrity of their own works when *they* see fit. Suppose the third party interests were not consistent with this outcome. In that case, we would have to give up the idea that artists have a claim-right to the integrity of their work. For artists should then be disabled from waiving the relevant duty and their disability would *not* be designed to advance the balance of their own interests. Rather, it would simply be required by the superior weight of third party interests inconsistent with artists' having the power to waive this duty. Hence, on (CH), individual artists would have no claim-right.

<sup>36</sup> The journalist's right to withhold the names of her sources is actually a cluster-right: a combination, that is, of a liberty-right to withhold (or to disclose) these names and of a claim-right not to be required to disclose them. This is a familiar arrangement, in which the claim-right serves to protect the liberty-right. However, it makes the relation between a power to waive the correlative duty (not to require disclosure) and the journalist's primary interest here (i.e. the liberty to withhold or disclose the relevant names) unnecessarily complicated for our purposes. This is less of an issue for Raz, for whom the specific notion of a claim-right, as distinct from a liberty-right, is not at the forefront of attention.

<sup>37</sup> For discussion of this right, see (e.g.) J. H. Merryman, 'The Refrigerator of Bernard Buffet' (1976) *Hastings Law Journal* 27 at 1023–49. The details of the case that follow in the text appear at 1023. I owe the example and the reference to Charles Beitz.

<sup>38</sup> Compare Merryman, at 1041: 'The machinery of the state is available to protect 'private' rights in part because there is thought to be some general benefit in doing so. Thus the interests of individual artists and viewers are only a part of the story. Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor, or improve the work of art is to falsify a piece of the culture'.

<sup>39</sup> To tighten the parallel with the journalist's claim-right, we can assume, plausibly, that these third party interests have a greater weight in the social calculus than the interests of individual artists.

But now suppose, not implausibly, that the common good and the audience interests are (at least, on balance) actually consistent with individual artists' being empowered to waive the duty not to distort, dismember, or misrepresent their work. From the standpoint of the social calculus, there would no longer be an impediment to artists' having this power. However, while it may then be justifiable to empower artists to waive this duty, that does not suffice to vest them with a *claim-right*: On (CH), it still matters whether this power of waiver advances their own interests on balance. For simplicity, let us say that artists have the power to waive the relevant duty and that (is because) it advances their interests on balance.<sup>40</sup> Then (CH) will assign them a claim-right to the integrity of their work; and this claim-right will illustrate the constrained piggy-back scenario.

The complications here highlight an important point. When the status of claim-right holder is not treated instrumentally, piggy-back riding is a fairly precarious enterprise. To stick with the right of integrity, the third party interests must be aligned with more than an artist's interest in actually protecting the integrity of her work. They must be aligned, more precisely, with the sub-alignment of the artist's own balance of interests on *having the choice* to protect that integrity or not. The artist's freedom of choice must serve *both* the balance of her own interests *and* (the balance of) the common good and audience interests. Without the first alignment, the artist will not qualify as the correlative claim-right holder on (CH); and without the second alignment, it will not be justifiable to empower her to waive a duty of such great weight. On the other hand, if this elaborate alignment of interests does hold, then the duties protecting the artist's interests can have a greater weight than the artist's interests themselves justify, and this without instrumentalizing her status as the correlative claim-right holder.

<sup>40</sup> In some jurisdictions (e.g. France), the right of integrity is actually partially inalienable. The artist lacks the power to waive the duty not to distort her work, but retains the power to enforce the duty (as Buffet did) or not. This arrangement remains in the spirit of (CH), since it reflects the same concern for the balance of the artist's interests (cf. Merryman, at 1044). (We need not enquire here what measure of control over this duty best satisfies that concern.)