The Very Thought of (Wronging) You

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ABSTRACT. Claiming rights against one another is a perfectly familiar phenomenon. We express the elementary thought *you cannot do that to me* in a variety of ways. And yet, in spite of the perfect familiarity of this phenomenon, the two standard philosophical theories of rights (the interest and the choice theories) face notorious difficulties in accounting for it. My aim in this paper is to introduce a distinctive, second-personal account of rights. I will call this the *independence* theory of rights, the view that rights are specifications of a basic right to independence against another. And I will argue that by taking as basic the second-personal thought *you cannot do that to me* the independence theory best illuminates the basic phenomenon of having rights against one another.

Claiming rights against one another is a perfectly familiar phenomenon. We express the elementary thought *you cannot do that to me* in a variety of ways: when defending one's right to life or security of the person, when claiming something as property, when demanding that something is owed by virtue of a previous agreement, or when pressing the state to treat one in a particular manner. And yet, in spite of the perfect familiarity of this phenomenon, the two standard philosophical theories of rights (the interest and the choice theories) face notorious difficulties in accounting for it.

My aim in this paper is to introduce a distinctive, second-personal account of rights. I will call this the *independence* theory of rights, the view that rights are specifications of a basic right to independence against another.[2] And I will argue that by taking as basic the second-personal thought *you cannot do that to me* the independence theory best illuminates the basic phenomenon of having rights against one another.

The argument proceeds as follows. In §1, I rehearse some of the standard criticisms of both the interest and the choice theories and show why these theories generate a puzzle about rights. Then, in §2, I introduce the independence theory of rights and show how it contrasts with the standard theories. The independence theory is distinctively second-personal in that it takes the relationship of right between persons as basic in the order of justification. In §3, I argue that the second-personal character of the independence theory allows it to avoid the standard problems of its competitors and thus to solve the puzzle. I conclude in §4 by preempting three objections to the independence theory and by showing in what sense the ultimate vindication of rights should be second-personal, as the requirement to think of oneself as a subject of rights and wrongs rather than the

location of suffering in the world. The very thought of you is the thought of an equal subject of rights.

1 A PUZZLE ABOUT WRONGS

I want to begin by formulating a puzzle: the two standard theories of rights, the choice and the interest theories, face formidable difficulties in explaining the phenomenon of having rights against one another. To formulate the puzzle, I do not elaborate a novel criticism of these theories. Rather, I simply organize the standard and well-known difficulties for each theory. This will set the stage for showing, in the sections that follow, that the second-personal *independence* theory is best situated to cast light on the phenomenon of having rights.

Consider Claudius's murderous act against his brother, as he pours poison into King Hamlet's ear. It seems obvious that Claudius does not merely perform a wrong act. He *wrongs* Hamlet. To see this difference, we should distinguish directed from undirected duties: while directed duties correlate with another's rights, undirected duties have no such correlate.[3] If you entrust upon me the care of your ficus tree while you are away on holidays, I have undirected duties *with regard* to the tree, but no directed duties *to* the tree. If upon your arrival it turns out that I have not watered the now moribund tree, I have wronged *you,* not the tree.[4] Indeed, so long as the tree is not a bearer of rights, you cannot *wrong* the tree. We may now restate our point by saying that it seems obvious that Claudius *wrongs* Hamlet and thereby breaches a directed duty, rather than an undirected one.

It would appear that the very thought of wronging another presupposes the *logical correlativity* between directed duties and rights. This is the thesis that directed duties and rights co-entail one another. If to wrong another is to breach a directed rather than an undirected duty, and if it is a conceptual feature that directed duties correlate with rights, then the possibility of Claudius wronging Hamlet rests on the thesis of correlativity.

The thesis of correlativity is often traced to the work of Wesley Hohfeld, who analyzed the concept of a right into four basic legal, bilateral positions – claim-rights, liberties, powers, and immunities.[5] Each legal position is bilateral or bipolar in the sense that it represents one pole in a relation of mutual logical entailment to the position of another.[6] Hohfeld called such relations "jural correlatives." Thus, if you bear a claim-right, then another owes you a relational duty of non-interference or of providing assistance or remuneration.[7] For *A* to be endowed with a claim-right is for *B* to owe a duty to *A,* and vice-versa. For the remainder of this paper, our concern will be exclusively with the jural correlation between claim-rights and relational duties.[8]

It is important to emphasize *why* the thought of wronging another presupposes the thesis of correlativity. In a classic paper, H.L.A. Hart invites us to imagine a society ruled solely by undirected duties of natural or divine law.[9] Hart argues persuasively that in such a society we would not be able to deploy the concepts of *rights* and *wrongs,* for we would only judge our actions as *right* and *wrong actions*. Since the only measure for judgment is whether the action conforms to an impersonal natural law, to act wrongly must be to infringe the law. Murder or adultery

would be condemned as wrong actions, but never as *wrongs* to another. This is because the very thought of wronging you presupposes that you bear rights against me, and a society ruled solely by undirected duties leaves no room for individual rights.

Joel Feinberg illustrates the same point by invoking a traditional religious picture of a wedding, according to which each of the spouses-to-be acquires marital duties not *to* one another but *before* God.[10] In such a society, adultery is a wrong act (construed as a wrong *before* God), but not a wrong to the spouse. In short, to put it now in our terms, a society ruled exclusively by undirected duties effectively puts you in the position of the ficus tree: others can act wrongly by breaching duties with regard to you, but cannot wrong you.

Against this backdrop, the puzzle I wish to formulate emerges because the two dominant theories of rights have serious difficulties accounting for how Claudius could wrong Hamlet. This is due to well-known theoretical challenges faced by each theory. Choice theories notoriously deny that a subject who lacks the power of waiver over a duty cannot have a right correlated to such duty. This would imply that, since Hamlet lacks the power to waive Claudius's duty, Hamlet lacks a right not to be murdered by Claudius. Interest theories notoriously introduce a gap between rights and their ground in interests — understood as constituents of well-being. This implies that interest theories struggle to accommodate the correlativity thesis essential to the thought of wronging another. The puzzle, then, is that neither account adequately illuminates the plausible thought that Claudius does not merely do something wrong but in fact *wrongs* Hamlet. Let me explain.

The basic thought behind the choice theory of rights is that rights function as protections of your choices.[11] More precisely, a central thesis unifying most (if not all) versions of choice theories is the following: *A* has the right to *X* if and only if *A* is competent and authorized to demand or waive the enforcement of the duty correlated to the right.[12] If you have a right, you thereby have normative control over someone else's duties to you; and if you lack normative control over someone else's duties then you lack a right proper.

A standard criticism of choice theories is that they cannot account for inalienable rights, for criminal wrongs, or for the rights of those who lack the requisite normative competence (e.g., infants).[13] Indeed, in a recent article Hillel Steiner, one of the chief proponents of the choice theory, has argued that the very idea of an inalienable right, a right you cannot waive, is incoherent.[14] Setting aside the question of inalienable rights and of the rights of the legally incompetent, criminal wrongs are of particular relevance to our purpose. Here is Steiner:

> The legal doctrine, that consent is no defense against criminal law charges, implies that the beneficiaries of criminal law duties – the persons whose interests are protected by criminal law duties – lack the power to waive performance of (i.e., to extinguish) those duties. Hence, those duties do not entail Will Theory rights in them.[15]

Applied to our reflections about Claudius and Hamlet, Steiner's concession means that if Hamlet lacks the power to waive Claudius's duty not to murder another — as

seems plausible — then Hamlet cannot be said to possess a right not to be murdered. This concession has the following problematic conclusions: if Hamlet lacks a criminal law right not to be murdered, then Claudius lacks a directed duty to that effect. And if Claudius lacks a directed duty, Claudius cannot *wrong* Hamlet when he pours poison into his brother's ear. Claudius clearly performs a *wrong action,* but does not and could not *wrong* Hamlet.[16] If this is correct, for choice theory Hamlet stands to Claudius as the ficus tree stood to you: he is the material for performing a wrong action, not the direct victim of a wrong.

Interest theories of rights may seem more promising here. The basic thought of interest theories is that rights are necessarily protections of aspects of a person's welfare, which may or may not include some aspect of that person's freedom.[17] Joseph Raz offers one of the most influential formulations of the interest theory.

> *Definition*. '*X* has a right' if and only if *X* can have rights, and, *other things being equal,* an aspect of *X*'s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty. (*emphasis added*)[18]

On Raz's view, rights play an "intermediate role" in our practical thought: while rights *ground* duties, rights themselves are grounded in the ultimate value of welfare.[19]

Interest theories regard it as neither necessary nor sufficient that you have normative control over another's duties. So they easily avoid the difficulties about criminal law duties faced by choice theories. Nevertheless, when so construed, interest theories face serious difficulties accommodating the correlativity thesis.

The crucial problem I want to focus on is that, so understood, rights cannot entail duties. Since rights play only an "intermediate" role in practical thought, they are merely defeasible grounds for imposing duties on others. When an aspect of your well-being is better protected in some other way, your right cannot ground a duty on another. And if this is correct, the interest theory must deny that rights and directed duties co-entail one another, i.e., must deny the correlativity thesis. Raz himself has put this point nicely:

> The right is the ground of the duty. It is wrong to translate statements of rights into statements of 'the corresponding' duties. A right of one person is not a duty on another. It is the ground of a duty, a ground which, if not counteracted by conflicting considerations, justifies holding that other person to have the duty.[20]

For Raz's interest theory, rights warrant imposing duties on others only when, *all things being equal*, the underlying interest provides a sufficient reason for holding another under a duty. When the right misfires and there is a better way to protect the underlying interest – when the right is "counteracted by conflicting considerations" – then the right cannot entail a duty, since there is no sufficient reason to impose the duty on another.[21]

So understood, the interest theory conflicts directly with the thesis of correlativity. But we have seen that the thesis of correlativity appears to be a necessary presupposition of the thought of wronging you. Once correlativity is

undermined, the necessary nexus between right and directed duty is broken. The interest theory makes it a puzzle how Claudius could *wrong* Hamlet in the first place. This is because the underlying normative notion is only one of Claudius merely setting back Hamlet's interests, simply committing a wrong action *with regard* to Hamlet. Having undermined the correlativity thesis, Raz's formulation of the interest theory makes it a mystery how interests could generate *directed* duties rather than merely *undirected* ones not to set back the basic interests of others.

Matthew Kramer has tried to avoid this problem by clarifying a potential confusion between interests and the legal protection of interests to which Raz's account seems particularly apt. We should distinguish, then, between the grounding interest and the legal protection of said interest, i.e., the right proper. While the grounding interest need not always generate a directed duty, the right proper necessarily does.[22] We could thus accommodate the thesis of correlativity while preserving the insights of an interest theory.

While Kramer's account fares better insofar as it tries to preserve the insight of the correlativity thesis, nevertheless it preserves the justificatory structure characteristic of any interest theory and thereby the justificatory gap between rights and their grounds in aspects of well-being. This is important because Kramer's move may not be sufficient to forestall the key criticism of any interest theory, namely, that it lacks an account of rights and directed duties as a whole.

As Leif Wenar has put this criticism, the interest theory must explain rights in terms of *benefits*: the right is a means for benefiting the right-bearer, a means for promoting an aspect of her well-being. The trouble is that many rights not only do not benefit but even *harm* the right-bearer (the right of the kamikaze to get fuel or the right of the bomb squadder to disarm the bomb).[23] And sometimes rights benefit only a third-party, not the beneficiary of the right (as with parental rights). As a result, if rights do not always depend on the underlying interests of their bearers, the interest theory appears fundamentally unable to explain rights and their necessary correlation to directed duties.

While Raz's formulation of the interest theory simply denies the correlativity thesis, Kramer's formulation does not deny it but, in spite of itself, ends up rendering correlativity mysterious.

Put differently, interest theories take the fundamental normative judgment to be a judgment about the production of benefit or suffering in the world. The key challenge here is that the judgment that Claudius ought to produce well-being or minimize suffering in the world cannot *entail* a judgment about Hamlet's rights or Claudius's duties. On some occasions, well-being may be better secured by infringing Hamlet's rights or simply not ascribing certain rights to Hamlet. But if judgments of duties to promote goals cannot *entail* judgments of rights, then interest theories appear systematically unable to account for judgments of rights in the first place.[24] For such theories, the fundamental judgment is not that Hamlet is a victim of Claudius, but rather that Hamlet is the accidental location of diminished welfare in the world brought about by Claudius's act.[25] And when the fundamental form of judgment is about undirected duties to promote certain goals, it is difficult to see why judgments of rights should enter into the picture in the first place.

To sum up, I have not developed any new criticism of the choice and interest theories of rights. Instead, I have simply shown that the well-known difficulties of each theory together generate a puzzle. While it seems obvious that Claudius *wrongs* Hamlet, for different reasons neither standard theory appears able to account for Claudius's wrong. Choice theory must see Claudius's duty as undirected. This is because Claudius's duty is a criminal law duty, a duty that Hamlet is not empowered to waive. Interest theory must either deny the thesis of correlativity – as Joseph Raz appears to have done – or accept the thesis of correlativity while rendering it mysterious, due to the contingent relationship between interests and rights. Either way, it remains mysterious how Claudius does not simply perform a wrong act but rather *wrongs* Hamlet.

2 THE INDEPENDENCE THEORY OF RIGHTS

The mystery can be easily lifted, I will argue, once we understand rights according to the independence theory. In this section I present the independence theory and contrast it with the standard theories of rights. In the next I argue that the independence theory solves the puzzle.

The basic thought of the independence theory is that rights are specific incidents of an enforceable, original right to independence against others. Here is the general thought:

> *Independence Theory of Rights*: *A* has a right against *B* if and only if *B* owes *A* a correlative, enforceable duty, which duty is a specific incident of *B*'s original duty to respect and not dominate *A*.
>
> *Independence Theory of Directed Duties*: *B* has a duty to *A* if and only if *A* has an enforceable right against *B,* which right is a specific incident of *A*'s original right to independence.

The two parts of the independence theory co-entail one another: we explain rights in terms of directed duties and directed duties in terms of rights. And although there is a certain circularity here, this is as it should be if we wish to preserve the insight of the correlativity thesis, namely, that rights and directed duties co-entail one another.

Let me unpack the basic thought of the independence theory by explaining what I mean by (i) a right to *independence* (or, equivalently, a duty of respect and non-domination), (ii) an *original* right, (iii) the relationship between specific rights and the original right to independence, and (iv) the enforceability of rights.

By 'independence' I have in mind the relational understanding of freedom expressed, for instance, in the republican tradition of political thought.[26] Independence involves the title to interact with others on a basic footing of equality rather than on one of subordination. You are independent when you are entitled, to put it metaphorically, to look others in the eye. Independence thus contrasts with a *negative* conception of freedom, according to which your freedom is compromised when others interfere with your purposes. Others can interfere with your purposes — say, by grabbing the last ribeye at the butcher — without subordinating you and

thereby compromising your independence. And independence contrasts with *positive* conceptions of freedom, according to which independence is not essentially a claim against another but rather a value to be promoted.[27] You can fail to reach, say, perfect integrity, internal coherence, or self-realization without thereby failing to be independent, since lack of integrity or internal coherence does not entail subordination to another.

It is important to stress that on the proposed view, independence is a relational status rather than a value to be promoted. Independence thus captures the juridical quality of *personhood*. And personhood expresses a basic status of equality: the equal dignity of persons.[28] In this sense, a person is not a thing bearing special normative properties. Instead, a person is a standing in relation to others.[29] For the independence theory, *A is a juridical person, A has dignity,* and *A has a right to independence against B* express one and the same judgment. Put differently, juridical personhood should not be understood as a grain in a heap of sand — where the grain is intelligible independently of its relations to the heap. Instead, juridical personhood should be understood relationally — where the relationship is conceptually prior to the members that instantiate it. Instead of beginning with the individual and eventually aggregating into a relationship, the juridical, bilateral relationship is basic, and the individual person appears as one pole of the relationship.[30]

Second, the right to independence is *original* in two senses, one juridical, the other justificatory.

In the juridical sense, an original right contrasts with an acquired right. Acquired rights require specific acts or specific social roles.[31] For instance, you only have a property right to your laptop because you have performed a specific act, such as purchase or receipt of a gift. Similarly, you only have the right to vote in your union because you enjoy a special social role, namely, being an active member of your union. You were not born a union member. By contrast, original rights require no specific acts or social roles in order for you to enjoy them.[32] They attach immediately to your status as independent. To say that you have an *original* right to independence, then, is to say that you need not perform any specific act or enjoy a specific social role in order to enjoy said right.

In the justificatory sense, the right to independence is original due to its inferential role in a normative order of juridical judgments. The right to independence functions as justificatory bedrock. When we ask, *Why is A entitled to right R?,* the philosophical answer will bottom out in the judgment *because A has an original right to independence against another*.

We have thus arrived at the idea of *second-personal normativity*. As I shall understand it here, a second-personal account consists in the justificatory thesis that the *relationship of authority and obligation between persons* is primary and irreducible.[33] By contrast, first- and third-personal accounts alike consist in the justificatory thesis that the primary and irreducible notion makes no reference to the *relationship* between persons. For instance, an account that takes as basic the idea of *autonomy* construed as a norm of intrapersonal coherence would qualify as first-personal insofar as the value of intrapersonal coherence makes no reference to the relationship between persons.[34] Similarly, a classical utilitarian account that takes as basic the idea of *well-*

being would qualify as third-personal insofar as the value of well-being makes no reference to the relationship between persons.

So understood, the independence theory is eminently second-personal. By regarding the right to independence as justificatory bedrock, the independence theory preserves a second-personal kind of justification. It bottoms out in a judgment representing the right of one person against another or, equivalently, the duty one person owes another. By taking as basic the *relationship* between two parties, the account remains essentially second-personal.

By contrast, the standard theories of rights seem to presuppose either a first- or a third-personal structure of justification. To the extent that the value of choice is construed as a norm of *intrapersonal autonomy, coherence, integrity* or *self-realization,* choice theories would take a first-personal form.[35] This is not to deny that rights are normative *relations* to others. Instead, what a first-personal theory denies is that the normative relation to others is basic in the order of justification. What is basic is the first-personal value of *choice*. Similarly, interest theories take a third-personal form, insofar as the basic judgment represents the value of an interest to be promoted, an interest that is intelligible independently of interpersonal relations. This is not to deny that rights are normative relations to others. Instead, what a third-personal theory denies is that the normative relation to others is basic in the order of justification. What is basic is the third-personal value of *well-being*.

Third, the second-personal character of the independence theory casts considerable light on (iii), the relationship between specific rights and the original right to independence. The original right to independence is abstract and general. It simply names your title to have an equal original authority to others. No one has an original authority over you. But what exactly does the original right to independence require in our everyday interactions?

The original right to independence can yield concrete and specific rights in two ways, one "natural" (or *necessary*) and the other "positive" (or *contingent*).[36]

Some rights can arguably be developed *necessarily* from the general original right to independence. Although I cannot argue for the view here, I believe that this gives us a schema for comprehending the normative structure of human rights. Those rights that are necessarily required by the original right to independence will be human rights.[37] Thus, your human right to life will be a specification of your title to independence by setting a constraint on how others may treat you with regard to your standing as an independent living being, for instance, by prohibiting murder. Your human right to freedom of conscience will be a specification of your title to independence by setting a constraint on the conduct of others with regard to your beliefs. No one is entitled to force you to believe in a particular (religious) doctrine. Your human right to work will be a specification of your title to independence by setting a constraint on how others may treat you in the market, for instance, by prohibiting slave labor. The general/specific distinction can be applied recursively, since each of these human rights will appear as purely general and requiring more specific determination through more concrete rights. The human right to work, for instance, cannot be limited to the prohibition of slave-labor, but will also include further rights, such as the rights to choose a place of employment or to form unions. The crucial point for our purpose is that human rights will function as necessary

developments of the original right to independence by *specifying* in more determinate ways what your status as *independent* requires in specific contexts and relationships.

All other rights will function as *contingent* specifications of the basic right to independence, requiring specific acts or social roles. While the right to life attaches immediately to your status as independent, your rights to a parking spot at your place of employment, or to the house you bought do not. More generally, to take the two main categories of private law, specific property or contract rights will function as rights with two features. On the one hand, they are made possible by the original right to independence, for if you did not enjoy the right to independence you could not own property or enter into contracts, as was the case with some extreme forms of slavery. On the other hand, specific property or contract rights do not flow necessarily from the right to independence but are contingent on specific acts or social roles. For instance, your right to independence entails neither your specific title to your house nor the specific terms of your employment. Thus specific property and contract rights will function as non-necessary specifications of your right to independence, specifications that are contingent on specific acts or roles on your part.

Finally, (iv) rights are enforceable.[38] On the proposed account, juridical rights and duties differ from other rights and duties precisely because juridical duties are enforceable, regardless of whether non-juridical duties are directed or not.[39] The claim here is conceptual and normative. The concept of a right involves a warrant to enforce the correlative duties even if, at a given time, the correlative duty is not or cannot be enforced. Thus, if there is a right to freedom from slavery, the empirical fact that you are enslaved to another or that your right cannot be effectively enforced in a given social context does not entail that you lack an entitlement to freedom from slavery. The empirical and the normative enjoyment of a right are two different creatures. The second-order power of enforcement is thus necessarily attached to your right to independence and to any specific rights falling under it *as a normative matter*.

Having presented the main thought of the independence theory, let me sharpen it by contrasting it again with the interest and choice theories.

The unifying thought of interest theories is that rights are necessarily protections of some aspect of your welfare. Interest theories appear to make three key assumptions. The independence theory rejects them all.

First, interest theories, as I have remarked, take a third-personal form. This is because for interest theories the judgment of fundamental normative significance is one representing the value of interests intelligible, in principle, independently of relations of right between persons. By contrast, the independence theory is thoroughly second-personal. This is because it regards the juridical bipolar *relation* between two persons as normatively basic. While interest theories construct relational judgments about rights and duties from non-relational judgments about interests, the independence theory recognizes as basic in the order of justification the indissoluble structure of a bipolar relational judgment, one linking two parties.
Second, interest theories appear to assume a form of normative *instrumentalism*: they justify rights as *means* for the protection or promotion of an end that is intelligible independently of rights or directed duties. Raz's interest theory is a clear example:

your rights are justified insofar as they protect a basic aspect of your welfare. We can form a concept of Adam's interests in well-being (e.g., interests in self-preservation, or in not being hungry or sick) before Eve enters the picture. Adam's rights against Eve are accidental to the concept of Adam's basic welfare. By contrast, the independence theory is *non-instrumentalist:* it justifies rights ultimately by grounding them in the original right to independence. Since your right to independence is itself a right, there is no instrumentalism here, for we justify more specific rights by grounding them in more general rights and ultimately in the right to independence itself. Take away Adam's relationship to Eve, and rights disappear from view.[40]

And third, interest theories tend to assume a monadic and atomistic picture of juridical personhood. To be a person is to be a bearer of interests in welfare. And so long as the value of your welfare is intelligible independently of your relations to others – as with Adam before Eve – juridical personhood is equally non-relational. By contrast, the independence theory presupposes a holistic and second-personal picture of juridical personhood. Instead of beginning with the individual and eventually adding others to aggregate into a juridical relationship, the juridical relationship to another is conceptually prior. This is a second-personal picture in the sense that juridical personhood cannot be comprehended independently of the status of one person in relation to another and the normative rights and duties constitutive of such relationship.

In short, interest theories tend to assume that the fundamental normative judgment takes a third-personal form, that this judgment represents an end intelligible independently of rights, and that the person bearing rights is only accidentally connected to others. By contrast, the independence theory begins from a second-personal judgment representing the right-duty correlation, eschews instrumentalism, and conceives of juridical personhood second-personally. Let me now contrast the independence theory with choice theories.

The central claim of the choice theory is that *A* has a right to *X* if and only if *A* has the power to enforce or waive the other's duties to *A* with regard to *X*. The independence theory departs from the choice theory in two key ways.

First, although a power of enforcement is internally connected to rights, nothing in the independence theory makes it necessary that the right-bearer be the one solely authorized to exercise said power. A third-party (e.g., the state) may rightfully enforce juridical duties.

Second, the independence theory does not make a power of waiver a necessary condition for the possession of a right. In the fundamental case, the original right to independence correlates with another's co-original duty of respect and non-domination. It belongs to the idea of independence that this right cannot be waived. Any power of waiver appears to presuppose the original right to independence, for it is only in virtue of your independence that you have a power of waiver in the first place. If so, the power of waiver cannot be applied to the right to independence itself, since this provides the normative basis for any waiver. In waiving your independence, say, by handing yourself into slavery, you would commit a type of practical incoherence.[41]

My point here is not to argue that some rights are inalienable, but rather to show that the independence theory does not commit us to the problematic view that

every right must be alienable. Second-order powers of waiver may be important to derivative rights, such as specific contract rights, but nothing in the concept of a right entails that every right must be alienable.

3 WRONGING YOU

Our puzzle concerned the very possibility of *wrongs*, since the two dominant theories of rights appear to render unintelligible the thought that Claudius wrongs Hamlet. Choice theories make criminal law duties undirected; interest theories struggle to accommodate (Raz) or illuminate (Kramer) the correlativity thesis. The independence theory promises to solve our puzzle.

The crucial difference between the independence theory and choice theories is twofold: for the independence theory rights need not be waivable, and the power of enforcement may be borne by third-parties. This difference makes it possible for Claudius to wrong Hamlet.

For the independence theory, Hamlet is entitled to a right to life, understood as a necessary specification of Hamlet's original right to independence. The independence theory does not commit us to the view that every right must be attached to a power of waiver. More specifically, Hamlet's right to life need not be waivable in order for it to count as a right. This permits us to say that Hamlet's right to life functions as a right proper. And if Hamlet's right to life functions as a right, then we can preserve the plausible thought that Claudius's correlative duty is *directed,* even if Claudius's duty falls under the criminal law.

Moreover, although Hamlet is certainly entitled to enforce Claudius's directed duty, Hamlet need not be the sole bearer of this power. The independence theory also permits the plausible view that the state of Denmark, for instance, may prosecute Claudius and enforce Claudius's duty to Hamlet. The power of enforcement need not be concentrated in the bearer of the right.

In this way, by rejecting the central doctrine of choice theories, the independence theory can preserve the thought that Claudius *wrongs* Hamlet. And the independence theory can claim to do this without adopting the problematic instrumentalist and non-relational apparatus of interest theories.

As we have seen, interest theories have difficulties accounting for the correlativity thesis, the view that rights co-entail directed duties. At bottom, this is due to the monadic and instrumentalist assumptions interest theorists tend to make. For these theorists, we ought to ground rights in an independently intelligible aspect of your welfare (instrumentalist assumption), and your welfare is a value intelligible independently of your relations to others (monadic assumption).

By contrast, in virtue of its second-personal character, the independence theory takes as basic the thesis of correlativity. More precisely, the independence theory rejects the instrumentalist and monadic assumptions of the interest theory. Specific rights are grounded in a more general right to independence. This is not an instrumentalist account because the grounding right to independence is still a *right* rather than a purpose external to rights. And this account does not rely on the monadic assumption because it treats as justificatory bedrock the co-original right to independence and duty of respect and non-domination. The thesis of correlativity is

built into the fundamental framework of the independence theory, for this is a second-personal theory, rather than one that focuses third-personally on just one of the terms of the relationship of right.

Let me put this point differently. The instrumentalist and monadic assumptions together mean that an interest theory must explain how a monadic judgment can entail a relational one. An interest theory must explain how the monadic judgment *A has interests* necessarily entails *B has directed duties to respect A's interests*. The trouble for interest theories is that the monadic judgment cannot entail the relational one, for as Raz argued, counteracting considerations can interrupt the inference from interest to duty. By contrast, the independence theory avoids this problem altogether because it does not ground rights in a monadic judgment. The order of juridical judgments comes to rest ultimately in the relational judgment *A has an original right to independence against B*. The bipolar nexus between *A* and *B,* their equal right to independence, is justificatory bedrock. Unlike interest theorists, we do not need to square the circle by showing how a monadic judgment can entail a relational one. Instead, we only need to show the interrelationships *among relational, bipolar judgments*. There is no trouble in accounting for the thesis of correlativity, then, when we begin our account by taking as basic the juridical correlation between the right to independence and the co-original duty to respect that independence.

The independence theory thus promises to account for the plausible thought that Claudius wrongs Hamlet. Unlike choice theories we can say that Hamlet has a right to life against Claudius, even if Hamlet lacks a power of waiver over Claudius's duty. Unlike interest theories we can say that Claudius's duty and Hamlet's right entail each other. This is because our account eschews instrumentalism and does not begin from a monadic judgment representing the parties' interests.

4 THE VERY THOUGHT OF YOU

If my argument so far is sound, the primary advantage of the independence theory is that it promises to make intelligible how Claudius *wrongs* Hamlet. Before closing, I want to strengthen the independence theory by pre-empting three objections.

The first objection simply repeats the standard criticisms of choice theories. The choice theorist appears committed to the problematic views that (i) children and the mentally unsound cannot have rights, (ii) that nobody has a right not to be murdered, and (iii) that unwaivable fundamental legal protections cannot be rights.[42] The objection, then, is that by grounding rights in the right to independence I have incurred the same problematic commitments.

This objection confuses the right to independence with a power of enforcement or waiver. Or to put the same point differently, it confuses two conceptions of juridical personality. For the choice theorist, your juridical personality just is your competence to demand enforcement of my duties or to waive them. For the independence theory, your juridical personality just is your right to independence against others. The latter conception of juridical personality is more primitive and capacious than the former. It is more primitive since, arguably, the power of enforcement and waiver presupposes the right to independence but not vice-versa. Personality as independence names the *potential* for competence to waive specific

rights, but does not require *full exercise* of such competence. And personality as independence is more capacious because its extension is broader.

The first worry concerning the rights of children illustrates this distinction between conceptions of personhood. According to choice theorists, we should not regard very young children as juridical persons (as bearers of rights), since children lack the normative competence to enforce or waive the duties of others. According to the independence theory, we should regard children as juridical persons. This point should be fairly intuitive, since there is nothing *prima facie* problematic in the view that young children ought not to be enslaved or be treated as property. Children, as persons, are owed basic duties of respect and non-domination correlative to their original right to independence.[43]

In short, once we distinguish these two conceptions of juridical personality, we can bring into view why the independence theory is not committed to any of these three problematic thoughts. Again, this is because the independence theory does not make a power of enforcement or waiver a pre-condition for the possession of a right.

Having pushed away from choice theorists, we now face a second objection. An essential part of my solution to the puzzle is to distinguish the instrumentalism of interest theories from the non-instrumentalism of the independence theory. But this may seem a philosophical distinction without a difference. Why exactly should we not think of specific rights as instrumentally related to the general and original right to independence? We could then think of the right to life, for instance, as a helpful means for producing your independence. My talk of "specification" may simply be masking what is, at bottom, an instrumental relationship. If so, the problems of the interest theory would be the problems of the independence theory.

As I have understood it, 'instrumentalism' is a form of justification where a right is justified as a means for the promotion of an end intelligible independently of rights. This label seems apt for interest theories, insofar as your interests in welfare appear intelligible independently of the rights you happen to have. Again, it appears we can form a determinate concept of Adam's interests in welfare before the creation of Eve. And this is precisely why a judgment about Adam's interests cannot entail a judgment about Eve's duties, since the appearance of Eve is completely accidental to our picture of Adam's interests. More formally put, instrumentalist accounts of rights seem committed to the view that we cannot infer second-personal juridical judgments about Eve's duties from Adam's first-personal judgment of his own interests. Adam's judgment *I have an interest in life* cannot entail *you have a duty to respect my life,* since the existence of a *second person* is accidental.

By contrast, I have argued that the independence theory lets us see how first-personal and second-personal juridical judgments co-entail one another. Let me reinforce this point by introducing what I shall call the "reciprocity condition," the view that you and I are embraced in an indissoluble, bilateral, and symmetrical juridical relation where *you and I are one in rights and duties*.

Above I distinguished original from acquired rights, those rights that require specific transactions or specific standing relationships from those that do not. The reciprocity condition tends to fail for acquired rights because such right-duty pairs are often *asymmetrical*. The judgment *I have a right to this laptop* does not entail *you have a*

right to this laptop. The rights and duties of a sergeant, a teacher, or a parent are not those of a troop, a student, or a teenage son. However, when it comes to *original* rights, it is crucial to see that the reciprocity condition *must hold.* As far as original rights are concerned, you and I are in a perfectly symmetrical, bilateral relationship. We can state the reciprocity condition thus: if I have an original right to *X* against you, you must have a correlative duty to me with regard to *X;* and *ipso facto* you must also have the same right to *X* against me, and I the correlative duty to you. You and I are one in original rights.

The significance of the reciprocity condition is that it clarifies further the non-instrumentalist character of the independence theory. An instrumentalist theory posits a justificatory gap between rights and their ground. As a result, a judgment of interests cannot entail a judgment of duties on another. By contrast, a non-instrumentalist theory lacks a justificatory gap between rights and their ground, since rights are grounded in further and more general rights. This makes it possible for a judgment about the ground of a right to entail the duty of another. Thus, my first-person judgment *I have the right to life* entails the judgment *you owe me the duty to respect my right to life,* and vice-versa. Furthermore, the reciprocity condition shows that the judgment *I have the right to life* must also entail *you have the right to life,* for you and I are one in original rights.

The reciprocity condition thus brings out the internal connection between first-person and second-person juridical judgments. Whenever I think of myself as a bearer of rights, I must think of you as an equal bearer of original rights. And you must think the very same thought. The key upshot, then, is that the thought of myself as a bearer of rights is not really a monadic judgment. Instead, such thought is always bound up with my thinking of you as an equal to me. The judgment *I am a juridical person* is not really monadic because it is a thought for two: you and I think the very same thought when you and I are in a relationship of original right.

These reflections suggest that that the independence theory cannot be instrumentalist, since specific rights are grounded at bottom in the right to independence. But the original right to independence is itself a right, rather than an end intelligible independently of rights. The relationship of specification is not best understood as one of means-end. Instead, it is better understood as one of a general category to specific instance: specific rights are *incidents* (either contingent or necessary) of the original right to independence.[44]

Think, for instance, of a particular boxer dog. This dog will be a specific instance of the general category *boxer dog,* which in turn is a specific instance of the general category *dog,* which in turn is a specific instance of the general category *mammal,* which in turn is a specific instance of the general category *animal.* Take away animality and our boxer dog disappears. The conceptual chain *boxer dog/dog/mammal/animal* is not a chain of instrumentalities. Being a boxer dog is a not a helpful means of producing mammals in the world. Boxer dogs *just are ways of being* dogs, mammals, and animals.

Think now of your property right to your laptop. This right is a specific instance of your general title to own property, which in turn is a specific instance of the general right to independence. Take away the general right to independence and your specific right to your laptop disappears. The conceptual chain *right to laptop/*

property right/right to independence is not a chain of instrumentalities. Owning your laptop is not a helpful means of producing independence in the world. Owning your laptop *just is a way of being* independent, we might say.

As the reciprocity condition makes explicit, while interest theories require a logical break in the inference from a monadic judgment about interests to a relational judgment about duties, the independence theory does not. Specific rights emerge as the self-development or increasing specification of the basic relational judgment representing one individual's right to independence against another.

The non-instrumental character of the independence theory might be the target of a further objection, the last one I shall consider here. The concern is that by binding so tightly the concepts of juridical personhood, the right to independence, and specific right-duty pairs I have argued in a circle. The charge is that I simply beg the question against the skeptic who questions the very idea of rights or of juridical personhood.

I would like to respond in two ways. First, we need to notice that the same skeptic who questions the very idea of rights can also question the ultimate value of choice or of welfare in grounding moral judgments about rights. In this respect, the independence theory begs the question against the skeptic no less and no more than interest and choice theorists do. The crucial point, I think, is which of these three theories can shed most light in our ordinary practice of claiming rights against one another. And I have argued that the independence theory gets the upper-hand, since it solves our puzzle about Claudius and Hamlet in a straightforward manner.

But we can also offer a second and more robust response to the radical skeptic, one I can only sketch here. We can offer a *second-personal vindication of rights.* The skeptic's charge is that unless we ground the original right to independence in a further, more basic value, our account will be viciously circular. However, were we tempted to give in to the skeptic's demands, our account would lose its second-personal, non-instrumentalist form by grounding rights in an end intelligible independently of rights. One way forward, then, is to show how the account is *non-viciously circular.*

Here, I want to take a clue from Kant's defense of freedom. In the *Critique of Practical Reason,* Kant faced a similar difficulty. He had established what Henry Allison calls the "reciprocity thesis," namely that practical freedom (autonomy) and the moral law co-entail each other.[45] The trouble is that unless we establish the actuality of either freedom or the moral law, the reciprocity thesis will beg the question against the skeptical charge that autonomy (or the moral law) is simply a fiction. The precise character of Kant's solution is controversial, but here is one way to understand it.[46]

Kant's vindication of freedom is not designed as a *refutation* of the skeptic: the skeptical charge is not revealed to be incoherent as such. Instead, the vindication of freedom is *enactive* and *non-viciously circular.* The vindication is enactive in the sense that it requires that the skeptic *enact* either autonomy or the bindingness of the moral law. Thus, Kant invites you, the reader, to imagine yourself in a situation where pursuing your every desire would land you in the gallows, or where a despotic local authority threatens you with the gallows unless you give false testimony against an honorable man.[47] The key question is this: can you imagine yourself resisting the

temptation of your desires or the command of the despot? If so, the very act of so imagining counts as an *enactment* of your autonomy (in Kant's terms, the determination of the power of choice by pure practical reason), or of the bindingness of the moral law. What vindicates freedom is not that the skeptic necessarily contradicts herself in denying either autonomy or the moral law. Instead, what vindicates freedom is that the skeptic *who enacts* autonomy or the bindingness of the moral law contradicts herself. Though circular, this argument is not vicious because it makes explicit the fundamental normative role played by the concept of autonomy. Take it away, and our entire moral edifice crumbles.

Now, regardless of whether Kant's vindication of freedom works, I want to take from it a similar and much less ambitious strategy for thinking of the vindication of rights against the skeptic. Although the skeptic need not contradict herself as such, the skeptic does contradict herself once she acknowledges herself as a subject of rights and wrongs. The vindication is second-personal, then, in that you, the presumed skeptic, acknowledge yourself as a juridical person vis-à-vis me.

Ask yourself: if I stole one of your precious possessions, say, your laptop or the pocket watch you inherited from your grandfather, would you think that I have wronged you? If we made a contract for me to renovate your kitchen, but I took your money without ever doing the job, would you think I have wronged you? If I cut off your hair without your permission, or a security guard prevented you entry into a public building due to the color of your skin, would you consider yourself wronged?

When you answer any of these questions in the affirmative, you acknowledge yourself as a *juridical person* in relation to another. In thinking of yourself as a possible subject of a wrong from me, you enact the juridical relationship, and you manifest that you already inhabit the circle of juridical concepts. You manifest this because you see yourself as *having addressed me* to not steal from you, break my contracts, or discriminate against you.

You acknowledge yourself as a juridical person because you judge yourself as a possible *subject of wrongs* rather than as a mere *sufferer of something bad*. You distinguish between your losing your laptop, say, when a rock falls from the sky and smashes it and me stealing it from you. If your self-consciousness were not intimately bound with your consciousness of yourself as a juridical person, you could not judge yourself as a possible subject of wrongs.

And once you grant that I am bound to you to respect your basic claim to independence, the rest of the structure follows by dint of the reciprocity condition. If I am bound to respect your independence, say, by respecting your property or contract rights, then you are bound to respect my independence in respecting my property and contract rights. You and I are one in original rights and duties. The reciprocity condition reveals the reciprocal structure of the juridical address.

Now, this second-personal vindication of the independence theory tries to show that the radical's skeptic charge of vicious circularity is itself arbitrary rather than incoherent. By showing the internal connection between juridical personhood and the original right to independence, we realize that rejecting the right to independence or deeming it arbitrary is not necessarily incoherent. However, it does come at an impossibly high cost. In order to be consistent, the radical skeptic would

be unable to ever think of herself as the subject of a possible wrong. If the radical skeptic were right, the entire web of interpersonal juridical relationships would vanish into thin air: you could never be an employee or employer, a property owner, a contracting party, a government official or a subject, a legally wedded or common-law spouse, a passport holding traveler, the heir to your parents' fortune or, in that majestic phrase, an equal before the law.

It emerges that the radical skeptic can only charge the independence theory with vicious circularity by assuming that the entire web of relations of right generated by the right to independence is perfectly optional and contingent. My second-personal vindication, if successful, makes explicit the internal conceptual connections between your self-consciousness as a possible subject of wrongs, the original right to independence and specific rights.

Furthermore, we can turn the tables on the radical skeptic. Given how fundamental your self-consciousness as a juridical person is, the mere charge of fiction or vicious circularity cannot be robust enough to warrant the view that these thoughts are simply arbitrary. What the radical skeptic needs is a robust account of why we must think that juridical personhood is normatively arbitrary. But until that argument is forthcoming, we have some reason to consider the skeptical charge as itself arbitrary. And when the argument does come forth, we can try to defeat it, piecemeal, as it emerges. Put differently, we do not need a generic refutation of the radical skeptic. The ball is on the skeptic's court, and we can then show why each of the arguments summoned by the radical skeptic is problematic. In the meantime, this argument should have made explicit what exactly is at stake in declaring the independence theory to be viciously circular: you would never be entitled to think of yourself as a possible subject of wrongs.

CONCLUSION

We began with a puzzle about wrongs. While it seems plausible to think that Claudius wrongs Hamlet, the two dominant theories of rights appear unable to account for this thought. I have argued that the independence theory of rights can solve the puzzle. Unlike choice theories, it does not make a power of enforcement or waiver a pre-condition of bearing rights. Unlike interest theories, it does not ground rights instrumentally in an end intelligible independently of rights. Rights are grounded ultimately in the original right to independence, a right that is co-original with a duty of respect and non-domination. The main argument for the independence theory I have offered is that it solves this puzzle in a straightforward manner. Additionally, the independence theory seems to have the resources for handling important standard objections to the two dominant theories of rights.

The ultimate vindication of rights, it has emerged, cannot turn on grounding rights in an independently intelligible value, such as your welfare. Such vindication must itself take a second-personal form. The radical juridical skeptic does not necessarily self-contradict, but the only way for such a skeptic to formulate the charge of vicious circularity coherently is to never think of another as a bearer of relational duties or conversely to never think of herself as a possible subject of wrongs. In so doing, the radical skeptic reveals the impossible cost that comes with

abdicating the juridical standpoint. The very thought of you must be thought of an equal juridical person, someone who owes me the duty to respect my independence and to whom I owe the very same respect.

[1] SSHRC Postdoctoral Fellow, Department of Philosophy, McGill University. I am grateful to Matthias Haase, Doug Lavin, Arthur Ripstein, Glenda Satne, Leif Wenar, and Jennifer Whiting for comments on an earlier draft.

[2] I draw inspiration for the independence theory from Immanuel Kant's philosophy of right, especially Kant's idea that the normative basis of any type of right is the one original right to freedom. However, the proposed account will not be exegetical in nature. For that reason, I will mention how certain ideas have their origin in Kant, but will not defend the particular interpretation or try to situate it in relation to Kant scholarship. For Kant's view that there is a single original right to freedom, see Immanuel Kant, *The Metaphysics of Morals* (henceforth, *MM*), in *Practical Philosophy*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 2006), 6:237.

[3] For recent and illuminating discussion of directed duties and their relationship to claim-rights, see the contributions to *Ethics*, 123:2, Symposium on Rights and the Direction of Duties (2013): Rowan Cruft, "Introduction," 195-201; Leif Wenar, "The Nature of Claim-Rights," 202-229; Hillel Steiner, "Directed Duties and Inalienable Rights," 230-244; and Matthew Kramer, "Some Doubts about Alternatives to the Interest Theory of Rights," 245-263. Immanuel Kant had drawn this important distinction between directed and undirected duties in *MM,* 6:442.

[4] Naturally this illustration presupposes that the ficus tree is not a bearer of the claim-right to be watered.

[5] In fact, as a thesis concerning the normative nexus of justice between individuals, the thesis of correlativity is of much more ancient pedigree, for it has found expression in a tradition of thinking of justice relationally that goes back through Hegel, Kant, Grotius, Aquinas, and Aristotle. A handful of current thinkers have defended this tradition in different ways by upholding the view that a direct connection between two parties is normatively basic and fundamental to an understanding of juridical wrongs and rights. As I will explain in a moment, this tradition informs my understanding of second-personal normativity. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009); Martin Stone, "The Significance of Doing and Suffering," in G. Postema, ed., *Philosophy and the Law of Torts*, (Cambridge: Cambridge University Press, 2001), 131-182; Michael Thompson, "What Is It to Wrong Someone? A Puzzle about Justice," in R. Jay Wallace, P. Pettit, S. Scheffler & M. Smith, eds., *Reason and Value* (Oxford: Clarendon Press, 2004); and Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995).

[6] Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Legal Reasoning," 23 *Yale Law Journal* 16 (1913).

[7] For illuminating discussion of Hohfeld's legal positions, see Matthew Kramer, "Rights Without Trimmings," in M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights* (Oxford: Oxford University Press, 2002), 8-10.

[8] For this reason and for the sake of economy of expression, when I speak of 'rights' I shall have in mind claim-rights exclusively, thereby disregarding the three other Hohfeldian positions. Nevertheless, I believe that the independence theory can be extended to these positions in a manner analogous to the way in which it explains claim-rights.

[9] H.L.A. Hart, "Are There Any Natural Rights?," *The Philosophical Review,* 64:2 (1955), 182.

[10] Joel Feinberg, "The Nature and Value of Rights," *The journal of Value Inquiry*, Vol.4 (1970), 249-50.

[11] H.L.A. Hart, "Are There any Natural Rights?," 175-178.

[12] M. Kramer, "Rights Without Trimmings," 62; see also M. Kramer, "Some Doubts," 247.

[13] See, for example, M. Kramer, "Rights Without Trimmings," pp. 70-72. Simmonds addresses this criticism (unconvincingly in my view) in "Rights at the Cutting Edge," in *A Debate Over Rights* (Oxford: Oxford University Press, 2002), 230-31. See also Wenar, "The Nature of Claim-Rights," 202-203; and Kramer, "Some Doubts," 262.

[14] Steiner, "Directed Duties," 230-244.

[15] Ibid., 232.

[16] For further elaboration of this criticism, see Kramer, "Rights without Trimmings," 72.

[17] Kramer, "Rights without Trimmings," 61; and Kramer, "Some Doubts," 245-6.

[18] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), chapter 7, 166.

[19] Ibid., 180.

[20] Joseph Raz, "On the Nature of Rights," *Mind* 93 (1984), 199 quoted in M. Kramer, "Rights without Trimmings," 44.

[21] For a similar criticism, see N. Simmonds, "Rights at the Cutting Edge," 151.

[22] Matthew Kramer, "Rights without Trimmings," 44-46.

[23] Wenar, "The Nature of Claim-Rights," 205.

[24] An analogy here may help. Stephen Darwall has recently argued that the standard theories have not accounted adequately for the normative structure of promissory obligations. Darwall argues persuasively that promissory obligations are bipolar (or, in our terms, directed), correlated with the promisee's right to performance. Darwall argues that, at best, the standard accounts, such as Rawls or Scanlon's, can account for a moral (and undirected) obligation to keep our promises. But since undirected obligations do not entail directed ones, these accounts make it mysterious how a promissory obligation could ever correlate with the promisee's right to performance. My point about interest theories here is more general but structurally analogous. Interest theories seem well-poised to explain how there are *undirected* duties to promote well-being or minimize suffering. However, since undirected duties do not entail directed ones, interest theories render the correlativity thesis mysterious. See Stephen Darwall, "Demystifying Promises," in *Honor, History, and Relationship: Essays in Second-Personal Ethics II* (Oxford: Oxford University Press, 2013).

[25] Leif Wenar has recently formulated a fascinating and deeply illuminating alternative to the standard choice and interest theories. There is much I admire in Wenar's account. My concern is whether Wenar's account does not, at bottom, replicate the central difficulty of interest theories. Wenar admits that for certain cases – particularly human rights – the form of explanation of interest theories is correct. He says: "Kind-desire analysis accepts that 'interest' in this objective sense grounds desire-attribution in certain cases, and so anchors the analysis of claim-rights in these cases... Here well-being is an independently defined value, and the rational desires of humans, children, and animals track it. Well-being is the primary concept, and kind-based desires are derived from it. Yet this is the direction of fit only for this new class of right-holders, not for most cases." (227) When we apply Wenar's theory to Hamlet's case, we should realize that his account matches perfectly the account of interest theorists, since Hamlet's right to life – Wenar would concede – is not contingent on Hamlet's inhabiting a specific social role.

[26] This conception of independence finds various expressions in the republican tradition. For the Kantian stream, see Immanuel Kant, *MM,* 6:218-220, 6:237. For discussion of Kant's view of independence, see B. Byrd and J. Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010), chapter 3, §§2-3; Arthur Ripstein, *Force and Freedom*, chapter 1, especially 11-12; and Jennifer Uleman, "External Freedom in Kant's *Rechtslehre:* Political, Metaphysical," in *Philosophy and Phenomenological Research,* 68 (2004), 578-601. For the non-Kantian republican stream see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998); and Skinner, "A Third Concept of Liberty," *Proceedings of the British Academy* 117 (2002). Although this is not the place to pursue the point, I should mention the worry that Pettit's consequentialist understanding of independence grounded in basic interests might be, at bottom, third-personal. By contrast, the Kantian stream is resolutely second-personal.

[27] For this important contrast, see Stephen Darwall, "The Value of Autonomy and the Autonomy of the Will," in *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford: Oxford University Press, 2013).

[28] See Jeremy Waldron, "Citizenship and Dignity," in C. McCrudden (ed.) *Understanding Human Dignity* (Oxford: Oxford University Press, 2013). While I agree with Waldron's characterization of the dignity of persons in terms of a *relational status,* Waldron understands this as a fundamentally *social status,* one constructed in social relations. By contrast, the independence of persons here is not a contingent social status, but an original and necessary one. I articulate and defend elsewhere the second-personal conception of human dignity implicated in the independence theory.

[29] For this contrast, see Michael Thompson, "What is it to Wrong Someone," p. 353.

[30] Of course, it might turn out that on a metaphysical register we keep track of persons differently, say, in terms of the person's continuous consciousness of her psychological states. My point here is restricted to the idea of a person as a bearer of rights. Cf. Kant, *MM,* 6:223.

[31] Kant, *MM,* 6:237.

[32] This contrast between original and acquired rights tracks Hart's distinction between general and special rights. See Hart, "Are There Any Natural Rights?," 187-188.

[33] Of course, there is no established, uncontroversial sense of what the "second-person standpoint," in Darwall's phrase, implicates. My thesis here, for instance, is controversial insofar as it regards as basic the relationship of authority and responsibility between persons. Although this may seem to coincide, for instance, with Darwall's account, Darwall has recently made it clear that the primary second-personal notion for him is that of *accountability* either a *to myself* and/or *to the moral community* as a whole, rather than that of the relationship between individual persons as such. This is clearest, perhaps, in Stephen Darwall, "Bipolar Obligation," in *Morality, Authority, and Law*. I raise some difficulties for such a view of second-personal normativity in my book review of Stephen Darwall's *Honor, History, and Relationship*, *forthcoming* in *Ethics*. However, we can set aside this debate for the purposes of this paper and simply stipulate my conception of second-personal normativity, leaving it an open question whether this is the basic notion. There is a second, methodological contrast that should be mentioned. Instead of beginning with a pre-conceived idea of second-personal normativity and then *applying* it to the topic of rights, part of the point of articulating an independence theory of rights is to give some sense to the idea of second-personal normativity in general, since claiming rights is regarded universally as a second-personal phenomenon. An account of rights would then shed light on the second-person standpoint. Methodologically, this too traverses the path contrary to that pursued by Darwall, which apparently seeks to begin from an abstract picture of second-personal normativity independently from an account of rights and then *applies* this picture to a variety of topics in morality (e.g., personhood, rights, or moral obligation). Here, we can also set aside this methodological disagreement.

[34] For the idea of autonomy as intrapersonal coherence, see Onora O'Neill, "Agency and Autonomy," in *Bounds of Justice* (Cambridge: Cambridge University Press, 2000).

[35] It seems possible to construe a choice theory in such a way that the significance of choice makes reference to relations to others. If so, the choice theory in question would remain second-personal, but would still have important differences to the independence account.

[36] Kant, *MM,* 6:237. Cf. Matthew Kramer, "Rights without Trimmings," 43-44.

[37] I develop and defend this thesis "Why Human Rights? Because of *You,*" *unpublished.*

[38] For similar discussion of the role of enforceability, see Leif Wenar, "The Nature of Claim-Rights," 209 and 214. Cf. Kant, *MM,* 6:231.

[39] The view at play here is not that every directed duty must be enforceable, but rather that only enforceable directed duties are juridical. Thus, even if it turned out that duties of love and friendship are best understood as directed duties, their lack of warrant to enforcement would mean that others lack enforceable rights to your love or friendship. I set aside here the topic of how we are to understand the relational though non-enforceable structure of moral (i.e., non-juridical) duties.

[40] Cf. Kant, *MM,* 6:261: "But it is clear that someone who was all alone on the earth could really neither have nor acquire any external thing as his own, since there is no relation whatever of obligation between him, as a person, and any other external object, as a thing. Hence, speaking strictly and literally, there is also no (direct) right to a thing. What is called a right to a thing is only that right someone has against a person..."

[41] Cf. Kant, *MM,* 6:283-4 and Ripstein, *Force and Freedom,* 38, 133ff.

[42] Matthew Kramer summarizes these problems in his "Some Doubts," 262.

[43] See Kant, *MM,* 6:280. The case of the mentally unsound is more complicated, since the category is not homogenous. There might be some extreme cases where we might not be justified in extending juridical personhood, whereas mild cases would fall within the purview of the independence theory.

[44] Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2012), 18: "The relation between a status and its incidents is not the same as the relation between a goal and the various subordinate principles that promote the goal; it is more like the relation between a set and its members."

[45] Henry Allison, *Kant's Theory of Freedom* (Cambridge: Cambridge University Press, 1990), chapter 11. See Immanuel Kant, *Groundwork for the Metaphysics of Morals,* 4:450; and *Critique of Practical Reason,* 5:29. Both appear in Mary Gregor, *Practical Philosophy.*

[46] To be clear, the argument for the fact of reason has generated considerable interpretative controversy, and I do not presume here to even enter the exegetical fray. My only point is to draw inspiration from one possible way of reading Kant's argument, without needing to defend this point as a reading of Kant's text. My brief presentation of this new strategy follows Paul Franks's interpretation of the *Factum of reason.* See Paul Franks, *All or Nothing: Systematicity, Transcendental Arguments, and Skepticism in German Idealism* (Cambridge, MA: Harvard University Press, 2005), §§5.2-5.3. Most recently, Patricia Kitcher develops, I think, a similar reading in her "Kant's Practical Proof of the Fact of Freedom," *unpublished.*

[47] Kant, *Critique of Practical Reason,* 5:30.