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Wrongs, Rights, and Third Parties

Nicholas Cornell

University of Michigan Law School, cornelln@umich.edu

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In philosophical and legal arguments, it is commonly assumed that a person is wronged only if that person has had a right violated. This assumption is often viewed almost as a necessary conceptual truth: to be wronged is to have one's right violated, and to have a right is to be one who stands to be wronged. I will argue that this assumption is incorrect—that having a right and standing to be wronged are distinct and separable moral phenomena.

My argument begins from cases in which third parties are affected by the violation of someone else's rights. I will introduce four general types of cases in which some third party seems to be wronged even though no right of hers is violated. These cases arise because we have important commitments and practices associated with having a right and with being wronged—commitments and practices that do not always line up with one another. Only by recognizing that rights and wrongings can come apart, I argue, can we preserve the roles that both moral phenomena play in our lives.

In addition to more accurately capturing our moral lives, I also believe that this recognition may be philosophically fruitful. It may add a new layer to recent work on the directedness of moral obligations. It may offer a path forward in the stalled debate between interest theories and will theories over the nature of rights. And, practically speaking, I believe that it can safeguard against certain common and tempting yet problematic inferences.

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I. RIGHTS AND WRONGS

Certain relationships connect one party with another party morally. Michael Thompson, for example, describes certain features of morality as joining the agents in a “practical nexus,” wherein agents are like “opposing poles of an electrical apparatus” with “an arc of normative current passing between the agent-poles.”¹ Somewhat differently, Stephen Darwall describes moral reasons as “second personal” in that they presuppose a relationship of authority of one agent with regard to another agent.² The idea is that morality does not just bind agents, but, in many important cases, it binds one agent *to another agent*.

The interpersonal character of morality includes both forward-looking and backward-looking elements. That is, directedness to others inflects both how we deliberate about what we ought to do going forward and how we assess and react to actions after they have been performed.

Leading up to an action, our moral relationships with others shape what reasons we have for acting and how we take these reasons into our deliberation. A person may owe it to another person to act in a particular way. In such contexts, the person to whom the action is owed has a sort of moral entitlement, which is frequently illustrated by that person’s ability to claim, waive, control, or even transfer the duty in question. We often characterize this relation by saying that one person has a *right* that another act in a particular way. The right describes the way that its bearer constrains how others ought to act; or, put another way, it describes a special kind of reason for action.

After an action has been performed (or omitted), a person may be in a position to hold another accountable for a failure. It may be apt for the victim to resent the transgressor, complain based on the injury, demand compensation, or seek to forgive the trespass. The transgressor might apologize, offer restitution, or feel the guilt of having committed an injustice. We may describe such relationships by saying that one person has *wronged* another. When we say this, we mean more than simply that the person has acted *wrongly*—that is, done what she ought not do.

1. Michael Thompson, “What Is It to Wrong Someone? A Puzzle about Justice,” in *Reason and Value*, ed. R. Jay Wallace, Samuel Scheffler, and Michael Smith (Oxford: Oxford University Press, 2004), p. 335.

2. Stephen Darwall, *The Second Person Standpoint: Morality, Respect, and Accountability* (Cambridge, Mass.: Harvard University Press, 2009).

Rather, the person has done *a wrong*³ *to the other person*—that is, there is someone who has been wronged. When someone is wronged, a particular moral relationship exists between parties with regard to some past action.

One question that might reasonably be posed is that of how these forward-looking and backward-looking relations are connected with each other. What is the relationship between our *ex ante* moral entitlements and the moral complaints that we can make *ex post*? Or, more simply, how are rights related to wrongs (that is, wrongings)?

Most philosophers, I believe, assume a straightforward answer to this question: rights and wrongs are opposite sides of the same coin—mirror images of the same moral relation. According to this view, our *ex ante* and *ex post* moral relations are merely different perspectives on the same underlying connection. To put the point more precisely, philosophers tend to accept something like the following claim: X wrongs Y by ϕ -ing if and only if Y has a right that X not ϕ .

Here is a smattering of examples—from philosophical and legal thinkers holding otherwise quite diverse conceptions of rights and morality—that represent this common assumption:

- DAVID OWENS: “What is it to do wrong in a way that wrongs someone? If X would wrong you by deceiving you then you have a right against X that he not deceive you; X *owes* it to you not to deceive you, he has an obligation to *you* [to] be truthful to you. And

3. As a purely terminological point, I generally take the word “wrong” in its noun form—for example, “she committed a wrong”—to mean an instance of wronging. In this way, the use as a noun is associated with the use as a transitive verb—for example, “she wronged him.” Thus, wrongs, in my usage, are directed against someone. This use should be contrasted with uses associated with the adjective “wrong”—the substantival use or use to imply simply an instance of doing something that is wrong—which would not necessarily imply injustice directed against someone. In other words, I distinguish “she did a wrong” from “she did wrong.” Not everyone agrees with this usage. David Owens, for example, distinguishes between “wrongs” and “wrongings.” See David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012), p. 45. So, for Owens, “she did a wrong” means the same thing as “she did wrong,” neither one implying “she wronged someone.” Out of an abundance of caution, I shall try to use the gerund “wronging” where there might be significant confusion. But the reader should understand that I generally use the noun phrases “a wrong” and “a wronging” interchangeably, both meaning more than just a wrong act.

owing *you* the truth is different from merely being obliged to be truthful.”⁴

- G.E.M. ANSCOMBE: “A wrong is an infringement of a right. What is wrong about an act that is wrong may be just this, that it is a wrong.”⁵
- E. J. BOND: “If you have a *right* to something from me, then you can demand of me that I not violate that right, and if I do violate it I have done you a *wrong*. . . . The preceding . . . showed only the interconnectedness of certain ideas that exist in the common understanding. . . . [I]f there is such a thing as injustice—and we know there is—then there are rights, for injustice consists in the violation of rights.”⁶
- BENJAMIN N. CARDOZO: “What the plaintiff must show is ‘a wrong’ to herself, i.e., a violation of her own right. . . . [T]he commission of a wrong imports the violation of a right. . . . Affront to personality is still the keynote of the wrong.”⁷
- JEREMY BENTHAM: “The distinction between rights and offences is therefore strictly verbal—there is no difference in the ideas. It is not possible to form the idea of a *right*, without forming the idea of an *offence*.”⁸
- JUDITH JARVIS THOMSON: “I will use ‘Y wronged X’ and ‘Y did X a wrong’ only where Y violated a claim of X’s. So on my use of these locutions, they entail that Y acted wrongly; but they entail more than just Y acted wrongly—they entail that Y wrongly infringed a claim of X’s.”⁹

What all of these writers share is the same premise—taken for granted or essentially stipulated—that a wrong and a rights violation are one and the same thing.

I mean to reject this premise. One may be wronged, I will argue, without having a right that is violated. In other words, it is not the case

4. Owens, *Shaping the Normative Landscape*, p. 46.

5. G.E.M. Anscombe, “On the Source of the Authority of the State,” in *Authority*, ed. Joseph Raz (New York: New York University Press, 1990), p. 152.

6. E. J. Bond, *Ethics and Human Well-Being* (Malden, Mass.: Blackwell, 1996), pp. 199–200.

7. *Palsgraf v. Long Island Railroad Company*, 248 N.Y. 339, 343–44 (1928).

8. Jeremy Bentham, *A General View of a Complete Code of Laws*, in *The Works of Jeremy Bentham*, ed. John Bowring (Edinburgh: William Tait, 1843), 3:159.

9. Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), p. 122.

that X wrongs Y by ϕ -ing only if Y has a right that X not ϕ .¹⁰ In order to show this, I will appeal to cases in which some third party is injured by the violation of someone else's rights. My argument is that such parties can, at least sometimes, legitimately complain that they have been wronged. But their complaint need not be linked to some right of theirs. Rather, their complaint may simply take the form "You have acted wrongly and injured me as a consequence, and I now hold you accountable for my injury." Put another way, parties may sometimes be put in a special moral position to complain and seek justification *ex post*, not by conduct over which they could have asserted any rights claim of their own *ex ante*, but rather by conduct that was wrong for other reasons, like violating someone else's rights. In this way, I will argue, wrongs can come apart from rights.¹¹

What this divergence points to, I believe, is the fact that having been wronged by someone and having a right against someone constitute distinct relations. Wrongs are not merely the outline left where rights have been trampled. And rights are more than the glimmer of future liability. Eliding the two relationships such that they become reciprocals of each other fails to do justice to either one. The correct picture, I believe, is more complicated.

II. METHODOLOGICAL REMARKS

Before turning to the argument itself, I want to begin with some brief comments about methodology. My argument for giving up the assumption that there is a necessary connection between having a right and being wronged is driven both by concrete examples and by theoretical considerations about the different moral functions of these relations. These two aspects of the argument are deeply connected with each other. So, although I start with concrete examples, the examples are not meant to stand on their own. The force of the examples can be fully appreciated only in light of the roles that our moral relations play, which I hope to develop as the argument progresses.

10. Although I also am skeptical of the other half of the biconditional—X wrongs Y by ϕ -ing if Y has a right that X not ϕ —that claim is not the subject of this article.

11. My focus on third-party cases in this article is not meant to imply that these are the only cases in which wrongs and rights come apart. Quite possibly there are many others. I use these cases only as a way to show the possibility of divergence.

In the next four sections, I will describe four types of cases in which it appears that wrongs diverge from rights. In each type of case, I will suggest that some third party—the beneficiary of a contract, the downstream victim of a lie, the causally affected bystander, and the caring friend or family member—is wronged despite not having had any right of their own violated. Within each section, I will offer more than one example, and the aim is to suggest general patterns rather than to fixate on any one example. I do not expect a single example to be convincing on its own.

The reader may be initially inclined to preserve the correlation between wrongs and rights by explaining the examples differently. There are two natural tendencies. One is to maintain that the third party in question is not, in fact, wronged. If this is meant to engage my argument, then it should not be a merely linguistic point. One might stipulate that “wrong,” when used as a verb or noun, refers only to rights violations.¹² But this would not address the substantive claim that there is an important moral relationship—call it what one may—that is not reducible to having had a right violated. To maintain that the third party is not wronged in this sense, one must be prepared to say that she does not have a special moral standing to complain—that, morally, she is like any other bystander. I think that this is an unsatisfactory thing to say about the examples that I will offer. Taken collectively, the examples should suggest the implausibility of this linguistic response. We have settled commitments about wrongs—commitments about the appropriateness of complaint, resentment, apology, forgiveness, compensation, and so on—that cannot be captured by focusing only on rights violations. To deny flatly the phenomenon of wrongs to third parties is, I think, paying too great a cost to preserve theoretical neatness.

12. I think that, as a claim about English usage, this description is false. “Wrong” has a significantly broader use than exclusively for rights violations. For example: “But what if I think you killed Cock Robin, when as things turn out you did not? I think we might in the ordinary way say I wronged you and did you a wrong, though it can hardly be thought that my merely harboring that thought was my violating a claim of yours.” Thomson, *The Realm of Rights*, p. 122. I take the linguistic fact that the noun and verb uses of the word “wrong” are generally broader than only rights violations to strengthen my argument.

The other tendency, instead of denying that a wrong has been committed, is to search for rights that might explain these wrongs and preserve the correlation. This response is quite reasonable, and, as I describe the different examples, I will consider possible explanations along these lines. But, ultimately, I believe that this kind of response proves inadequate. And the reason it proves inadequate is that we have settled commitments about rights and claims—commitments about how they shape our action, our deliberation, and our expectations of one another. Positing rights to explain the cases that I describe will not, I believe, allow us to stay true to these settled commitments. The argument for this claim will not fully come out until Sections VII, VIII, and IX, but it nonetheless informs the intervening discussion of the four types of cases.

III. CASE ONE: THE THIRD-PARTY CONTRACT BENEFICIARY

I will come to the first type of case by way of a brief discussion of the two classic approaches to thinking about rights. Interest theories, beginning with Bentham and continuing on through Raz, begin with the basic idea that rights serve to protect the interests of the rightholder. That is, the interests or reasons in favor of placing a duty on one party are what generate the rights of the other party. To have a right, then, is simply to be the one whose interests are sufficiently strong, or of the appropriate character, to generate moral obligations protecting them. Speaking roughly, one might say that the interest theory takes the idea of a prohibition as primary, and infers the related concept of a right.¹³ Part of what is attractive about the interest theory is precisely that it reduces the idea of a right to the seemingly more basic ideas of interests and the injuries that can be suffered to those interests. A right is explained as a protection against certain injurious conduct of others.¹⁴

According to a different view—the will theory—a right grants the rightholder normative control over the subject matter of the right. As

13. See, for example, Joseph Raz: “Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties.” Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 181.

14. See, for example, Bentham: “The fundamental idea, the idea which serves to explain all the others, is that of an *offence*.” Bentham, *A General View of a Complete Code of Laws*, p. 160.

H.L.A. Hart put it, a rightholder is “a small-scale sovereign.”¹⁵ The idea is that to say that Y has a right that X do ϕ is to say that Y is the one who is morally entitled to determine what X does with regard to ϕ . By focusing on the idea of normative control, the will theory attempts to capture the sense in which the duties that correlate with rights are directional—that is, owed to another agent. Again speaking roughly, one might say that the will theory starts with the idea of claim-rights over others; wrongs derive from the violation of this control.

Because it describes a link between moral agents, the correlation between wrongs and rights crops up in some of the most famous arguments in favor of the will theory against the interest theory. H.L.A. Hart offers the following famous example to illustrate the failure of a simple interest theory of rights.

X promises Y in return for some favor that he will look after Y's aged mother in his absence. Rights arise out of this transaction, but it is surely Y to whom the promise has been made and not his mother who *has* or *possesses* these rights. Certainly Y's mother is a person concerning whom X has an obligation and a person who will benefit by its performance, but the person *to whom* he has an obligation to look after her is Y. This is something *due to* or *owed to* Y, so it is Y, not his mother, whose right X will disregard and to whom X will have done *wrong* if he fails to keep his promise, though the mother may be physically injured.¹⁶

Hart argues—I think convincingly—that the son (Y), and not the mother, is the rightholder in this case. That is, the contractual duty is owed to Y. It was to Y that the promise was made. That X did not owe the duty to the mother is evidenced by the fact that she would not control X's performance. She could not demand or excuse performance.¹⁷ In this regard, Hart's argument appears convincing.

15. H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), p. 183.

16. H.L.A. Hart, “Are There Any Natural Rights?” *Philosophical Review* 64 (1955): 180.

17. Hart goes on to make precisely this point: “And it is Y who has a moral *claim* upon X, is *entitled* to have his mother looked after, and who can *wave* the claim and *release* Y from the obligation.” *Ibid.*

But the last sentence of the quoted passage strikes me as, in part, false. Hart says, essentially, that the duty is something owed to Y, and that *therefore* it is Y *and not* the mother who stands to be wronged. The inference here is rather straightforward, and it is not hard to find the unstated premise. Hart assumes, without stating it, that a person stands to be wronged by the absence of something if and only if that something is owed to the person. This premise underwrites a valid inference: the duty is owed to Y, not the mother; one stands to be wronged only based on those things that one is owed; *therefore*, Y, and not the mother, stands to be wronged.

It seems to me, however, that we ordinarily would think that the mother stands to be potentially wronged. She has a stake in the duty that is owed to her son. Suppose that the promise to Y were broken. I think it would be mistaken to say that the mother has no complaint, as though she were akin to any other mere bystander. It would seem perfectly appropriate for her to resent X's failure in such a case. Her son arranged something for her, and as a result of X's malfeasance, she has not received it. Furthermore, one can imagine X apologizing to the mother or the mother forgiving X.¹⁸ It is worth noting that, in Anglo-American law, intended third-party beneficiaries do have standing to bring a complaint for breach of contract. In short, it seems to me that the mother has a particular moral standing to demand that X account for his action.

I believe these two descriptions of the case should be taken at face value. The mother *does not* have a claim-right against X—this is Hart's main point. But she *is* wronged by his action. If this is correct, then the unstated premise that underwrites Hart's inference must be incorrect. It is not the case that one stands to be wronged only by those matters in which one is owed something. Taking these descriptions seriously means giving up the theoretical assumption that rights and wrongs are inexorably linked.

One might, however, try to offer a different description that preserves the connection between wrongs and rights. In particular, one might suggest that the mother actually does have some sort of claim—something that is owed to her—though perhaps in some more subtle way. One might argue that our sense that the mother is wronged is based

18. For a nice discussion of the standing that third parties like the mother have to forgive, see Glen Pettigrove, "The Standing to Forgive," *Monist* 92 (2009).

on her entitlement to rely on X or based on a duty of her son to take care of her. Somehow, the thought goes, the mother has a claim of her own that piggybacks on her son's claim. One might thus attempt to resist the idea that, insofar as the right is her son's, it is not also hers.¹⁹

Even if one could make this idea work in the mother example, I believe that reflection on additional examples makes this response seem increasingly strained as a general explanation of third-party wrongs. One can postulate more and more rights in order to maintain the correlation, but only at the expense of a meaningful sense of what it is to have a right.

To begin with, one can construct a gift example in which no special relationships of potential reliance or familial duty exist. Suppose that, instead of aiding his mother, the son decides that he 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.²⁰

It seems to me that you will consider yourself wronged by X. I would. The feeling would not be merely the "Aw, shucks!" attitude that one might have upon discovering that your ticket was one digit away from winning the lottery. You would feel aggrieved, I think. If you ever met X, you might have something to say to him.

Even though it is natural to see you as wronged, your complaint would not have anything to do with any right of yours. Although it may feel as though X has stolen money that was "as good as yours," you did not

19. Frances Kamm suggests both the attraction and the difficulty with such an approach: "What if my mother got only a derivative right contingent on my right? My waiver would give me a power to revoke her right and so would be the dominant right. Yet it would not be the only right. But if she had such a right, why is she unable to singlehandedly waive the right (as I can) rather than merely set conditions for its being acted on?" Frances Kamm, "Rights," in *The Oxford Handbook of Jurisprudence & Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002), pp. 481–82.

20. For an actual case that is structurally similar though involving family, see *White v. Jones* [1995] UKHL 5. Two daughters sued after a solicitor failed to follow their father's instructions in drawing up a modified will. The court found that the solicitor was liable to the daughters even though they were not owed contractual or fiduciary duties.

actually have a property right.²¹ Nor would your complaint be based on any reliance on your part, because you did not rely on receiving the money. Nor would it be based on some relationship that you had with the son, because you have no substantive relationship with the son whatsoever.

As the earlier point about contract law suggests, there is one relationship that you do have with the son: that of being his intended beneficiary. Of course, this is a looser sense of “intended” than in the case of the mother, in that he did not really intend *you* as his beneficiary as much as he intended *whoever it was* whose name got pulled out of the lottery. Still, one might cling to the piggybacking thought by asserting that you have a right because the son has a right and you are the one who was supposed to be the beneficiary. The trouble is that this relationship is so flimsy.²² It amounts to little more than a placeholder for the idea that you stand to be wronged depending on whether his contract is fulfilled. It is not a meaningful right in any other way. I will return to this thought.

IV. CASE TWO: THE OVERHEARD LIE

That the rightholder and the injured party need not be connected at all is, I think, ultimately correct. There need be no particular *ex ante* relationship between the person to whom the duty is owed—that is, the rightholder—and the person who ends up being wronged by its violation. Consider a second class of cases, involving the indirect receipt of false testimony. Suppose that you overhear your coworker talking to a customer at work. Your coworker tells the customer that the South Bridge has been fixed and is now operational. You do not think anything of it at the time. Later that day, you are suffering from an asthma attack

21. In regard to ownership, the difference between “yours” and “all but yours” is critical. Rights serve to distinguish a point at which the property shifts from being one person’s to another’s. Up until such a point is reached, a person does not have a right to the property. After that point, the original owner must give up the right in question. Of course, all associated rights need not transfer at once. Some aspects of ownership can transfer before others. But with regard to any particular normative power—any “stick in the bundle” as lawyers would put it—it must lie with one person or another. For this reason, a vested right is very different from one that is merely anticipated.

22. 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.

and need to rush to the hospital. You try to take the South Bridge only to find it closed, and you end up in a great deal of distress. The next day, you ask your coworker why he said the South Bridge was fixed. Your coworker responds by saying that he was lying because he does not like the customer and wanted to play a prank on him.

It seems to me that you can reasonably complain to your coworker about his actions—you would not be mistaken in feeling wronged. The familiar package of emotions and practices would seem to apply: resentment, apology, forgiveness, and so on. This is not, however, because the coworker violates your rights in any obvious way.

For a real example presenting a similar problem about third parties and duties of truth, consider *Randi W. v. Muroc Joint Unified School District*.²³ The case arose after a thirteen-year-old girl was sexually assaulted by her vice principal. The girl sued the former employer of the vice principal because the former employer had given unreservedly positive references for the vice principal despite knowing about prior charges of sexual misconduct and impropriety. That is, she sued alleging that the prior employer had wronged her by lying in the reference that it gave to others. The court found the former employer liable.

The reader inclined to preserve the correlation between rights and wrongs is likely to appeal to a different explanation for the wrong in this type of case. It will be noted that your coworker and the former employer both seem to have been negligent in spreading their falsehoods.²⁴ In seeking some right of yours that the coworker violates, for example, a natural candidate is a right not to be negligently harmed—or, more specifically, negligently subjected to false information.²⁵ Your coworker

23. 929 P.2d 582 (Cal. 1997).

24. Negligently spreading falsehoods can involve two different things: being negligent about uttering statements that one knows to be false or being negligent about determining the truth of one's statements. In my examples, the parties knew what they said to be false, so the negligence I am considering here would be the former type.

25. Although we sometimes talk about a right not to be negligently harmed, it can obscure matters. Negligently harming does not describe an intentional act and, therefore, is not per se something that we can demand that others refrain from doing. What we can demand is that others should take due care, that is, precautions. So when we talk of a right not to be negligently harmed, I think that we should be focused on the right to have certain precautions taken. Against this view, a right not to be negligently harmed might be understood as not actually involving a right to certain precautions. On this understanding, one can avoid violating the right *either* by taking precautions *or* by getting lucky and not harming anyone. But this makes the right look like something that can neither be claimed

ought, according to this line of thought, to have recognized the possible harms of such an action. His failure toward you is one of carelessness. It might here be suggested that your coworker would not have wronged you if he had taken every precaution not to be overheard and had been foiled only by your eavesdropping. Thus, he is in a position to wrong you only because he did not take such precautions.

There is, I recognize, an obligation not to spread false information negligently. For example, if one is rehearsing a play that bystanders might mistake for reality, one ought to take precautions to do so in private. It is not outlandish to suggest that this same obligation underlies the wrong in the example of the overheard lie. But there are two significant problems for such a proposal.

First, even granting that there is an obligation not to spread falsehoods negligently, this obligation does not seem to be the basis for your complaint. In asserting your grievance, you would likely be asking, “Why did you lie?” It would not simply be, “Why didn’t you make sure that I couldn’t hear you?” One piece of evidence that negligence toward you is not really the issue is that the coworker could not answer your complaint by saying, “I could never have foreseen that you would overhear me.” Even if that were true—perhaps the room had bizarre acoustics like the whispering galleries in St. Paul’s Cathedral and in the U.S. Capitol—it would not really answer the complaint. In this way, the overheard lie is unlike the overheard play rehearsal or other mere negligence. Whereas the duty to avoid foreseeably spreading false information exhausts the conduct for which the rehearsing actors can be held accountable, the coworker can be held accountable aside from that—for having lied and for the consequences of that lie.²⁶ In this way, the wrong does not seem to be only about negligence.

in advance nor be used to guide one’s action. Beforehand, I cannot demand that you do anything on account of it, and it does not tell you to do anything either. It gives no real directive whatsoever. Instead, it is a placeholder for the relations that will exist *ex post* if you have not taken precautions *and* you are not lucky. As will be discussed in Section VII, part of my argument is that, once we start thinking of rights in these placeholder ways, they lose their action-guiding qualities.

26. A number of philosophers have commented on the way that even unforeseen bad consequences can be imputed to our actions when we breach an obligation. Kant wrote, “the bad results of a wrongful action . . . can be imputed to the subject.” Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 6:228. Anscombe contends that it is a mistake to think that “you can exculpate

Even if this problem could be somehow finagled, there is a second. Supposing that there is an obligation not to spread falsehoods negligently, it is not clear that this is an obligation that is correlative to a right. Although the liar or the actor should perhaps be cognizant of potential bystanders, a bystander would not necessarily be able to claim an entitlement to be shielded from the falsehoods, as in, "You owe it to me to do that behind closed doors." Notice here how the theoretical insistence on postulating a right to correlate with every wrong draws one into a proliferation of rights. A commonsense inventory of rights—the things that we might reasonably demand of another person—is unlikely to include a right that others not lie in our proximity, or even more strangely, a right that others take due care in arranging privacy when they decide to promulgate lies. Trying to find a right to explain the wrong proliferates rights unnaturally.

The unconvinced reader may think that my argument now trades on shifting, to suit my purposes, between two possible ways of thinking about the case. Either the bystander was wronged insofar as there was a right against negligence, or the bystander was not wronged insofar as there was no right. Either there is a wrong traceable to a right, or there is no wrong at all. Suitably specified, the case would turn out to be one or the other.

But my argument is that we should not foreclose a third possibility. Imagining only two possibilities is too limiting. It forces us say *either* that the relevant precautions were actions the bystander could demand in advance *or* that the bystander was not wronged at all. But this, I think, is inadequately textured. Sometimes we are not in a position to demand conduct in advance and yet we end up wronged after events unfold. In at least some bystander situations, an *ex ante* demand—"You owe it to me [bystander] to be speaking the truth now"—would not be appropriate, though an *ex post* complaint would be once the injury has been suffered. This is because the *ex post* complaint need not take the symmetric form,

yourself from the actual consequences of the most disgraceful actions, so long as you can make out a case for not having foreseen them." Instead, she argues, "a man is responsible for the bad consequences of his bad actions." G.E.M. Anscombe, "Modern Moral Philosophy," *Philosophy* 33 (1958): 12. Ordinary negligence involves a failure to guard against foreseeable harms. But in cases like the overheard lie, the wrong is not based on a failure to protect against foreseeable harms—it is based on the consequence, foreseeable or not, of a wrongful action.

“You owed it to me [bystander] to tell the truth.” It may instead take the form, “You shouldn’t have lied and now you’ve screwed things up for me.” Insisting that there are only two possibilities—either there is a right or not—does not allow for any such asymmetric ex post complaint. The asymmetry requires a third possibility: the bystander may suffer a wrong not traceable to a right of his or her own.

V. CASE THREE: THE INJURED BYSTANDER

The fact that the wrong to a third party often cannot be explained by some right that one not be negligently harmed is particularly clear when the primary rights violation is itself one of negligence. This leads to a third type of case, exemplified by the well-known legal decision in *Palsgraf v. Long Island Railroad Co.*²⁷

In *Palsgraf*, a railroad company’s employees negligently pushed a passenger onto a train, causing the passenger to drop the package he was carrying. The traveler’s package turned out to contain fireworks, which exploded. The explosion caused a metal scale to fall over, which landed on Mrs. Palsgraf, injuring her.

In a famous opinion dismissing Mrs. Palsgraf’s lawsuit against the railroad company, Judge Benjamin Cardozo explained that, although the railroad breached a duty to the owner of the package, the railroad did not breach any duty owed to Mrs. Palsgraf. He explained—correctly, I think—that the injury to Mrs. Palsgraf was unforeseeable, that “[t]he risk reasonably to be perceived defines the duty to be obeyed,” and that, therefore, 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. Perhaps other considerations might justify not granting Mrs. Palsgraf’s legal relief.²⁸ But Cardozo’s

27. 248 N.Y. 339 (1928).

28. There may be reasons, in administering a legal system, that one would not want to allow legal redress for every moral wrong. Pragmatic considerations might press toward cutting off inquiry into circuitous causal chains at some point. In this sense, legal wrongs could be different from moral wrongs, but I do not read this to have been Cardozo’s point.

reasoning—that only a rightholder can be wronged—is deeply mistaken, even if it has become canonical.

To see the difficulty, consider the facts of *Flanders v. Cooper*,²⁹ a more modern case from the Maine Supreme Court. A physical therapist allegedly used highly atypical methods, including hypnotism, for treatment of a joint disorder, which negligently implanted false memories of sexual abuse in the patient's mind. The patient's father, against whom these allegations of abuse were made, attempted to sue the therapist. The court held that, assuming the treatment was negligent, duties regarding medical treatment are exclusively between the patient and therapist, so no duties to the father were present.³⁰ The court therefore dismissed the father's complaint.

When this case is viewed strictly from a moral perspective—that is, leaving aside the practicalities of running a legal system³¹—I think that it should seem almost bizarre to claim that the father could not be wronged here. This incident quite possibly ruined his life. Assuming the allegations against the physical therapist to be true, I think we would—and should—say that the therapist wronged the father. And yet, at the same time, the court's premise that a physician's duties run uniquely to the patient looks hard to deny. Admittedly, there are some duties that the physical therapist did owe to the father. For example, the physical therapist owed a duty not to make defamatory statements about him; the physical therapist also owed a duty not to send the daughter home with

29. 706 A.2d 589 (Me. 1998).

30. The court contrasted duties regarding treatment methods with duties to warn, which might be owed to third parties: "Unlike the duty to warn . . . the duty that Flanders advocates is a duty of medical treatment that goes to the core of the relationship between a patient and a health care professional. . . . Our recognition of the duty Flanders advocates . . . would intrude directly on the professional-patient relationship." 706 A.2d at 591. For a decision similarly rejecting liability for third parties injured by negligent medical treatment but offering a more explicit discussion of *Palsgraf*, see *Brady v. Hopper*, 570 F. Supp. 1333, 1338–39 (D. Colo. 1983), which held that, even if the treatment offered by John Hinckley's therapist "fell below the applicable standard of care," the therapist could not be liable to those injured in Hinckley's assassination attempt.

31. The *Flanders* court was notably concerned with the policy implications of imposing liability. After explaining that medical treatment is between the patient and doctor, the court explained that it was "also concerned that recognition of the duty urged by Flanders would undermine . . . efforts to uncover and to investigate possible instances of child abuse." 706 A.2d at 591.

a weapon if she was unstable.³² But these duties are precisely the kind of thing that the father could demand at the time—“you owe it to me not to do that.” The choice of treatment seems unlike that. While the physical therapist did have a duty not to provide improper treatment, that was something that he owed to the daughter. So I think that we should say—as the court did—that the father did not have a right over what treatment his daughter received.

I suggest that we should see these two claims—that the father was wronged and that the father was not the rightholder—as compatible. It is true that the duty to provide a responsible treatment was owed to the patient. Similarly, in *Palsgraf*, the duty of care was owed to the passenger, not to Mrs. Palsgraf. But these points about to whom the duty was owed—about who is properly viewed as the rightholder—do not necessarily dictate who stands to be wronged by a transgression. To the extent that it makes a contrary conceptual claim, Cardozo’s iconic opinion strikes me as incorrect.

VI. CASE FOUR: THE LOVED ONE

What cases like *Palsgraf* and *Flanders* suggest is that we can have a stake in what happens to another person without having a right over what happens. We may have this stake because we chance to be on the same railroad platform. But it will often be because we care about the other person.

The philosophical assumption that rights and wrongs are necessarily connected has an attractive simplicity to it. Whether we are wronged maps onto whether we had a claim to begin with, and vice versa. But the moral world is not always so clean and simple. Shakespeare—a great student of life’s complexities—was attentive to the fact that we are sometimes wronged by actions done to others, not just by conduct directly owed to ourselves. Consider two of the many wrongs that he depicts. In *Much Ado about Nothing*, Leonato says that he is wronged by the false accusations Claudio makes against his daughter:

32. It may be tempting to try to explain the wrong to her by reference to one or another of these duties. But they are inadequate for that task. Although details are scarce, it is quite plausible that the physical therapist never made false statements about the father that would count as defamation. And, while the plaintiff argued that giving the daughter hypnosis was reckless toward third parties—in the way that sending her out with a gun might be—that argument is strained and the court understandably rejected it.

LEONATO: Marry, thou dost wrong me, thou dissembler, thou . . .
 Know, Claudio, to thy head,
 Thou hast so wronged mine innocent child and me
 That I am forced to lay my reverence by,
 And with gray hairs and bruise of many days
 Do challenge thee to trial of a man.³³

In *Julius Caesar*, Cassius believes himself wronged by Brutus's condemnation of a man whom Cassius had supported:

CASSIUS: That you have wronged me doth appear in this:
 You have condemned and noted Lucius Pella
 For taking bribes here of the Sardinians;
 Wherein my letters praying on his side
 Because they knew the man, was slighted off.³⁴

What Shakespeare knew is that our stake in actions done to others often makes us vulnerable to those actions as well. We are wronged not only by what is done to us, but by what is done to our daughters, or our friends, or even strangers with whom our lives just happen to become connected.

Consider what I take to be a very simple but clear example of a wrong without an underlying right: the parent who loses a child to a drunk driver. The drunk driver violates the child's rights to a safe roadway. That is, the direct rights violation here is to the child. But I think any reasonable person would say that the parent is also wronged by the drunk driver—just as Leonato feels wronged in *Much Ado about Nothing*. 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.³⁵

33. *Much Ado about Nothing*, Arden edition (London: Thompson Learning, 2006), 5.1.53–66.

34. *Julius Caesar*, Arden edition (London: Thompson Learning, 1998), 4.3.1–5.

35. I am suggesting that the parent is wronged not because he or she had a right violated, but because of the harm that was caused by a wrongful action. This puts

VII. RIGHTS AS ACTION-GUIDING

I have been arguing that third parties can be wronged even though it is someone else who holds the right that has been violated. I have tried to suggest that positing a right in such third parties, in order to maintain the correlation of wrongs with rights violations, is both awkward and artificial.

The concern with positing such rights is not merely a matter of conceptual tidiness or tracking our folk intuitions. We have important theoretical commitments about rights playing a role in moral reasoning. These commitments cut against positing rights to explain all the cases of third-party wrongs.

Rights, I believe, are significant mainly because they are action-guiding. That is, they tell an agent something about what she should do; they give her reasons. As Hohfeld famously made clear, rights correlate with duties.³⁶ When one party has a right against another, the other party is bound by a duty owed to the first. Duty is a normative notion—it describes what one ought to do. If you owe a duty, you have a certain kind of reason—perhaps especially pressing or second-personal or exclusive of others. So rights, correlative to duties, play a role in our deliberations about what to do. They give us reasons, presumably reasons of a special kind.

I do not believe that the rights that we might posit to retain a correlation between rights and wrongs serve this deliberative function. Consider the example of the parent wronged by the injury to the child—the parent of the drunk driver’s victim or Leonato when his daughter is slandered. One might simply posit that a parent has a right against

the weight—correctly, I think—on the emotional connection and not on the formal relationship. This may, however, appear wildly overinclusive, as a total stranger might be caused emotional harm—perhaps because of an irrational attachment to the child or because hearing about the event triggers memories of a wrong done to him or her. Some readers may view this as a crippling problem. To my mind, it is a virtue of the view that it appreciates the unpredictability and expansiveness of potential wrongs and casts focus back on the hard questions about causation. To what extent we should say that a stranger’s trauma is caused by the wrongdoer or should be attributed to something else—the irrational attachment or the mistreatment received in the past—strikes me as a difficult but appropriately confronted question.

36. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. Walter Wheeler Cook (New Haven, Conn.: Yale University Press, 1919).

having his or her child wrongfully injured or killed. Along these lines, the law sometimes posits a “right to consortium” that is violated when one’s spouse is injured or killed.³⁷ A right like this could explain how the parent is wronged, and the correlation between rights and wrongs would be held intact by hypothesizing such a right. But such a right, I mean to argue, would not be action-guiding.³⁸ If we posit such rights, we must give up on the idea that rights are normative—that the presence of rights affects our deliberation about what to do.

This claim may be surprising. One might think that, in positing these rights, we are basically saying that this is something that the agent should have thought about—for example, the drunk driver should have thought about the spouse or parent that he might wrong. But this is precisely what I mean to deny. Potential wrongs are, I mean to suggest, normatively inert; they do not provide us with reasons to think about as we deliberate.³⁹ And, even if they do, they do not provide rights-like reasons.

To see the point, consider an example. Suppose that as a hobby you engage in recreational pyrotechnics. That is, you enjoy spending your Saturday afternoons setting off various elaborate explosives and

37. See, for example, *Fitzsimmons v. Mini Coach of Boston, Inc.*, 440 Mass. 1028 (2003): “A loss of consortium claim presupposes a legal right to consortium of the injured person.” This is an excellent example of erroneously positing a right in order to reach the correct result. We generally believe that someone is wronged by the wrongful killing or harming of a spouse, which is why we allow such a legal right. But the right itself—implying that one has a right over one’s spouse—is a problematic holdover from a time when wives were seen as husband’s property. When loss of consortium figured more prominently, there would be a parallel tort for alienation of affection. In part because of a discomfort with such rights, many common law jurisdictions have abolished actions for loss of consortium, considering it antiquated or even misogynistic. See *Sharman v. Evans* (1977) 138 CLR 563, 598 (Austl.). Modern wrongful death statutes again create an action for loss of a family member, but should not be read to create a right to one’s family member.

38. I do not mean to deny that wrongs to third parties may be foreseeable such that they might figure into deliberation. One might foresee the injury to a parent or a spouse or, perhaps, a third-party rescuer. My claim, as I develop it below, is that these potential wrongs are not the proper focus of the deliberating agent.

39. This is not to say that potential wrongs are motivationally inert. A person may sometimes be moved to ϕ by considering the potential wrongs that failing to ϕ might produce. Telling a serial killer that you have a mother named Doris might shake his intention to kill you, but I do not think that he now has any more reason not to kill you than he had before.

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.

Both children have a right to be saved. And whichever child you do not save will certainly have been wronged by your negligence. But if we accept the rights-based solution to the third-party cases—if parents have a right that their children not be wrongfully injured or killed—then additional rights will be violated if you save the familyless girl. The rights of not only the little boy but also his parents are at stake. This conclusion follows directly from the fact that the boy's parents would be wronged if he were killed, as long as one assumes that being wronged and having a right necessarily go hand in hand.

I believe, however, that the fact that the little boy's parents stand to be wronged does not play any role in what you should do—and it certainly does not play the action-guiding role that we would like rights to play, which is all that my argument requires. Consider, first, whether the potential wrong to the parents should be treated as a reason to save the little boy. There are balanced reasons for saving each child. The fact that failing to save the boy would also wrong some related parties does not seem to provide any further reason. It is no reason at all. It would be erroneous—perhaps downright pernicious—to think that the existence of the parents can decide between the otherwise evenly balanced claims of the two children. It is not something that you should think about. Whatever status the parents have, it does not appear to inform your choice.

Now, admittedly, this is a complex case. The fact that one should not, on account of the parents, choose the boy over the familyless girl does not, on its own, conclusively show that the potential wrong to the

parents provides no reason.⁴⁰ It would be a mistake to assume that the weights of reasons can always be added. There are many ethical contexts in which an additional reason will not settle or even bear on a decision. Many things that generally do provide a reason—say, the opportunity to save a friend’s crystal vase—could not be used to settle the choice between the girl and the boy. So perhaps the potential wrong to the parents similarly provides a reason, but one that is outweighed or silenced or redundant or otherwise inoperative in this particular context.

Though this general response may sound plausible, I think there are strong grounds for doubting that this is what is happening here. First, the potential wrong to the parents is no comparatively small matter like a vase; killing someone’s child may be about as grievous an injury as one can inflict. If it were a reason, one would think that it would be a fairly significant one. So that closes off at least one natural explanation for why the parents cannot play a tiebreaking role.⁴¹ Second, it is not clear that there is *any* sense or context in which the wrong to the parents would matter to deliberation. While a reason need not function as a tiebreaker,

40. Mark Schroeder argues that we should be wary of negative existential intuitions about reasons, and I concede that I am offering just such an argument. See Mark Schroeder, *Slaves of the Passions* (Oxford: Oxford University Press, 2007), pp. 92–97. Still, my argument should at least shift the burden onto the person who wants to claim that there is a reason to explain in what sense there is a reason.

41. As Frances Kamm has pointed out, there seems to be something perverse about deciding which person to save based on the tiebreaking fact that you could cure some third party’s sore throat. Frances Kamm, *Intricate Ethics* (Oxford: Oxford University Press, 2007), pp. 61–63. One might think that the parents’ case is like that one: in the face of the tie between the rights of each child, the parents’ claim is “an irrelevant good” relative to the children’s rights. I think this is mistaken for a couple of reasons. First, a parent’s grief is not comparatively small, on a par with a sore throat. Kamm accepts that if a third party stands to lose his legs, then that fact can serve as a tiebreaker. But I suspect that most parents would prefer to lose their legs than their child. Second, in the sore throat case, there is not the same asymmetry between wrongs and reasons. What motivates Kamm’s conclusion in the sore throat case is the thought that the person suffering from the sore throat would *not* be wronged if you do not cure her sore throat—she would have no complaint. Kamm says that the important question is, “Would the tiebreaker have a complaint for his own sake, based on the seriousness of his own need, if he does not break the tie?” Kamm, *Intricate Ethics*, p. 62. The sore throat is not a reason *because* it would not be a cause for complaint. But in the pyrotechnics case, the parents would be wronged and would have a complaint, and yet this fact does not correlate with any additional reason.

it must be capable of functioning in some way or in some context.⁴² Perhaps, one might suggest, we should view the parents as providing a reason contrastively: the potential wrong to the parents does not provide a reason to save the boy over the girl, but it does provide a reason to save the boy rather than do nothing. But does it? It seems to me that the boy and his rights provide all the reason to save.

Alternatively, one might suggest that the parents provide a reason counterfactually. This is the sense in which the crystal vase provides a reason: if it were not for the children, then the vase would be a relevant consideration. One might suggest something similar about the parents: if the boy's rights were not present, then the wrong to the parents would matter. Were it not for the boy's rights, however, there would not be a wrong to the parents at all. Suppose, for example, that the explosion would not kill the boy but would cover him in permanent ink, and that the boy were old enough to consent to this.⁴³ Insofar as it is not a violation of his rights, then there is no wrong to the parents. This is why I have used a case that involves preempting one's own wrongful action.⁴⁴ If there were not something to make the action wrongful antecedently, then there would not be a potential wrong to the third party. A potential wrong to a third party only exists if there are already reasons in place sufficient to dictate one's decision. This is true in all of the third-party wrongs considered thus far. The coworker ought not lie, irrespective of the overhearer; the railroad employee ought not be negligent, irrespective of Mrs. Palsgraf; and so on. The fact that an act would wrong

42. For a discussion of the idea that reasons must count in favor of action, at least counterfactually, see John Broome, "Reasons," in Wallace, Scheffler, Smith, *Reason and Value*, pp. 28–55.

43. This modification is necessary because it is hard to imagine what it would mean for someone, especially a child, not to have a right not to be killed. But, if capital punishment is ever justifiable, then I do not think that the executioners wrong the parents of those executed. The point is that the wrong to the family member only comes onto the scene when there is already a direct rights violation, and that direct violation provides all the reasons. Note that, in this way, potential wrongs do not have the same structure as the kind of latent reasons that Schroeder considers. Unlike, for example, my reason to eat my car for its iron content, which persists in the background or not, potential wrongs only come onto the scene once there is already decisive reason not to do something.

44. The case might avoid this by simply asking whether you should kill the beloved boy or the familyless girl. But that would prompt the question, why should you kill either one? Why violate anyone's rights? The case as I have presented it takes that question out of the equation by making the rights violation a *fait accompli*.

someone (or someone additional) does not, I think, count as yet another reason. It is not that the third parties are morally irrelevant, but that, from the deliberative perspective, the wrongs they might suffer are epiphenomenal.⁴⁵ If this is correct, then the presence of the third parties is not a reason and does not guide our action.⁴⁶

Even if I am wrong about this and the potential wrong to the parents is a reason in some capacious sense, my argument actually requires only a second, weaker point: the potential wrong to the parents is not a reason *of the special kind that rights should generate*. The potential wrong to the parents is not associated with any *ex ante* claim on your conduct. The parents could not (properly) demand that you save their child at the expense of the familyless girl. Of course, they would hope for such a choice, but it would be wholly inappropriate to assert that you owe it to them to make such a choice. Nor should you consider yourself to owe it. Believing oneself obligated to the parents to choose the little boy over the familyless girl would be an inappropriate way to respond to the potential wrong one might do to the parents. It would be to treat as demanding a consideration that is not entitled to that status, elevating the parents from stakeholders to claimholders. To do so misapprehends the significance of the parents. They do not have an *ex ante* entitlement that guides your choice of conduct. The bipolar moral relationship with the parents exists only downstream. In deliberation, they are not significant in the way that their having a right would imply.

45. Similarly, I would also say that the fact that an action would be regrettable or blameworthy should not count as reasons not to perform the action. The reasons not to perform the action are ingredients in making the action regrettable or blameworthy, so it would be misguided to treat these features as further reasons.

46. Even if one accepts this understanding of the pyrotechnics case, one might doubt whether this can really be true of all third-party wrongs. For example, if one were deciding which among incompatible promises one is to break, then the potential wrong to the beneficiary (for example, Hart's mother) looks like it should be a reason to keep one over another. There is much more to say about this case than I can offer here, but I think that it involves unique features of promising and the strength of different promissory obligations. In short, you may owe it more to one promisee than to another to keep the promise to him because his beneficiary would be hurt. So, while the potential consequences to the beneficiary may be relevant, that is different than saying that the potential wrong to the beneficiary is providing a reason. It is still the rights doing the action-guiding work, I think. But, even if this is incorrect, what is essential to my argument is that some wrongs are not action-guiding, whereas rights should be.

One might nevertheless insist that there are rights in these third-party cases, just not rights that serve any *ex ante* function as claims on our conduct. But understanding rights in this weaker way is unsatisfactory for two reasons. First, such rights would not offer a meaningful explanation of the wrongs. Positing rights was meant to explain the wrongs in question, but, for them to be explanatory, the rights must be independently significant. They cannot be mere placeholders for the thing being explained. Second, by positing rights as essentially placeholders to retain a correlation between wrongs and rights, we denude rights of their normative importance. 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.

This problem is particularly clear in the parent-child cases, but I think we have already seen evidence of it elsewhere. In the example of the overheard lie, it seems awkward to posit a right not to have lies told nearby. In some circumstances—such as the play rehearsal—one might be guided by a duty not to spread falsehoods negligently. But this duty seems ill equipped to explain the wrong done by the lie. The reason, I think, is that we believe that the liar should be responding to the rights of his conversational partner. Any third parties are essentially beside the point. Rights, we think, should describe guiding features of the moral landscape, items that an actor keeps in his deliberative field of vision. The more we posit rights in third parties, the more this is lost.

The importance of having rights play an action-guiding function has also been touched upon in another way. In the example of the con man absconding with the money for the charitable lottery, it was tempting to explain the wrong done by noting that the con man is essentially stealing from both the benefactor and the beneficiary at the same time. But the difficulty with this temptation is that it seems to vest the same property right in two parties at the same time. To do so is problematic because we think that rights serve important allocative purposes. By describing who has a right to various things, we allocate available entitlements. This

allocative function depends on the action-guiding nature of rights. We could say that both the benefactor and the beneficiary have a right that is violated, but in doing so we would lose the idea that one or the other has the power to govern our actions relating to the property. The right would be a placeholder for future wrongs, not a marker of normative control.

In sum, rights serve an important role in guiding how we act. Rights tell us about how to treat one another. But if one posits rights for the purpose of explaining the apparent wrongs against third parties, those rights will not have this character. I believe that we are better off by preserving this appealing conception of rights and abandoning the idea that we can posit rights in the third-party cases.

VIII. INTEREST THEORIES AND WILL THEORIES

I have been arguing, based on concrete examples and considerations about the role that rights and wrongs play in our moral lives, that we should abandon the assumption that rights and wrongs are different forms of the same moral relation. Thus far, my argument has been based on the thought that such an assumption is incompatible with our everyday understandings and practices. The argument has been presented as a matter of casting aside a tempting theoretical assumption for the sake of accuracy to our moral experience. To the extent that the reader has accepted the argument, she may have done so only as a bitter pill that must unfortunately be swallowed. In this section and the next, I want to say something to alleviate this bitterness. I believe that the division between rights and wrongs is connected with a natural division between two different ways that people morally relate to one another. Thus, separating rights and wrongs may be viewed not as a theoretical misfortune but as a happy way to capture two otherwise competing thoughts about morality.

Return to the debate between the interest theory and the will theory. Hart's example of the promise to take care of the mother constituted an objection to the interest theory of rights. It illustrates that having an interest that is protected by a duty is too weak to ground a right. Such a theory gives out rights too freely. Because parties who are not in a position to claim or waive a duty may nevertheless have an interest in its

performance, the interest theory seems overinclusive. And although more modern permutations of the interest theory have developed more sophisticated ways of dealing with the third-party problem,⁴⁷ the problem persists.⁴⁸

But the will theory has difficulties of its own. Not the least of these is that the will theory can appear overly atomistic and adversarial. To hold that we are all small-scale sovereigns of our own little domains is to carve up the entire moral landscape into mutually exclusive spheres of influence. Rights, as a sort of moral property, begin to look like a zero-sum game. My normative power comes only at the expense of your freedom, and our interests become pitted against one another. In this way, the will theory is the sort of thing that leads Marx to describe the rightholding individual as an “isolated monad . . . withdrawn behind his private interests and whims and separated from the community.”⁴⁹ The will theory—when combined with the assumption that wrongs require rights violations—thus creates an illusion that we only relate morally to one another as separate individuals. Our accountability to one another appears limited to not trespassing upon another’s sphere. This ignores the fact that we live in communities and often have a stake in what is done to one another. The will theory can thus seem to underappreciate the social web in which we reside.

The virtues and vices of these two theories are the inverse of one another. The interest theory seems valuable in its focus on the injury involved in unjustified harm. The will theory, on the other hand, seems correct in drawing our attention to the normative power of the rightholder. But the interest theory produces too many rights claims, and the will theory produces too little accountability to others.

I want to suggest that recognizing rights and wrongs as distinct offers the possibility of seeing the interest theory and the will theory as describing different moral phenomena. The interest theory’s focus on injured interests seems to be too broad to undergird an account of claims or

47. See Raz, *The Morality of Freedom*, pp. 165–86; Matthew Kramer, “Rights without Trimmings,” in *A Debate over Rights: Philosophical Enquiries* (Oxford: Oxford University Press, 1998), pp. 60–100.

48. See, for example, the criticisms in Gopal Sreenivasan, “A Hybrid Theory of Claim-Rights,” *Oxford Journal of Legal Studies* 25 (2005): 257–74; Kamm, “Rights,” pp. 483–87.

49. Karl Marx, “On the Jewish Question,” in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 2000), pp. 60–61.

rights. But, as an account of complaints or wrongs, it is quite plausible. In each of the examples that I have presented, the third party—be it Shakespeare’s Leonato, the lottery recipient, the bystander who overhears a lie, or the parent of the child killed by the drunk driver—has a major stake in the action of another. And in each case, the third party is wronged not simply because he or she is harmed but because the other person acts wrongfully. The wrong appears to consist in the unjustifiability of the action in which the third party had some stake.⁵⁰

The will theory, on the other hand, begins with the idea that a rightholder has a special kind of normative influence. To have a right is to have one’s choices command respect. In this sense, the will theory provides an attractive picture of the sense in which rights are action-guiding. But the will theory risks ignoring the implications that our actions have for others. If rights and wrongs are not necessarily correlated with each other, however, then rights need not crowd out the significant stake that others have in our actions. By acknowledging that we may wrong our fellow citizens even where they do not have a right against us, we recognize that morality is not just about remaining confined to our own little sphere. Rather, it acknowledges broader accountability rippling outward to the moral community.⁵¹

In short, treating rights and wrongs as distinct moral relationships has the felicitous consequence that the interest theory and the will theory

50. I have deliberately used the construction “have some stake” because harm to interests, narrowly understood, may not be necessary for a wrong. I might violate a duty owed to you, but in a way that does you no harm whatsoever. Arthur Ripstein offers various examples of this phenomenon, which he refers to as “harmless trespass.” See, for example, Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009), pp. 44–46. In such cases, I take it that one still has a stake in the action insofar as it is a violation of one’s rights. It would, of course, be circular for a theory of rights to appeal to a general interest in having one’s rights respected, but I am describing a theory of wrongs as distinct from rights. In general, I understand “having a stake” to mean having something that answers the question, “What’s it to you?” This is what grounds the standing to demand justification.

51. Admittedly, the view that I am defending retains a significant individualism, especially in comparison with some rights critics. My view is not that we are always accountable to the community or that wrongful actions become “a wrong to the world at large,” as Justice Andrews’s dissent in *Palsgraf* put it. Wrongs are, on my view, still attached to particular individuals or groups. But they can extend beyond mere rightholders. In this way, my view can be understood as an intermediate between the restrictive view that only rightholding individuals stand to be wronged and the expansive view that the entire community is wronged. I am grateful to an anonymous reviewer for pressing me to clarify this.

may be understood not to be competing over the same conceptual territory. They are, instead, focused on two different but equally real parts of the moral landscape—roughly speaking, the will theory supplies an account of claim-rights and the interest theory supplies an account of wrongs. Philosophers have recently considered the debate between interest theories and will theories to be “at an impasse”⁵² or to have “ended in a standoff.”⁵³ If there are really two moral relationships to be described and accounted for, then this result is unsurprising. Each theory may be correctly describing a different part of our moral lives.

IX. JUSTIFICATION AND RESPECT

I want to make one further suggestion as well, though I put it forward more as hypothesis than as argument. I believe that the divide between rights and wrongs and the divide between the interest theory and the will theory both map onto a deeper distinction. In describing how an obligation is owed to another person, philosophers often appeal to two ideas: justification and respect. These two ideas are invoked, slightly differently, to capture the directedness of our morality.

First, morality seems to demand that we be able to justify our actions to one another.⁵⁴ Many actions that adversely affect others are not necessarily wrong—my dodging an errant frisbee may mean that it hits you instead, my company’s success may diminish your profits, my loving

52. Rowan Cruft, “Rights: Beyond Interest Theory and Will Theory?” *Law & Philosophy* 23 (2004): 379.

53. Leif Wenar, “The Nature of Rights,” *Philosophy & Public Affairs* 33 (2005): 223.

54. Many writers draw the connection between justifiability and the deontological structure of morality. Thomas Nagel, for example, offers a sketch of rights-based reasoning as giving a special centrality to justification to the other person: “[Utilitarian justifications] are really justifications to the world at large, which the victim, as a reasonable man, would be expected to appreciate. However, there seems to me something wrong with this view, for it ignores the possibility that to treat someone else horribly puts you in a special relation to him, which may have to be defended in terms of other features of your relation to him. . . . If the justification for what one did to another person had to be such that it could be offered to him specifically, rather than just to the world at large, that would be a significant source of restraint.” Nagel, “War and Massacre,” *Philosophy & Public Affairs* 1 (1972): 137. Contractualism picks up on this idea. Scanlon, for example, “takes the idea of justifiability to be basic in two ways: this idea provides both the normative basis of the morality of right and wrong and the most general characterization of its content.” T. M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998), p. 189.

someone else may break your heart, and so on. Harmful actions seem to involve wronging only if they are unjustifiable—if I could have caught the frisbee, if my commercial success was forged through underhanded tactics, or if I led you on in your affections. Reflections of this sort naturally suggest that what I owe to you is that my actions be justifiable to you.

Second, moral obligations seem to be importantly connected with an idea of respect for others.⁵⁵ We have the sense that only certain treatment constitutes a proper appreciation for your status as a person. I should respond to your personhood by according your choices, needs, and interests a special kind of normative significance. Rights, it is often thought, reflect this special normative significance—they describe constraints on how I may treat you, even if such treatment might be otherwise advantageous. It is in this sense, the thought goes, that the obligation is owed to you—it is not based on the balance of general considerations but based exclusively on your status as a person. The obligation characterizes what it means to respect you.

55. The connection between rights and respect is found in a range of theories, particularly those with a Kantian heritage. Kant famously argued, “[A] human being regarded as a *person*, that is, as the subject of a morally practical reason, is exalted above any price. . . . Humanity in his person is the object of the respect which he can demand from every other human being.” Kant, *The Metaphysics of Morals*, 6:434–35. Modern theorists have picked up on this thought as an explanation for rights. Warren Quinn, for example, writes: “It is not that we think it fitting to ascribe rights because we think it is a good thing that rights be respected. Rather we think respect for rights a good thing precisely because we think people actually have them—and . . . that they have them because it is fitting that they should.” Warren Quinn, *Morality and Action* (Cambridge: Cambridge University Press, 1993), pp. 170–73. Robert Nozick appeals to the respect for the moral status of persons as a way to explain the nonaggregative feature of right: “Side constraints express the inviolability of other persons. But why may not one violate persons for the greater social good? . . . To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.” Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 30–33. Joel Feinberg argues that having rights may simply amount to the ability to demand respect from others: “Having rights enables us to ‘stand up like men,’ to look others in the eye, and to feel in some fundamental way equal to anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights, so that there cannot be the one without the other; and what is called ‘human dignity’ may simply be the recognizable capacity to assert claims.” Joel Feinberg, “The Nature and Value of Rights,” *Journal of Value Inquiry* 4 (1970): 252.

What I want to suggest is that the difference between these two ideas—justifiability and respect—corresponds with the difference between wrongs and rights. Detaching wrongs from rights allows us to capture these two fundamental moral relationships. Wrongs arise where another person's action affected us and is unjustifiable to us.⁵⁶ Rights, in contrast, are about the ways that other people's deliberation and action should be guided by respect for us and our choices. So, here too, distinguishing rights and wrongs may open the door to seeing different theoretical ideas as covering different parts of the moral landscape, not as competing over the same territory.

Notice that one way in which the ideas of justifiability and respect can be distinguished is by the perspectives that they represent. Justifiability most naturally represents a backward-looking relationship. The practice of giving or demanding justification presupposes an action that is the subject of justification.⁵⁷ Respect, in contrast, is typically forward-looking. Respecting someone's status as a person involves giving that person a proper place in one's deliberations. It describes how one should be guided by another person's moral significance going forward.

An animating difference between wronging and rights also lies in their temporal perspective. One perspective is irreducibly *ex post*: it considers whether one person has done another an injustice. In looking back at an action, we are concerned with whether that person has been treated in a way that cannot be justified to him or her by the actor. Another perspective is irreducibly *ex ante*: it considers how one should be guided in an action that has yet to be undertaken. Looking forward, respect for a person's status may demand giving him or her special significance in one's deliberation.

56. For the purposes of this article, I am only concerned with actions that are morally unjustifiable. My thesis is that a person can be wronged by actions that are unjustifiable in a way that is not traceable to a right of the harmed party. I have focused on morally unjustifiable actions. It is an interesting question, beyond the scope here, whether we can also sometimes resent and complain against violations of nonmoral norms (for example, prudential or aesthetic norms) that adversely affect us.

57. It is true that, in a forward-looking manner, we can inquire whether an action *could be* justified. But even this question seems to involve assuming something of a hypothetical *ex post* perspective. Roughly speaking, it asks what could be said, if the action were performed, to those affected.

I do not want to create the impression that these perspectives are not also related. Ex post justification will be deeply connected with what reasons were present ex ante. This might produce a lingering worry about my argument that rights and wrongs come apart. We can only make out a case of ex post unjustifiable conduct by pointing to the balance of ex ante reasons. And this seems to make the complaint that one can make after the fact—"you shouldn't have done that"—resolve back into the ex ante considerations—"you should not do this because. . . ." The wrongs in all of the cases considered look plausible only insofar as some consideration against the action was there beforehand.

The point that I have tried to extract from the third-party cases, however, is that there can be an asymmetry in *how we can invoke* these considerations. In each case that I have considered, an actor violates someone's right and some third party suffers adverse consequences. Insofar as the action violated someone's rights, it constituted acting wrongly. Insofar as the action has an adverse consequence on the third party, the third party then has a standing to complain about the unjustified action. The actor becomes accountable to the third party for acting wrongly, even though the considerations that made the action wrong did not concern the third party. The third party's complaint takes the form: "You shouldn't have done that, and now I've suffered as a result. I am not saying that you shouldn't have done it *for my sake* or *out of respect for me*, but the effect on me now makes me one of the people you are accountable to for having acted as you have." This, I have tried to suggest, is a perfectly coherent form of moral address. Though the same considerations were present ex ante and ex post, the way in which they link the parties changes. What was originally the rightholder's to invoke becomes something that the third party too can invoke. What was originally about respect for the rightholder becomes a question of justification to someone else.

In sum, I believe that distinguishing between wrongs and rights may allow us to see otherwise competing thoughts about morality—the focus on justification or respect, the interest theory and the will theory—as describing different but equally real moral phenomena. My aim in drawing these connections has been to gesture that, if reflection on examples presses us toward divorcing rights and wrongs, this result need not be philosophically distressing. It may actually be felicitous; such a

distinction may connect with other, broader differences in the ways we relate to one another morally.

X. MISTAKEN INFERENCES

I want to conclude by sketching the practical significance of the distinction that I have been drawing. Although how we categorize our moral relations might appear purely academic, this appearance could not be further from the truth. Rights and wrongs are bound up with a wealth of practices and understandings. When it is appropriate to deploy these practices and understandings is a matter of great practical importance, and I do not want that to be lost.

I have been arguing that, by separating rights and wrongs, we can accommodate two competing pulls. Thus we can say, with the will theory, that the son to whom the contract is made is the rightholder, and also, with the interest theory, that the mother is wronged by the violation of the contract. What is at stake here is hardly just a matter of labeling. Determining who is a rightholder affects questions about who can waive or demand performance, and about the source and stringency of the obligation in question. Determining who has been wronged implicates other practical questions about who can complain, forgive, or seek compensation, and about the moral costs and ramifications of an obligation's breach.

In seeking to answer practical questions like these—which arise in innumerable legal, political, and everyday contexts—people routinely draw inferences between rights and wrongs. On the one hand, a familiar form of argument infers that a party cannot be wronged if that party did not hold a right initially. As in *Palsgraf* and *Flanders*, a tortfeasor may escape liability by arguing that the injured party was not the holder of the right that was violated. Similarly, the government may avoid a defendant's complaint that evidence was unconstitutionally obtained if the search did not violate the right of the defendant, even if it did violate the rights of others.⁵⁸ In political discourse, it is sometimes argued that a disadvantaged group can have no complaint against a given social

58. *Alderman v. United States*, 394 U.S. 165, 169 n.2, 174 (1969).

arrangement on the grounds that the group has no right to assistance.⁵⁹ In personal interactions, we might think that we can have no complaint at being spurned because we had no right to affections or friendship.⁶⁰ If my thesis is correct, then all of these inferences are unsound. Lacking a right does not preclude the possibility that one has been wronged.

The opposite inference—from wrongs to rights—is equally mistaken. It is tempting to think that every wrong can be traced to a rights violation. Those concerned with injustice may therefore be inclined to posit rights. We have already seen some examples of this temptation. The law, for example, relies on a “right to consortium,” which it retains only for the sake of acknowledging certain wrongs.⁶¹ And there is a temptation to say that parents, when faced with the injury or death of their child, have a right not to have their children harmed. Positing rights runs amok in political discourse. The serious injustices in the world lead to a proliferation of rights talk. But not every wrong—serious though it may be—is founded upon a right that has been violated. The proliferation of rights

59. To pick on someone, consider the argument in Jon Elster, “Is There (or Should There Be) a Right to Work?” in *Democracy and the Welfare State*, ed. Amy Guttmann (Princeton, N.J.: Princeton University Press, 1988), pp. 53–78. Elster argues that there is no right to work and that the unemployed do not have a claim against society on the basis of their unemployment. But it seems to me that the important question is not whether the unemployed have a right to work but whether they can complain against society for their situation. It may be correct that individuals do not have a right to work, but it does not follow that we do not wrong those whom society leaves unemployed. It may be—indeed, I suspect it is—the agenda of those who describe a right to work to suggest the sense in which society fails to do right by those who are left unemployed. It seems to me that Elster’s argument does little to address this question.

60. In *Anna Karenina*, Levin says to himself: “Yes, she was bound to choose him. So it had to be, and I have nothing and no one to complain about. I am myself to blame. What right did I have to think she would want to join her life with mine?” Leo Tolstoy, *Anna Karenina*, trans. Richard Pevear and Larissa Volokhonsky (New York: Penguin, 2000), p. 84. In saying this, Levin infers naturally from the fact that he had no right to Kitty’s affection the conclusion that he can have no complaint when she rejects his suit. Tolstoy’s reader, however, may not be so convinced. As another example, Anthony Trollope describes the situation of a character as follows: “Frank Greystock was not her lover. . . . She had no right to say to anyone that the man was her lover. She had no right to assure herself that he was her lover. But she knew that some wrong was done her in that he was not her lover.” Anthony Trollope, *The Eustace Diamonds* (London: Asher, 1872), p. 73.

61. The “rights” of third-party beneficiaries in contract law—which amount to little more than the standing to complain—may be another example. See Nicolas Cornell, “The Puzzle of the Beneficiary’s Bargain,” *Tulane Law Review* 90 (forthcoming).

comes at the expense of confusing what obligations we really have and to whom we really owe these obligations.

We are better off, I have argued, recognizing that our ex ante and ex post moral relations with one another are not simply different perspectives on the same underlying moral connection. Being wronged and having a right are not opposite sides of the same coin. Instead, they represent two different ways in which persons can relate to one another morally.