

RELATIONAL NORMS

ROBERT MULLINS

BALLIOL COLLEGE



D.PHIL IN LAW

Trinity Term, 2016

ABSTRACT

RELATIONAL NORMS

ROBERT MULLINS, BALLIOL COLLEGE

DOCTOR OF PHILOSOPHY IN LAW, TRINITY TERM 2016

The thesis is a study of relational norms—those norms that regulate how we behave in our valuable relationships. I argue that the presence of relational norms in the law reflects its capacities and limitations as an instrument for the guidance of conduct. I make three arguments to support of this claim. First, I argue that we have norms that are constitutive of our practically significant relationships. Second, I argue that the content and justification of these relationships is not necessarily reflected in their legal forms. Third, I argue that we can have relationships that are justified by their instrumental value. There are three Parts to this thesis, each of which is devoted to one of these claims. Part I discusses relational norms in practical reasoning. I identify relational norms as norms that constitute a relationship of value. I then argue that we can owe obligations to one another in what I call the ‘relationship sense’. These obligations are neither necessarily enforceable, nor necessarily correlate with the rights of others. Part II discusses relational norms in law. I consider various constraints on the incorporation of relational norms in law, as well as the various relationships of correlativity that are sometimes said to define private law. I also consider the nature of legal rights to perform certain relational duties. I argue that although the duties are burdensome, these rights promote our interests, or at least are claimed to do so by legal officials. Part III considers the significance of relational norms to the general character of law. First I argue that we can have instrumental relationships—relationships that possess their value in virtue of some end that they serve. I then argue that any authoritative relationship that exists between legal officials and their subjects must be instrumentally justified.

ACKNOWLEDGMENTS

To my parents, Glen and Sharon, and my brother Joseph, I give my love and thanks. Roisin Goss, Ryan Goss and Amy King also have my gratitude for their support. Caitlin Goss was a constant source of empathy, companionship, wit and insight.

I thank my friends. In particular: Simon Quinn, Miles Jackson, Dan Vujcich, Heather Millar, Kate Orkin, Matt Smith, Sebastian Keim, Rebecca Lizárraga Alonso, Ben Green, Christine O'Neill, Mungo Crawford, Samara Skubij, Sally Robb, Natasha Simonson, Lindsay Whorton, Leah Trueblood, Nik Kirby, and the Gore-Lindholm clan.

During the first two years of working on this thesis, I lived with Sara Everett and Chris, Gus and Charlie Jones. I will always be grateful for their kindness and hospitality. I also thank the Rhodes and Clarendon Trusts for their generous support.

I have several intellectual debts to acknowledge. Dr. Grant Lamond, Dr. Sandy Steel and Professor Leslie Green gave invaluable feedback on earlier stages of this work during my transfer and confirmation of studies. Nik Kirby and Leah Trueblood read earlier drafts and gave feedback that lead to some thorough revisions. Caitlin Goss, Roisin Goss and Glen and Sharon Mullins read the document in its entirety and it was much improved by their corrections and feedback.

Professor John Gardner was a tireless supervisor. I am grateful to have had a supervisor who is as kind and energetic as he is philosophically formidable.

Since intellectual debts are hard to repay, all I can do is acknowledge the influence these people have had on my work. Any errors that remain are despite their efforts.

Not long after I began writing this thesis, Wayne Goss was diagnosed with a brain tumour for the fourth time in 16 years. He died the following year, in November 2014. He was a wonderful lawyer, father and friend. I dedicate this thesis to him.

Table of Contents

Table of Cases	iii
United Kingdom	iii
United States	iv
Australia	iv
Table of Statutes	v
Chapter 1: Introduction.....	1
1.1 The Thesis in Overview	5
1.2 Relational Norms and the Character of Morality.....	7
1.3 Relational Norms and the Character of Law	14
1.4 Further Problems	29
1.5 Conclusion	32
Part I.....	37
Chapter 2: Relational Norms.....	38
2.1 The Analysis of Relational Norms.....	41
2.2 Relational Obligations	54
2.3 Relational Permissions	63
2.4 Relational Norms in Practical Reasoning.....	67
2.5 Conclusion	77
Chapter 3: Normative Relationships.....	80
3.1 Friendship as a Normative Relationship.....	82
3.2 Explanatory Reflexivity and External Intelligibility	92
3.3 Common Objections	106
3.4 Normative Relationships and Artificial Norms	115
3.5 Conclusion	119
Chapter 4: Relationships Without Rights	122
4.1 The Problem Cases.....	125
4.2 Enforceability.....	129
4.3 Pragmatic Explanations	136
4.4 The Justificatory Explanation.....	144
4.5 Rights and Legal Relations	157
4.6 Conclusion	160
Part II.....	162
Chapter 5: Relational Norms and the Limits of Law	163
5.1 Incorporation	167

5.2 The Duty to Love Our Children	171
5.3 Limits to Incorporation	181
5.4 How the Law May Improve Normative Relationships.....	201
5.5 Conclusion	209
Chapter 6: Relationships and Correlativity in Private Law.....	211
6.1 Relational Conceptions of Private Law	215
6.2 Relationship Sensitivity	218
6.3 Correlativity in Private Law.....	231
6.4 Legal Relations and Theoretical Explanation of Law	252
6.5 Conclusion	255
Chapter 7: Legal Rights, Relationships and Wellbeing.....	258
7.1 Rights, Interests and <i>The Children Act</i>	259
7.2 The Interest Theory and the Problem of Role-Bearers' Rights.....	269
7.3 Other Responses.....	277
7.4 The Response.....	283
7.5 Detached Rights Attributions	297
7.6 Conclusion	301
Part III	306
Chapter 8: Instrumental Relationships	307
8.1 Instrumental Relationships	310
8.2 Teamwork	318
8.3 Objections to the Instrumental Account of Teamwork	326
8.4 Authority as an Instrumental Relationship.....	336
8.5 Conclusion	343
Chapter 9: Relationships, Community, and Legal Authority	345
9.1 The Value of Authoritative Relationships.....	347
9.2 Legal Authority, Friendship, and Community.....	358
9.3 Impersonal Legal Authority.....	363
9.4 Indirectness.....	367
9.5 Pluralism and the Justification of Authority.....	371
9.6 Relationships and Justification in Moral Theory.....	388
9.7 Conclusion	393
Bibliography	396

TABLE OF CASES

United Kingdom

A (Conjoined Twins) [2001] 2 WLR 480 (CA)	266
Allcard v Skinner (1887) 36 Ch D 145 (CA).....	167
Allen v Flood [1898] AC 1 (HL)	242-243
Barrett v Enfield London Borough Council [2001] 2 AC 550 (HL)	28, 220
Bourhill v Young [1943] AC 92 (HL).....	216
Bristol & West Building Society v Mothew [1996] EWCA Civ 533; [1998] Ch 1.....	168, 219
Bull v Hall [2013] UKSC 73.....	1
Campbell v MGN Limited [2004] UKHL 22; [2004] 2 AC 457 (HL)	248
Caparo Industries v Dickman [1990] 2 AC 605 (HL)	217
Donoghue v Stevenson [1932] AC 562 (HL)	116-7, 217, 223, 225, 249
Hammond v Osborne [2002] EWCA Civ 885, [2002] WTLR 1125	2
Hilton v Barker Booth Eastwood [2005] UKHL 8; [2005] 1 All ER 651	220
JD v East Berkshire Community Health Trust & Ors [2005] UKHL 23.....	268, 290
KD (A Minor: Ward) (Termination of Access) [1988] 1 AC 806 (HL).....	176
L (Care: Threshold Criteria) [2007] 1 FLR 2050 (FD)	169, 177, 170

Prime Sight Ltd v Lavarello [2013] UKPC 22; [2014] AC 436	248
Rylands v Fletcher (1868) UKHL 1; (1868) LR 3 HL 330.....	246
Smith v Littlewoods Organisation ltd [1987] UKHL 18; [1987] AC 241.....	220
White v Jones [1995] 2 AC 207 (HL)	249
Wright v Hodgkinson [2004] EWHC 3091 (Ch), [2005] WTLR 435	2

United States

Lake Shore & M.S.R. Co v Kurtz (1894) Ind. App., 60	232
Macpherson v Buick Motor Co 217 N.Y. 392 (1916).....	216
Palsgraf v Long Island Railroad Co 248 NY 339 (1928).....	216-8
Vincent v Lake Erie Transportation 124 NW 221 (1910)	246

Australia

Johnson v Buttress (1936) 56 CLR 133.....	168
---	-----

TABLE OF STATUTES

Child Support Act 1991 (UK)	177
Children and Young Persons Act 1933 (UK)	22
Education Act 1996 (UK).....	177
Family Law Act 1975 (Cth) (Australia).....	1, 89
Matrimonial Causes Act 1973 (UK).....	1
The Children Act 1989 (UK)	199, 259-69, 273, 293, 301-5

CHAPTER 1: INTRODUCTION

The law does not just instruct us about what we must and may do. It tells us what we must and may do as mothers and fathers, as friends and confidants, as neighbours, and as citizens. In the process of creating and applying the law, judges and other legal officials make claims about our relationships with others and what we must do on their behalf. In Australia, for example, parents are told in statute that they should endeavour to agree with one another when they are making decisions about their parenting.¹ Spouses in many countries are mandated to provide for one another, even after divorce.² When the law tells us what we must do as parents and spouses, it is making a claim about the value of our relationships and the need to support the various norms that help us to realise them. (In the United Kingdom, one member of the Supreme Court has claimed that the laws of marriage exist ‘to recognise and to encourage stable, committed, long-term relationships’.³) In certain relationships, like those that exist between solicitors and their client, the common law will not allow people to

¹ Family Law Act 1975 (Cth), s60B. As I argue in Chapter 6, these provisions are regulative—they state goals for parents, rather than strict duties.

² See e.g. Matrimonial Causes Act 1973 (UK), s 23.

³ *Bull v Hall* [2013] UKSC 73, [36] per Lady Hale.

retreat from the duties and burdens of ‘trust and confidence’ that their relationships impose upon them—the courts will conclude that their relationship has raised expectations that they should not be allowed to defeat.⁴

It is not surprising that the law takes interest in our relationships. In our practical reasoning, a special kind of importance is given to our relationships and to the duties that define them. I value my relationships, and I often cite them as sufficient reasons for acting in a certain way.⁵ Sometimes relationships are cited as sufficient reasons for doing things that would otherwise seem extraordinary.

⁴ Friendship is not an established category of fiduciary relationship, but the law has been willing to recognise that friendships and other relationships of amity may give rise to fiduciary duties if the requirements are independently made out. For a discussion in the context of American law see Ethan Leib, ‘Friends as Fiduciaries’ (2009) 86 *Washington University Law Review* 665. Examples of cases in the United Kingdom where friendships of the requisite type have created equitable duties include *Hammond v Osborne* [2002] EWCA Civ 885, [2002] WTLR 1125 and *Wright v Hodgkinson* [2004] EWHC 3091 (Ch), [2005] WTLR 435. On the role of relationships in common law undue influence doctrine see discussion in Mindy Chen-Wishart, ‘Undue Influence: Vindicating Relationships of Influence’ (2006) 59 *Current Legal Problems* 30.

⁵ On the tendency to cite relationships as reasons for action see Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press 2002) 100; Samuel Scheffler, ‘Morality and Reasonable Partiality’ in Brian Feltham and John Cottingham (eds), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010); Niko Kolodny, ‘Love as Valuing a Relationship’ (2003) 112 *Philosophical Review* 135; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 253–258. cf Simon Keller, *Partiality* (Princeton University Press 2013) 69–72.

Bernard Williams' example has now passed into philosophical lore: a man will save his wife rather than saving several strangers *because* she is his wife.⁶

The thesis is a study of relational norms. 'Relational norm' is a term of art that denotes those norms that are constitutive of these practically significant relationships. (Friends, for example, have various duties to one another that are expressive of their good-will that they share.) The thesis makes two principal arguments. First, I argue that relational norms have special significance for practical philosophy and therefore for the philosophy of law. The law reflects the beliefs of legal officials about the value of our relationships and the interests that they serve. Our legal duties, powers and rights are sensitive to our relationships with one another in important ways. This makes an understanding of relational norms indispensable to the theoretical explanation of law. Second, I argue that the existence of relational norms in law is continuous with traditional accounts of law as a specific means of authoritative intervention in the lives of its subjects.⁷

The law's intervention in and incorporation of our relationships may serve a

⁶ Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge University Press 1981) 18–19.

⁷ See e.g. Hans Kelsen, *General Theory of Law and State*, (Lawbook Exchange 1945); H.L. Hart, 'Positivism and the Separation of Law and Morals', *Essays on Jurisprudence and Philosophy* (Clarendon Press 1983); Raz, *The Authority of Law: Essays on Law and Morality* (n 5).

variety of ends, including but not limited to the promotion of the relationship itself.

The significance of this thesis lies in its making both of these arguments concurrently. Many lawyers and philosophers of law take the relationality of certain legal norms as indicating the need to abandon various kinds of instrumentalism. Philosophers of private law treat the relational character of various duties as incompatible with ‘instrumental’ accounts of legal doctrine.⁸ Other legal philosophers have argued that instrumental accounts of authority are unable to explain what it is that relates us towards legal officials—what it is that binds us to accept their directives.⁹ In the remainder of this Chapter, I begin by offering a brief summary of the thesis and the structure of my argument. I then reflect on the general significance of my arguments in greater depth, and identify a number of discrete issues raised by the thesis.

The arguments that I make in this thesis are also intended to act as a corrective to two current trends in practical philosophy. Both trends are the

⁸ Ernest Weinrib, *Corrective Justice* (Oxford University Press 2012) xi. See also, Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001) 13–24.

⁹ Scott Hershovitz, ‘The Role of Authority’ (2011) 11 *Philosopher’s Imprint* 1; Stephen Darwall, ‘Law and the Second-Person Standpoint’, *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford University Press 2013).

result of a failure to understand the interaction between the character of relational norms and the law's specific means of upholding them. The first trend emphasises the 'bipolar' or relational character of morality. The second trend involves the inflation of the significance of relational norms in law—there is a tendency to argue that the presence of relational norms in law is incompatible with accounts of law as an instrument of social control. After summarising my argument below, I will reflect on each of these trends in turn.

1.1 The Thesis in Overview

The principal argument of this thesis is supported by three subsidiary claims. First, I claim that we have irreducibly relational norms—duties, permissions, powers and rights that constitute our morally significant relationships with others. Second, I claim that the law often promotes these norms, but that the law's ability to promote them is limited by its particular capacities as an instrument of social control—by its particular methods of incorporation. In many situations the law can only protect our relationships indirectly. Where it would limit our autonomy, threaten our intimacy, or where legal rules would be ineffective or self-defeating, legal intervention to promote our relationships is undesirable. Third, I argue that relational norms may be instrumentally

justified—they may be justified, in whole or in part, because they are a means to realising some other value.

This thesis is divided into three parts, each of which develops one of these three claims. In Part I of this thesis, I offer an account of relational norms as *sui generis* objects of practical reason. Chapter 2 introduces the account of relational norms on which the thesis relies. Chapter 3 applies the account to the relational norms that define friendship, and considers some potential objections. Chapter 4 discusses the relationship between rights and relational norms. I argue that there can be relational norms that do not correlate with rights, since certain relationships are inimical to the recognition of individual interests. This shows one way in which our rights are sensitive to the character of our relationships with others.

In Part II of the thesis, I progress to the discussion of relational norms in law. I argue in Chapter 5 that the law incorporates relational norms in a variety of ways, but that there are various principled constraints on the law's ability to uphold relational norms directly, including instrumental constraints. Chapter 6 argues that the private law is not exhaustively defined by relational norms, and that, in any case, the apparent relationality of private law norms is compatible

with a variety of disparate accounts of their form and justification. In Chapter 7, I return to discussing the relationship between rights and relational norms, this time from a legal perspective. I argue that many of our legal rights to perform certain roles within burdensome relationships are grounded in our interests.

In Part III of the thesis, I reflect on the significance of relational norms to the general philosophy of law. Chapter 8 defends the proposition that relational norms can be instrumentally justified—they derive their value, in whole or in part, from some other value that they help us serve. In Chapter 9, I claim that to the extent that we do have relational duties to act on the directives of legal officials, these duties must be instrumentally justified.

1.2 Relational Norms and the Character of Morality

1.2.1 Relational Norms, Justice, and Interpersonal Morality

Relationships and relational forms of normativity have always been given a degree of prominence in practical philosophy. In books VIII and IX of his *Nicomachean Ethics*, Aristotle turned to considering varieties of friendship and partnerships. Aristotle claimed that our duties of justice were sensitive to the precise nature of our relationships with other people:

How a man should live in relation to his wife, and in general how one friend should live in relation to another, appears to be the same question as how they can live justly. For the demands of justice on a friend towards a friend are not the same as those towards a stranger, nor those on a companion the same as towards a fellow student.¹⁰

What Aristotle is referring to with respect to duties of justice is a certain kind of relationship sensitivity or dependence in our practical reasoning.¹¹ We have reasons for acting in certain ways that arise *because* we share certain relationships with one another. The relationships themselves appear to be a source of reasons for action. In this thesis I contend that the relationship-dependence of our reasons for action is partly explained by the presence of relational norms—norms that define our particular relationships of value.

Aristotle's insistence on the relationship-sensitivity of justice has had a clear influence on the development of moral and political theory through to the present day. Judeo-Christian ethics, with what Nietzsche disparaged as its 'unparalleled genius for popular morality' appealed to relational morality by reifying the concept of neighbourhood or fellowship.¹² According to the Levitical

¹⁰ Aristotle, *Nicomachean Ethics* (Roger Crisp ed & tran, Cambridge University Press 2000) 160; 1162a.

¹¹ See also *ibid* 158; 1160a.

¹² Friedrich Wilhelm Nietzsche, *On the Genealogy of Morality* (Cambridge University Press 2007) 32.

injunction, we must love our neighbour for their own sake, as if they were ourselves.¹³ Aquinas followed the Roman jurists and spoke of justice as a virtue that directs us towards others, and which requires us to give others their right or *jus*. His work harnesses the full force of the Christian ethic of neighbourly love to an Aristotelian conception of justice.¹⁴

The utilitarians identified relational norms as a fundamental feature of common sense morality. Mill's discussion in Chapter 5 of *Utilitarianism* recognised our relational duties as exceptions to the requirement of impartiality in justice. For Mill, the permissibility of partiality demonstrated that the value of impartiality was largely instrumental in the pursuit of justice—'for it is admitted that favour and preference are not always censurable, and indeed the cases in which they are condemned are rather the exception than the rule'.¹⁵ Sidgwick devoted a chapter of his *Methods* to discussing the different duties of benevolence in common sense morality—those duties 'that we owe to our fellow men—so far as they do not seem to come under the head of Justice', including the duties of kindness that we owe towards parents, spouses and children, and 'neighbours

¹³ *Leviticus* 19:18.

¹⁴ *Summa Theologica* II-II, Q. 122.

¹⁵ JS Mill, *Utilitarianism* (Roger Crisp ed, Oxford University Press 1998) 90.

and fellow-countrymen'.¹⁶ (Notice that, unlike Aristotle, Mill and Aquinas, Sidgwick distinguishes relational norms from norms of justice).¹⁷

Contemporary philosophy is replete with appeals to relational normativity. Relational obligations are a much-discussed issue in the context of political obligation.¹⁸ But they have had a broader influence on the development of moral theory in the twentieth century. In his essay, 'War and Massacre', Thomas Nagel laments the lack of restraint placed on our conduct in warfare by traditional utilitarian moral theories. In rejecting the traditional approach, he places great weight on the interpersonal nature of warfare: 'the absolutism about murder has a foundation in principles governing all one's relations to other persons, whether aggressive or amiable, and these principles, and that absolutism, apply to warfare as well'.¹⁹ T.M. Scanlon's widely influential *What*

¹⁶ Henry Sidgwick, *The Methods of Ethics* (Macmillan 1877) bk III, ch IV, 216.

¹⁷ I am inclined to agree with Sidgwick and to part ways with the tendency to assimilate all norms of conduct (including relational norms) into norms of justice. This is because I am sympathetic to the view that justice is just one of several virtues, amongst which we might count e.g. benevolence and prudence; see further TD Campbell, 'Humanity before Justice' (1974) 4 *British Journal of Political Science* 1. But I will not make this argument in this thesis.

¹⁸ For a summary of the literature on 'special obligations' in political philosophy see Diane Jeske, 'Special Obligations' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2014, 2014) <<http://plato.stanford.edu/archives/spr2014/entries/special-obligations/>>. I return to discussing some of this literature in the context of legal authority in Chapter 9.

¹⁹ Thomas Nagel, 'War and Massacre' (1972) 1 *Philosophy and Public Affairs* 123, 142.

We Owe to Each Other is dedicated to analysing that important part of morality (morality in the 'narrow sense') that contains those duties or obligations we owe to one another.²⁰ Stephen Darwall's recent work appears to consolidate upon this central Scanlonian claim.²¹ Wallace appeals to relational norms in order to account for what he calls the 'deontic structure' of our practical reasoning (our tendency to reason through appeals to duty or obligation).²²

The continuing invocation of relational norms within moral theory demonstrates something of the importance of this thesis's subject matter. However I am less interested in the merits of this sort of general project in moral theory than my choice of topic might suggest. I do not reflect in any detail on the extent to which a privileged part of the moral landscape is 'relational'. In Chapter 6 I offer some reasons for thinking that even if there are impersonal relational norms of the sort that these theorists rely on, they are not directly analogous to relational norms of the sort that this thesis largely discusses. My suspicion is that,

²⁰ TM Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) ch 4, section 7.

²¹ A revealing dialogue between Wallace and Darwall has helped to uncover the extent to which Darwall himself thinks his work is concerned with relational norms; R Jay Wallace, 'Reasons, Relations and Commands: Reflections on Darwall' (2007) 118 *Ethics* 24; Stephen Darwall, 'Bipolar Obligation' in R Shafer-Landau (ed), *Oxford Studies in Metaethics*, vol 7 (Oxford University Press 2012).

²² R Jay Wallace, 'Duties of Love' (2012) 86 *Aristotelian Society Supplementary Volume* 175; R Jay Wallace, 'The Deontic Structure of Morality' in David Bakhurst, Margaret Olivia Little and Brad Hooker (eds), *Thinking About Reasons: Themes From the Philosophy of Jonathan Dancy* (Oxford University Press 2013).

in invoking a general moral relationship (a relationship that holds equally between strangers at war as between friends and family members) these philosophers create a kind of *tertium quid*, one that obscures the distinction between the impersonal and the interpersonal in practical reasoning.²³ My project in this thesis is largely to reflect on the character of relational norms more broadly, especially with respect to the nature of law and legal doctrine. I hope that my discussion, by offering a general account, helps to show what is at stake in these arguments about the relational character of morality.

1.2.1 Quasi-Jural Moral Theories

Recent work by moral philosophers like Michael Thompson, Stephen Darwall and R. Jay Wallace has heralded the re-emergence of what Sidgwick referred to as ‘jural’ or ‘quasi-jural’ moral theories. Quasi-jural accounts typically stress the primeness of duty and right-conduct, especially in our interpersonal and social relations.²⁴ These theories typically invoke quasi-legal apparatus in their

²³ For broader concerns see Scheffler, ‘Morality and Reasonable Partiality’ (n 5) 114–124. The closest I come to engaging with this project directly is my consideration of the basic duty of care in negligence law, which some authors have characterised in relational terms; see Chapter 6.

²⁴ See Sidgwick (n 16) 106.

exposition.²⁵ In the particular accounts offered by Darwall and Thompson, the basic concepts of ethics are developed by analogy to the civil and criminal trial.²⁶ Morality obtains its distinctiveness from other areas of practical reasoning because it reflects our various abilities to call one another to account for our wrongs. Darwall divides morality into bipolar morality (those parts of morality that bestow an ‘individual authority’ to call one another to personal account) and ‘monadic’ (non-relational) morality, for which we have only ‘representative’ authority to call others to account for their wrongs.²⁷ The distinction between bipolar and merely monadic moral obligation is further supposed to be reflected in the distinction between the civil and criminal trial.²⁸ Civil wrongs are those wrongs for which we have personal standing to call others to account. Criminal wrongs, on the other hand, are those wrongs for which we have only ‘representative’ authority to call others to account on behalf of a community.

Darwall and Thompson rely on the distinction between relational and non-

²⁵ See especially Michael Thompson, ‘What Is It to Wrong Someone? A Puzzle About Justice’, *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Clarendon Press 2004); Darwall ‘Bipolar Obligation’ (n 21); John Skorupski, *The Domain of Reasons* (Oxford University Press 2010); Wallace, ‘Duties of Love’ (n 22); Wallace, ‘The Deontic Structure of Morality’ (n 22).

²⁶ Thompson (n 25); Darwall ‘Bipolar Obligation’ (n 21); Stephen Darwall, ‘Law and the Second-Person Standpoint’, *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford University Press 2013).

²⁷ Darwall ‘Bipolar Obligation’ (n 21).

²⁸ Thompson (n 25) 343–345; Darwall ‘Bipolar Obligation’ (n 21) 347; Darwall ‘Law and the Second-Person Standpoint’ (n 26).

relational norms (and the equivalent jural distinction between public and private wrongs) to do a great deal of explanatory work in their moral theory.

The arguments in this thesis shed light on the distortions inherent in quasi-jural conceptions of practical reasoning in at least two ways. To begin with, in Chapter 3 I argue against accounts of rights and their correlative obligations that draw on juridical notions like enforcement. Quasi-judicial accounts of rights and duties are particularly inapt in relational settings. In relational settings we can have rights but lack the standing to complain or enforce those rights. It might even be the case that we fail to have rights against one another altogether—because rights are inimical to the character of the relationship.

1.3 Relational Norms and the Character of Law

1.3.1 The Pathology of the Trial

In its own way, the excessive focus on legal enforcement that is evident in quasi-judicial conceptions of morality contributes to a distorted understanding of the law and legal systems. Hart noted the law gives individuals the power to form relations with one another (marriage, for example) and this kind of power-creating norm was a problem for theories of law that focus entirely on sanction

or coercion. He insisted that our theory of law should pay appropriate attention to the 'diverse ways in which the law is used to control, to guide, and to plan life out of court'.²⁹ The law mediates our relationships with others in a variety of ways other than through the imposition of civil and criminal liability. As Hart acknowledged, the form of the civil trial, which connects plaintiff and defendant in an immediate relationship of liability, has the potential to distort our understanding of the law: 'the principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions'.³⁰ The trial is signatory of a breakdown in many parties' relationships—often an irreparable one. The relationship between plaintiff and defendant is not the typical kind of relationship that the law seeks to uphold or support.

In their attempts to guide our lives outside of the courtroom, legal officials acknowledge our relational norms in a variety of ways that fall short of upholding or enforcing them. In Chapter 5 I consider the various ways in which

²⁹ HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 40. See further discussion in Leslie Green, 'Introduction', *The Concept of Law* (Third, Oxford University Press 2012) xxx–xxxiii.

³⁰ Hart (n 29) 40. In his tribute to Fuller, Albert Sacks noted that Fuller similarly disparaged the law's focus on the breakdown of social relationships, at the expense of a focus on the way in which the law created and supported those relationships in the first place; Albert Sacks, 'Lon Luvois Fuller' (1978) 92 *Harvard Law Review* 349, 350. Perhaps this reflects yet another issue for which Fuller mistakenly took Hart to be his adversary. I discuss this point further below.

the law should refrain from intervening to uphold our various relational norms. For instance, the law acknowledges that ideally parents will love their children (and indeed that they have a moral duty to do so) without imposing a *legal* duty on parents to love their children. A variety of principles limit the law's ability to uphold or enforce relational norms. I discuss three such principles: the rule of law, the harm principle, and what I denote as 'instrumental concerns'. Each of these principles affects the law's ability to uphold and enforce relational norms.

In Chapter 6 I consider the theoretical significance of relational norms to the philosophical explanation of private law doctrine. I note that overemphasis on the form of the civil trial leads to a distorted picture of the relationship between plaintiff and defendant in private law. Aspects of the private law—particularly the law of obligations—appear to demonstrate a distinctive kind of relationality that is sometimes called 'correlativity'.³¹ Correlativity purportedly acts as a constraint on theoretical explanations of the private law. In Chapter 6 I argue that if there are private law relationships, then their existence remains compatible with a variety of different theoretical explanations of the private law.

³¹ Ernest Weinrib, *The Idea of Private Law* (Revised, Oxford University Press 2013); Ernest J Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 *Theoretical Inquiries in Law*. As my discussion makes clear, Weinrib's notion of correlativity needs to be distinguished from Hohfeld's deployment of the same terminology in his work; *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1919).

Several accounts of private law are compatible with the observation that a particular right-duty relationship exists between plaintiff and defendant. Moreover, these accounts are compatible with diverse theoretical explanations of legal doctrine.

The distortionary effects of the trial are also evident in rights-based analysis of law and legal doctrine. According to a popular account, all of those duties that relate us to others are just duties that correlate with another person's rights.³² Contemporary rights theorists describe the duties that correspond to Hohfeldian claim rights as 'directed duties'. They take the function of the claim right to be what 'directs' the duty towards the right-holder.³³ If claim rights promote interests of a certain sort, for instance, then it is those interests of the right-holder that 'direct' the duty towards the right-holder. It might be thought, therefore, that an account of directed duties provides all that is needed for a complete philosophical account of relational norms. In Chapter 2 of this thesis I argue that, at least where norms are constituent of some relationship of value between the bearer and the counterparty, they resist being analysed in this way.

³² See Chapter 2.

³³ I return to discussion of these accounts in Chapter 2. For a useful summary of the debate see Simon Cabulea May, 'Directed Duties' (2015) 10 *Philosophy Compass* 523.

The argument I make to this effect can be demonstrated with a brief example. Consider the interest that is promoted by a parent fulfilling their duties of care towards their son. The son's particular interest is in having *his parent* fulfilling these responsibilities—he would not have the same interest in anyone else's doing so. But the role of parent cannot be understood without having reference to the duties that the parent owes his child. So we are back where we started. The 'directed duty' is putatively explained by the son's interest in the relationship, while the relationship itself is explained by the presence of the directed duty. Supposing that there is a normatively significant relationship between persons, there is no way of simply reducing that relationship between persons to some monadic moral property of a right-bearer. In fact, the existence of the relationships and their constituent norms has explanatory priority over any interests that are derived from them.

In Chapter 4 I return to considering rights within relationships in greater depth. Relational duties typically do correlate with rights. A parent's duty to provide their son with an education correlates with a right on behalf of the son that they secure his education in this way. But in what I call 'problem cases', we owe certain duties to others but those to whom the duties or obligations are owed do not appear to have rights against us. For instance, I might owe it to my

friend to be grateful when she does me a favour, but she does not have a right to my gratitude. I consider a variety of different kinds of explanation for these cases. Ultimately I settle on one particular account of the problem cases—they are cases where, due to the nature of the relationship between the duty-bearer and the other person, the interests that are served by the duties cannot ground rights. The problem cases therefore demonstrate the importance of relational norms to the understanding of practical reasoning in a different way. The very nature of the relationships under discussion precludes the existence of individual rights.

In Chapter 7 I discuss rights in the context of a variety of legal relationships that impose duties on people that are apparently burdensome. Since rights are to the benefit of their holders, rights to perform burdensome responsibilities like those associated with parenthood appear to be problematic. I argue that these relationships *are* beneficial to the rights-holders.³⁴ Fulfilling our relational commitments promotes our wellbeing in a particularly vital way. It follows that, when we occupy a role, our rights to perform that role protect our

³⁴ I build upon similar arguments made by Matthew Kramer and Joseph Raz, offering some refinements of my own along the way; Joseph Raz, 'Rights and Individual Well-Being', *Ethics in the Public Domain* (Oxford University Press 1995); Matthew H Kramer and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 *Oxford Journal of Legal Studies* 281; MH Kramer, 'Refining the Interest Theory of Rights' (2010) 55 *American Journal of Jurisprudence* 31.

wellbeing in a legally significant way. We should reject accounts that attempt to draw too bright a line between our commitments and the promotion of our interests.

Strictly speaking, the predicate 'relationship' could be used to describe any kind of state of affairs involving two or more people.³⁵ An example of a different kind of account of relationality can be found in W.N. Hohfeld's logical parsing of legal positions in terms of what he called 'legal relations' – varieties of correlative right-duty pairings.³⁶ At various stages in this thesis I am careful to distinguish Hohfeld's particular analytical project from my own. The kinds of relationships that this thesis discusses are relationships that have a greater practical significance than Hohfeld had in mind when he designated certain fundamental legal relations. Hohfeld is usually read as having advanced a scheme of deontic logic for the purpose of precisifying the description of legal positions.³⁷ His scheme is consistent with a variety of different accounts of law, including accounts of the law that do not accord any specific significance to relational norms. Hohfeld does not confine his scheme of legal relations to the

³⁵ This point is made by Niko Kolodny in his discussion of love as a normative relationship; Kolodny, 'Love as Valuing a Relationship' (n 5) 147.

³⁶ Hohfeld (n 31).

³⁷ Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights* (Oxford University Press 1998) 22.

study of what I am calling relational norms. Chapter 6 observes that Hohfeldian correlativity is compatible with a variety of different theoretical explanations of private law doctrine.

1.3.2 Instrumentalism and the Character of Law

The core argument of this thesis is that relational norms are indispensable to the proper philosophical understanding of law and legal doctrine. To begin with, the description of law involves engaging with the various deontic categories that the law creates or invokes. To appropriately describe and explain the law, we must describe the powers, rights and duties that the law confers and imposes. Where those powers, rights and duties are partly constitutive of normatively significant relationships, then our descriptions and explanations must appeal to the relationships themselves. The identification of relational norms is in practice inseparable from the identification of our practically significant relationships.

It is impossible to describe any such relationship without also describing the duties and permissions that define them.³⁸ Someone who does not understand that a father is someone who has duties to care for their child has not

³⁸ Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) 41. See further Chapters 2,3.

understood fatherhood in anything other than its thin genetic sense. A variety of norms of this sort are incorporated into the law. In the criminal law, for example, a special crime of neglect acknowledges the particular duties of parents towards their children.³⁹ In private law, our duties of care display what John Goldberg and Ben Zipursky refer to as ‘relationship sensitivity’—they resonate in particular ways with our relationships and histories of interacting with others.⁴⁰ Lawyers possess unique duties of care towards their clients, home-owners possess duties of care towards their immediate neighbours, and parents have duties of care towards their children.

This thesis therefore concedes that relational norms have an indispensable role to play in the philosophical description and explanation of law. I argue, however, that the relationality of law or legal norms is compatible with instrumentalism about those same norms. Philosophers of law—both those who discuss law in general and those who discuss specific aspects of legal doctrine—often take relationality and instrumentalism to be incompatible.⁴¹ Lon Fuller is

³⁹ Children and Young Persons Act 1933 (UK), s 1(2).

⁴⁰ John Goldberg and Benjamin Zipursky, ‘The Moral of Macpherson’ (1998) 146 *University of Pennsylvania Law Review* 1734, 1829.

⁴¹ Some theorists of the private law argue that the character of private law relationships is incompatible with ‘instrumental’ accounts; Weinrib, *The Idea of Private Law* (n 31). Some legal philosophers argue that instrumental accounts of legal authority are unable to

often associated with the argument that the law plays a particular role in the realisation of social relations, and that, as a result, law should not be regarded simply as an 'instrument of social control'.⁴² In Fuller's terms, the law 'facilitates human interactions'—it contains rights and obligations that do not 'emanate from some identifiable centre of authority'.⁴³ Fuller's concerns continue to resonate in contemporary legal philosophy. At various times in his writing, Dworkin appears sympathetic to this claim. His conception of 'law as integrity' regards law as a set of 'public standards', and requires individuals to 'treat relations among themselves as characteristically, not just spasmodically, governed by these standards'.⁴⁴ Political values, like friendship, 'are not instrumental in any obvious way'.⁴⁵ Because the law allows us to realise some of our most fundamental forms of social interaction, it is supposed that it cannot be a mere means of authoritative intervention in the relationships of others. The law itself is supposed to be a realisation or embodiment of those relationships.

explain what it is that relates us towards legal officials; the objection is very nicely stated in Hershovitz (n 9).

⁴² Lon Fuller, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' [1975] Brigham Young University Law Review 89.

⁴³ *ibid* 95.

⁴⁴ Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 189.

⁴⁵ Ronald Dworkin, *Justice in Robes* (Belknap Press 2006) 159–160.

Others have done much to refute the various confusions that attend this objection in more general terms. There is no unique end that defines the law. The law may be *both* an instrument of social control and an instrument through which relationships are facilitated. What distinguishes the law from other forms of control or guidance is its particular *mode* of facilitation.⁴⁶ The contribution of this thesis is to present a more detailed picture of the way in which law upholds and incorporates our relational norms. The law facilitates human interaction in a particular manner that reflects its capacities as an instrument for the guidance of conduct.

The law also acknowledges our relational norms in a variety of ways that fall short of upholding or enforcing them. In Chapter 5 I consider the various ways in which the law should refrain from intervening to uphold our various relational norms. For instance, the law acknowledges that ideally parents will love their children (and indeed that they have a moral duty to do so) without imposing a *legal* duty on parents to love their children. A variety of concerns limit the law's ability to uphold or enforce relational norms. I discuss three such

⁴⁶ In Green's words: 'the law is thus a *modal* kind and not a functional kind at all; it is distinguished by its means and not its end'; Leslie Green, 'The Concept of Law Revisited' (1996) 94 Michigan Law Review 1687, 1711.

concerns: autonomy, intimacy, and effectiveness. Each of these principles affects the law's ability to uphold and enforce relational norms.

I also show that at least some kinds of legal relationships have instrumental value. My account distinguishes between the reasons that a certain relationship *constitutes* and the reasons that we have for forming and continuing those relationships. In Chapter 8 I defend the possibility of what Aristotle described as 'friendships of utility'—relationships derived from the value of some external end that their participants seek.⁴⁷ Though Aristotle described these friendships as inferior and easily dissolved, he did not deny that they were friendships.⁴⁸ My purpose in Chapter 8 is to elucidate the possibility of instrumentally valuable relationships.

⁴⁷ Aristotle (n 10) bk VIII. I do not describe the instrumental relationships I discuss in this thesis as friendships due to the attendant ambiguities in the phrase. Aristotle's used the Greek *philia* (φιλία), which encompassed a broader array of relationships than those denoted by 'friendship' in English.

⁴⁸ This is an exegetical claim—one with which some readers will inevitably disagree—and I do not mean to ignore this disagreement. Debate about the character of Aristotle's friendships of utility continues amongst scholars; see e.g. John M Cooper, 'Aristotle on the Forms of Friendship' (1977) 30 *Review of Metaphysics* 619; Julia Annas, 'Plato and Aristotle on Friendship and Altruism' (1977) 86 *Mind* 532; ADM Walker, 'Aristotle's Account of Friendship in the "Nicomachean Ethics"' (1979) 24 *Phronesis* 180; Charles H Kahn, 'Aristotle and Altruism' (1981) 90 *Mind* 20; Kenneth D Alpern, 'Aristotle on the Friendships of Utility and Pleasure' (1983) 21 *Journal of the History of Philosophy* 303.

Many contemporary legal scholars denounce what they see as the evils of 'instrumentalism' in legal scholarship and legal education.⁴⁹ Instrumentalism is supposed to ignore 'the interactions, interrelationships and sites of mutual adjustment that constitute the workings of a legal system in practice'.⁵⁰ But these complaints are often attended by a variety of confusions. As my discussion makes clear 'instrumentalism' is sometimes used as a loose and unhelpful catch-all where more specific language would be preferable. 'Instrumentalism' is not exhausted by the kinds of value scepticism or preference utilitarianism that are popular in economic analysis of law.⁵¹ Instrumentalism is also consistent with a variety of other claims we might wish to make about the value of relationships and the relational norms that constitute them. For instance, one can be an instrumentalist about certain kinds of relationship without denying that those relationships have additional value that is not simply reducible to their

⁴⁹ Brian Tamanaha and Ernest Weinrib are amongst the more well-known complainants; Tamanaha, Brian Z., *Law as a Means to an End: Threat to Rule of Law* (Cambridge University Press 2006); Weinrib, *Corrective Justice* (n 8) 297–333. Many of their concerns are ably dispelled by Leslie Green in his 'Law as a Means', *The Hart-Fuller Debate in the Twenty-First Century* (Oxford University Press 2010).

⁵⁰ Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing 2012) 194.

⁵¹ I do not devote much time to discussing these kinds of analyses of law. But I hope my discussion makes it clear that I regard them as implausible for reasons that do not relate to their instrumentalism.

instrumental value. The possibility of this sort of additional value is also defended in Chapter 8.

It is often said that various relationships recognised by the private law resist instrumental analysis.⁵² Hence Ernest Weinrib's famous claim that the private law is 'like love', and that private law has no other purpose than 'to be private law'.⁵³ My concern in Chapter 6 is not so much to vindicate instrumental accounts of private law, as to observe that the form of the private law relationship is compatible with a variety of different philosophical explanations of private law doctrine. If instrumental accounts of various aspects of private law fail, it is not simply because private law is embodied by certain correlative relationships between plaintiff and defendant.

In fact, its relationship sensitivity demonstrates one way in which instrumental concerns affect the development of the private law. Our

⁵² Varieties of this claim have been made by, *inter alia*, Goldberg and Zipursky, Weinrib, Perry, and Coleman; Coleman (n 8) 13–24; Goldberg and Zipursky (n 40) 1744; Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 *Vanderbilt Law Review* 1, 40–42; Stephen Perry, 'Torts, Rights and Risk' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014); Weinrib, *The Idea of Private Law* (n 31).

⁵³ Weinrib, *The Idea of Private Law* (n 31) 5–6. On the analogy between private law and love, see John Gardner, 'The Purity and Priority of Private Law' (1996) 46 *The University of Toronto Law Journal* 459.

relationships have value.⁵⁴ Presumably, at least part of the law's reason for displaying any sensitivity to these relationships is to support and uphold their place in our lives. In deciding whether or not to hold parents to be under legal duties to their children, or doctors to their patients, the law has regard to the effect that this distribution of legal burdens will have on the relationships themselves. But this purpose is itself extraneous to the precise content of relationship between plaintiff and defendant. The judge must consider the extent to which their decision will uphold or undermine the category of valuable relationship that they represent.⁵⁵

The thesis concludes with a discussion of instrumental relationships. I concede that there are relationships in which the authority of one person over another is not instrumentally justified. The authority may be necessary for the realisation of a relationship of intrinsic value that the parties share. Parents, for instance, exert a kind of authority over their children that is constitutive of their relationship, and justified by its intrinsic value. Chapter 9 does not deny the possibility of this kind of authority, but I argue that the relationship of authority that is claimed by legal officials must be justified instrumentally, at least in the

⁵⁴ The view that the relationships have value, and that their value is at least part of the reason for holding people to be under their constitutive duties, is defended in Chapter 3.

⁵⁵ See *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL), 588, per Lord Hutton.

circumstances in which that authority is generally claimed. The law is commonly supposed to play a special role in the resolution of problems requiring large-scale coordination of activity. In those circumstances, justifying the authority in terms of the intrinsic value of the relationship that they share with their subjects is implausible.

1.4 Further Problems

There are a number of issues that are related to those discussed in this thesis, which I do not discuss in any depth due to constraints of time and space. Some of these questions might form the basis for future research. For example: to what extent are our various relationships of value socially defined? Does the apparent value of our relationships make certain moral theories more attractive than others? What is the significance of the reactive attitudes like blame and resentment to the proper philosophical understanding of relational norms? Each of these questions is deeply engaging and philosophically difficult. But attempting to answer them would have taken me too far afield.

I leave largely undiscussed an issue that I regard to be one of the more vexed questions in contemporary moral philosophy. A number of authors have noted that our current obligations towards others resonate, or are continuous

with, our histories of interacting and engaging with each other.⁵⁶ My friend is my friend, in part, because they have been part of my life—they have a distinct value to me because of the part that they have played in making my life the way that it is. I cannot simply replace an existing friend with another friend of equivalent value—the value of friendship is grounded, at least in part, in our unique shared history. Principles of historical continuity or resonance are ubiquitous in the law, particularly in the private law.⁵⁷ They at least partly explain why it is that individuals are called on to repair their wrongs—our remedial duties are continuous with our primary wrongs.⁵⁸ I take it for granted that this principle of continuity or resonance offers an intelligible account of the significance of these interactions, and I have been happy to rely on the principle where I must in this

⁵⁶ Discussions of this principle, in various guises, can be found in Joseph Raz, *Value, Respect, and Attachment* (Cambridge University Press 2001); Niko Kolodny, 'Which Relationships Justify Partiality? General Considerations and Problem Cases', *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010); Niko Kolodny, 'Which Relationships Justify Partiality? The Case of Parents and Children' (2010) 38 *Philosophy and Public Affairs* 37; Susan Wolf, *Meaning in Life and Why It Matters* (Princeton University Press 2010); Samuel Scheffler, *Death and the Afterlife* (Oxford University Press 2013); R Jay Wallace, *The View From Here: On Affirmation, Attachment, and the Limits of Regret* (Oxford University Press 2013).

⁵⁷ But also in constitutional law; see John Finnis, 'Revolutions and Continuity of Law', *Philosophy of Law: Volume IV* (Oxford University Press 2011).

⁵⁸ A.M. Honoré, 'Responsibility and Luck' (1988) 104 *Law Quarterly Review* 530; Arthur Ripstein, 'Private Law and Private Narratives' (2000) 20 *Oxford Journal of Legal Studies* 683.

thesis, but I am yet to find any attempts to offer a rational justification of this principle convincing.⁵⁹

It is partly due to the difficulties presented by continuity principles that in this thesis I have not discussed the well-known 'relational' theory of contract; for fear that doing so would inevitably involve me in debates that it is not my present purpose to resolve.⁶⁰ Though the relational theory of contract is partly concerned with identifying contractual norms as relational norms, it is better identified with a number of other unrelated claims. In particular, relational contract theory can be identified with the claim that the obligations associated with contracts are *continuous* rather than discrete. Contracts are said to be long term commitments that contain obligations that reflect the shared history of the parties. Though I have my doubts about relational contract theory as a model for contract law, I would not want to deny a role for these sorts of continuity

⁵⁹ Perhaps, the principle resists any further justification—it is just a constitutive explanation. This is Kolodny's response to the problem, but I have my doubts about it as well; cf. Kolodny, 'Which Relationships Justify Partiality? General Considerations and Problem Cases' (n 56); Kolodny, 'Which Relationships Justify Partiality? The Case of Parents and Children' (n 56).

⁶⁰ For an overview of the relational theory of contract see Ian MacNeil, *The Relational Theory of Contract: Selected Works of Ian MacNeil* (David Campbell ed, Sweet & Maxwell 2001); for criticisms see Melvin Eisenberg, 'Why There Is No Law of Relational Contracts' (1999) 94 *Northwestern University Law Review* 805; Dori Kimel, 'The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model' (2007) 27 *Oxford Journal of Legal Studies* 233.

principles. A complete discussion of them clearly falls outside of the scope of this thesis's argument.

1.5 Conclusion

In previous sections I offered a summary of my arguments and some reflection on the thesis's themes and significance. I am wary of making my arguments seem too holistic. Across this thesis I make a number of discrete philosophical observations and arguments. Though they serve a more general argument, each of these theses is worth considering individually. Some of them might be accepted by those who reject other aspects of my overall argument. Some of them are also worthy of lengthier consideration than I have the opportunity to give them. For the sake of clarity, I believe these individual arguments are worth enumerating separately.

- (1) Some of our relationships with others are constituted by various obligatory and permissive norms that are justified by the value of the relationship. Our reasons for action are therefore partly dependent on our relationships with others (Chapters 2 and 3).

- (2) The analysis of these relational norms is not exhausted by the analysis of the rights to which they correspond (Chapters 2 and 4). In fact, our rights themselves may be sensitive to the character of our relationships with others (Chapters 4 and 7).
- (3) We should be wary of excessively juridical accounts of moral relationships (Chapters 2, 4) and even legal relationships (Chapters 5 and 6).
- (4) The law incorporates relational norms (Chapters 3, 5, and 6) but it is often reluctant to uphold them directly. A variety of concerns limit the law's ability to incorporate relational norms (Chapter 5, 9).
- (5) Though the private law incorporates some relational norms, it is not exhaustively relational. Appeals to the correlative or relational character of private law risk concealing substantive disagreement about the form and justification of private law norms (Chapter 6).
- (6) Our relationships with others promote our interests to the extent of grounding rights. Furthermore, even apparently burdensome relationships can ground rights (Chapter 7).

- (7) Some of our normative relationships are instrumentally justified. They derive their value, in whole or in part, from some other value that the relationship serves (Chapters 2 and 8).
- (8) The law's role in facilitating relationships is compatible with the claim that the law has instrumental value. Instrumental concerns affect the law's ability to uphold relational norms (Chapter 5). Some legal relationships are instrumentally justified (Chapter 8).
- (9) A type of authority can exist within relationships, and the value of the relationships may help to justify the existence of such authority. However to the extent that citizens share relationships with one another, these relationships cannot justify the authority that legal officials typically claim over their subjects. To the extent that such authority can be justified, it must be justified instrumentally (Chapter 9).

Taken in conjunction, these theses ought to give an impression of the general philosophical significance of relational norms to our understanding of law. The proper philosophical understanding of our legal rights, duties, permissions and powers requires us to identify which of these legal norms are

also relational norms. Philosophical accounts of the law cannot safely ignore the extent to which our various reasons for action are sensitive to our relationships with one another. But we should be equally wary of attempts to make the possibility of relational norms the basis of more general theses in the philosophy of law. The account of relational norms that I offer here augments, rather than challenges, traditional accounts of the law as an instrument for the guidance of conduct. Because the law is made by people, it reflects and embodies our loyalties and commitments to one another. (How could it not?) Yet it does so in a way that is ultimately reflective of the nature and capacities of legal institutions.

In the next three Chapters I study relational norms as general objects of practical reason. I defer any detailed consideration of relational norms in legal settings until Parts II and III. Unless we can account for relationships outside of the law, then there is a risk that we will attribute mistaken significance to the different rights and duties that protect them within the law. As Jeremy Waldron has observed in another context, our relationships cannot be reduced to 'some

formal array of legalistic rights and duties'.⁶¹ There is more to relational norms than this.

⁶¹ Jeremy Waldron, 'When Justice Replaces Affection: The Need for Rights' (1988) 11(8) *Harvard Journal of Law and Public Policy* 625, 626.

PART I

CHAPTER 2: RELATIONAL NORMS

In Jane Austen's *Emma*, Frank Churchill fails to visit his father Mr Weston and sends a letter of excuse. Emma's friend Mr Knightly upbraids her for her sympathy towards Mr Churchill: 'It is Frank Churchill's *duty* to pay attention to his father', he says, adding 'he knows it to be so, by his promises and messages, but if he wished to do it, it might be done'.¹ Like Mr Knightly, we often understand our relationships in terms of their normative content—their attendant duties and permissions.² This Chapter offers a preliminary analysis of these norms, which I call 'relational norms'.³ Relational norms are those norms that partly constitute a relationship of normative significance between persons—

¹ J Austen and G Justice, *Emma: An Authoritative Text, Contexts, Criticism* (WW Norton & Company 2012) 103; emphasis added.

² Note that throughout this thesis I follow the usual practice of using 'duty' and obligation' interchangeably.

³ Similar terminology used by philosophers includes 'relational reasons', 'relationship-dependent reasons', 'relational facts', 'partial reasons', and 'partial facts'; see *inter alia* RA Duff, 'Relational Reasons and the Criminal Law' (2012) 2 *Oxford Studies in the Philosophy of Law*; Samuel Scheffler, 'Relationships and Responsibilities' (1997) 26 *Philosophy and Public Affairs* 189; Samuel Scheffler, 'Morality and Reasonable Partiality' in Brian Feltham and John Cottingham (eds), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010); Christopher Heath Wellman, 'Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun "My"?' (2000) 110 *Ethics* 537. I return to discussing the relationship between reasons for action and relational norms below. On the distinction between relational norms and relational reasons, see further Simon Keller, *Partiality* (Princeton University Press 2013) 2–4.

a *normative relationship*—like the relationship between Frank Churchill and his father.

The purpose of this Chapter is to attend to a number of issues in the philosophical analysis of relational norms, and to state the assumptions that I will rely on in my thesis. In this Chapter I restrict my analysis to relational obligations and permissions. There are other sorts of relational norms. Some relational norms confer power over other people. I consider power-conferring relational norms in Chapters 8 and 9 of this thesis. Some other relational norms state what is ideal between the parties without imposing any obligation or duty on the parties to reach that ideal.⁴ Though I sometimes make mention of these ideals and their importance to our relationships, I will not make them a central focus of my study.

I will argue that relational norms are *sui generis*. More precisely, I will not attempt to identify necessary or sufficient conditions for their existence, or to reduce them to other normative facts.⁵ This does not mean that they resist

⁴ They may however impose obligations on the parties to aspire to that ideal; see Kimberley Brownlee, 'Moral Aspirations and Ideals' (2010) 22 *Utilitas* 241. Ideals are discussed in the context of friendship in Chapter 3.

⁵ Others who have suggested that relational norms are *sui generis* in this sense include; Margaret Gilbert, 'De-Moralizing Political Obligation', *Joint Commitment: How We Make the Social World* (Oxford University Press 2013); Tim Hayward, 'On Prepositional Duties'

philosophical analysis. Much of what can be learned about relational norms, I argue, is to be learned by reflecting on the nature of norms more generally.⁶ My discussion in this Chapter is intended to prefigure a number of arguments that are made in later stages of the thesis. I consider the character of relational norms within practical reasoning—both their analysis and their justification. My purpose is to undertake the necessary preliminaries for the development of my argument throughout the thesis.

In section 2.1, I distinguish relational norms in the sense in which I intend from other types of norms that relate us to others. In section 2.2, I outline an account of relational norms as reasons for action that draws upon a broader reasons-based account of obligatory and permissive norms. In section 2.3, I consider the role of relational norms in practical reasoning. I argue that relational norms and non-relational norms play a common role in practical reasoning.

(2013) 123 *Ethics* 264; R Jay Wallace, 'Duties of Love' (2012) 86 *Aristotelian Society Supplementary Volume* 175; R Jay Wallace, 'The Deontic Structure of Morality' in David Bakhurst, Margaret Olivia Little and Brad Hooker (eds), *Thinking About Reasons: Themes From the Philosophy of Jonathan Dancy* (Oxford University Press 2013). Note that in arguing that relational obligations are *sui generis* I am not recommending them as the basis for analysis of norms *simpliciter*; cf Wallace's arguments in 'The Deontic Structure of Morality'.

⁶ I assume throughout this Chapter that we are interested in analysing relational norms—relational obligations and permissions—rather than simply their concepts. The same arguments could be made, however, with respect to attempts to analyse the concepts of *relational norm*, *relational obligation*, and *relational permission*.

Finally, I suggest that some relational norms can be justified instrumentally. (I will argue for this possibility at greater length in Chapter 8 of this thesis).

2.1 The Analysis of Relational Norms

Relational norms need to be distinguished from other types of norms that can relate one party to another. It is tempting to analyse relational norms reductively, as ordinary norms that perform some function for another person who is not the norm-bearer. Perhaps relational norms are just ordinary norms that promote someone else's interest, for example, or which require us to act on their interest. Below I consider a variety of attempts to offer this sort of reductive analysis of relational norms. I argue that each of them is unsuccessful. Relational norms of the sort that this thesis discusses cannot be analysed as norms that perform some other, non-relational function.

2.1.1 Relational Norms and Directed Duties

We often state our relational norms in terms of what we owe towards one another. If I have a duty of loyalty arising out of a friendship, then I have an obligation *to* that friend to be loyal. I *owe* it to them to be loyal. Some philosophers call obligations owed to others 'directed duties'. They argue that

directed duties can be analysed as duties that perform some other function for the person to whom the duty is owed (such as promoting their interests).⁷

Their accounts often begin with the observation that these ‘directed duties’ and what Hohfeld called ‘claim rights’ are converse relations. By stipulation, the relation expressed by the sentences ‘S has an obligation to T’ and ‘T has a claim right against S’ is the same as the relation expressed by the sentences ‘S is taller than T’ and ‘T is shorter than S’. This is what Hohfeld referred to as the ‘correlativity’ of claim rights and duties.⁸ In and of itself, this stipulation is harmless. It is reasonable to suppose that all relations are capable of being expressed in converse form—though not all relations will necessarily have converse expressions in natural language.⁹ Hohfeldian claim rights are also said to be rights ‘in the strict sense’.¹⁰ Note, however, that the Hohfeldian term ‘claim right’ is a term of art—it does not necessarily denote what ‘right’ denotes in natural language. Claim rights are not rights unless as a matter of further

⁷ For a summary see Simon Cabulea May, ‘Directed Duties’ (2015) 10 *Philosophy Compass* 523.

⁸ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1919) 38.

⁹ Consider the relation expressed by ‘...is good for...’ which usually holds between an object or state of affairs and a person (‘immunisation is good for a child’). The converse relationship cannot be expressed in natural language, though we can readily conceive of it.

¹⁰ Hohfeld (n 8) 43.

stipulation, or unless an equivalence can be shown by further philosophical argument.¹¹

Very often this kind of rights-theoretic investigation into directed duties is conceived of in terms of analysis into necessary and sufficient conditions for possession of a claim right. The function of the claim right is said to 'direct' the correlative duty, since rights-theorists have tended to use the phrase 'directed duty' to describe duties that are owed to a right-holder.¹² Accounts of Hohfeldian claim rights are sometimes envisaged, especially by rights theorists themselves, as providing an analysis of the directed duties in terms of ordinary obligations that meet some further necessary and sufficient condition.¹³ It is taken to be

¹¹ Kramer and Steiner offer some useful reflection on the stipulative method (and its benefits) in Matthew H Kramer and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 Oxford Journal of Legal Studies 281, 294–298.

¹² For some illustrative endorsements of analysing relational obligations in terms of the functions of the claim right to which they correspond see Joseph Raz, 'On Respect, Authority, and Neutrality: A Response' (2010) 120 Ethics 279, 291; Gopal Sreenivasan, 'A Hybrid Theory of Claim Rights' (2005) 25 Oxford Journal of Legal Studies 257; Gopal Sreenivasan, 'Duties and Their Direction' (2010) 120 Ethics 465; Jeremy Waldron, *Theories of Rights* (Oxford University Press 1984) viii; Leif Wenar, 'The Nature of Claim Rights' (2013) 123 Ethics 202, 208; Carl Wellman, 'Relative Duties in the Law' (1990) 18 Philosophical Topics 183; Carl Wellman, 'Relative Moral Duties' (1999) 36 American Philosophical Quarterly 209. In deontic logic, Krogh and Herrestad, and Makinson endorse the analysis of rights as providing a bridging rule between obligation *simpliciter* and relational obligation. See David Makinson, 'On the Formal Representation of Rights Relations' (1986) 15 Journal of Philosophical Logic 403; Henning Herrestad and Christian Krogh, 'Deontic Logic Relativised to Bearers and Counterparties', *25 Years Anthology—Norwegian Research Center for Computers and Law* (Tano forlag 1995).

¹³ The assumption that the analysis of directed duties is analysis into necessary and sufficient conditions is made particularly explicit in Wenar (n 12).

necessary and sufficient for S to have an obligation to T that S has an obligation and that S's obligation fulfils some other condition that is associated with T's claim right. For instance, so-called 'interest' theorists argue that the relational obligation can be factorised into a conjunction of an obligation and an interest. An obligation is directed towards another person if and only if it is an obligation that promotes or protects some interest belonging to the counterparty (the precise formulations of the analysis vary depending on the theory).¹⁴ The interest theorist's principal philosophical rival, the 'will' or 'choice' theorist, contends that relational obligations are just obligations the waiver or enforcement of which lies within the power of the counterparty.¹⁵ But, in so far as the directed

¹⁴ Prominent contemporary interest theorists include Lyons, MacCormick, Raz, Finnis, Waldron and Kramer; John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011); Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights* (Oxford University Press 1998); Matthew H Kramer, 'Some Doubts About Alternatives to the Interest Theory of Rights' (2013) 123 *Ethics* 245; David Lyons, *Rights, Welfare and Mill's Moral Theory* (Oxford University Press 1994); Neil MacCormick, 'Children's Rights: A Test Case for Theories of Rights' (1976) 62 *ARSP: Archiv für Rechts-und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy* 305; DN MacCormick, 'Rights in Legislation', *Law, Morality and Society* (Clarendon Press 1977); Joseph Raz, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1; Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988); Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1990).

¹⁵ Will theorists include Hart, Steiner and Wellman; HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175; HLA Hart, 'Bentham on Legal Rights' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1973); Hillel Steiner, *An Essay on Rights* (Blackwell 1994); Hillel Steiner, 'Working Rights', *A Debate Over Rights* (Oxford University Press 2000); Carl Wellman, *Real Rights* (Oxford University Press 1995).

obligations in question are constitutive of an actual relationship of value between the parties, I argue that they will resist this kind of reductive analysis.

We get some indication that attempts to analyse relational obligations in terms of the function of their correlative claim rights are likely to fail from the fact that the two principal attempts to do so are disjunctive. So-called ‘will’ and ‘interest’ theories offer directly conflicting accounts of relational obligation. They do not appear to offer a common analysis.¹⁶ Neither approach is capable of accommodating the other. They are better treated as competing attempts at substantive moral theorising that attempt to capture—as far as possible—the colloquial notion of a right. Both offer what Raz has referred to as attempts to ‘illuminate a tradition of political and moral discourse in which different theories offer incompatible views’.¹⁷ Both accounts capture cases that are purportedly excluded by the other.

Attempts at reconciling the interest and will theories have been unsuccessful. Sreenivasan gives one of the more plausible attempts when he analyses claim rights as giving the bearer an amount of control over a duty that

¹⁶ For expansions of this problem see Siegfried Van Duffel, ‘The Nature of Rights Debate Rests on a Mistake’ (2012) 93 *Pacific Philosophical Quarterly* 104; Hayward (n 5).

¹⁷ Raz, *The Morality of Freedom* (n 14) 166.

is proportionate to the extent that such control would advance the bearer's interests.¹⁸ He calls this the 'hybrid' account of claim rights and directed duties. But there are easy counterexamples to the hybrid account, ably demonstrated by the possibility of individuals who have powers of control that outstrip their individual interests, or, more damagingly, of individuals who have no interest in performance of a duty, and no control over it, and therefore become right-bearers under Sreenivasan's account.¹⁹ The hybrid account fails *because* it attempts to reconcile two divergent traditions that resist this kind of reconciliation. In the words of Kramer and Steiner (both prominent theorists belonging to the rival traditions), it is 'replete with implications which those two theories are united in rejecting'.²⁰

What is now a long history of failed attempts at analysis of directed duties into a set of individualised moral properties is illustrative of a deeper methodological problem: there is no reason to think that duties are always capable of this kind of analysis. This is particularly evident where the directed duties are also relational norms. Relational norms embody a relationship

¹⁸ Sreenivasan, 'A Hybrid Theory of Claim Rights' (n 12); Sreenivasan, 'Duties and Their Direction' (n 12).

¹⁹ Kramer and Steiner (n 11) 308–309.

²⁰ *ibid* 309.

between two or more people. Attempts to state necessary and sufficient conditions for this relation typically analyse this relationship as a conjunction of monadic moral properties like *obligation* and *interest*. But why should we suppose that any conjunction of moral properties predicated of individuals is necessary or sufficient for the relationship embodied in the obligation? The relation expressed in phrases like ‘S has an obligation to T’ expresses an asymmetric relation between two persons—it has what many authors have referred to as ‘direction’.²¹ S can have an obligation to T without T likewise being obliged to S, and these kinds of asymmetric relationships resist analysis in terms of non-relational properties. Consider, by way of analogy, the relation captured by the predicate ‘taller than’. As Russell showed us, there is no way to analyse this relation into a conjunction of monadic properties like *having x height* and *having y height* without invoking a further relational property that relates the two monadic properties.²² The same argument can be reiterated with respect to attempts at reductive analysis of relational obligations in terms of monadic moral properties. Suppose, for instance, that my neighbour owes it to me to be considerate when they are

²¹ The phrase ‘directed duty’ is used in e.g. Joel Feinberg, ‘The Nature and Value of Rights’ (1970) 4 *The Journal of Value Inquiry* 243; D Enoch, ‘A Right to Violate One’s Duty’ (2002) 21 *Law and Philosophy* 355; Sreenivasan, ‘Duties and Their Direction’ (n 12); Margaret Gilbert, ‘Scanlon on Promissory Obligation: The Problem of Promisees Rights’, *Joint Commitment* (Oxford University Press 2013).

²² Bertrand Russell, *Principles of Mathematics* (2nd edn, WW Norton 1937) 225.

hosting a party. It is tempting to analyse their duty as grounded in my interest in their considerateness. But my interest in their consideration is not an interest in anyone's considerateness. It is an interest in *my neighbour's* considerateness. My interest and my neighbour's duty of consideration must be related to one another in this way for the analysis to be coherent.²³

So long as we accept *S's* having an obligation to *T* states a relationship that is of some practical importance, then we should eschew attempts to analyse relational norms into a conjunction of individualised moral properties. Even if an extensionally correct account of the Hohfeldian notion of a claim right in terms of some individual function can be found, it would not dispose of these doubts.²⁴ Rather it would suggest that the question of whether or not we have relational obligations is not of any significance—since we could just as easily make do with another set of moral properties or concepts. But I take it that the question of whether or not *S* has an obligation to *T* *is* significant, hence the interest in gaining some reflecting understanding of the nature of relational obligations more broadly.

²³ I do not deny that there is such an interest, but the interest in question is a special interest in the relationships, rather than a general one; see Chapter 7.

²⁴ Wenar and Cruft think that they have found one—in the notion of a 'kind-desire'; Rowan Cruft, 'Why Is It Disrespectful to Violate Rights?' (2013) 113 Proceedings of the Aristotelian Society 201; Wenar (n 12). I think it is possible to dispute the extensional adequacy of the kind-desire account, but I will not do so here.

2.1.2 Relational Norms and Acting for Another's Sake

Many relational norms enjoin or permit us to act for each other's sake. I am supposed to want the best for my friend for her own sake, and this means that I should act on her behalf. So it is tempting to analyse relational norms as norms that require or permit action for someone else's sake, but a little reflection demonstrates that this analysis is implausible.²⁵

To act for someone else's sake, as I understand it, is to act for the reason that it serves their interests.²⁶ But there is a difference between acting for someone's sake and acting in conformity with a duty that is constitutive of a shared relationship. I can act for someone's sake even if I bear no previous relation to them, and my reason for doing so may well be that it is the right thing to do, all things considered. Suppose that I find myself accidentally standing on your toe (to borrow what is now a slightly tired example).²⁷ Morality requires me

²⁵ cf. Finnis (n 14) 142.

²⁶ Toni Rønnow-Rasmussen, 'On for Someone's Sake Attitudes' (2009) 12 *Ethical Theory and Moral Practice* 397. Note that acting for someone's sake is not necessarily the same thing as acting in conformity with a duty that correlates with their right. Whether or not the two coincide will depend on our analysis of rights and 'for someone's sake' attitudes. For instance, on my own preferred view, someone can have a right that I act in a certain way without having a right that I act for their sake. I can conform with the duty grudgingly, or even in complete ignorance of their interest in my so-acting.

²⁷ See e.g. Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press 2006) 5–8.

to take my foot off your toe for your sake—the pain you are feeling, and your interest in its relief, ought to be sufficient reason for me to act as I do. But this reason is not in itself constitutive of a relationship between us.

Moreover, not all of my relational norms will require or permit me to act for the sake of my relations. Some think that it is a norm of friendship that I treat all friends of my friend in a particular way. It could, conceivably, be a requirement of a friendship that I look after my friend's children, and that I act for *their* sake when it is required of me. The duty to act for the sake of my friend's children is constitutive of the particular relationship that I share with my friend, not a separate relationship between myself and his children. Other relational norms are indifferent to my reasons for conforming with them. The flautist may well owe it to his fellow band-members to come to rehearsal on time, but it makes very little difference to them if he does it for their sake or for the sake of his own pleasure and enjoyment. The duty of punctuality is partly constitutive of band membership, but he is not required to comply with the duty for his fellow band member's sake.

Norms that require or permit their bearer to act for someone's sake are not necessarily constitutive of any relationship between the two parties. Nor are

relational norms necessarily norms that require me to act for the sake of my relations. Understanding what it means to act for another's sake is undeniably an important part of understanding our various relationships, but there is little prospect of analysing all relational norms on these grounds.

2.1.3 Relational Norms and Acting towards Another

Relational norms are commonly mistaken with norms that attempt to guide or regulate our conduct towards others. Zipursky, for instance, argues that the norms of tort law are 'relational' and that they are 'guidance rules', which 'enjoin particular agents from treating the particular patients in this way'.²⁸ This suggests an analysis on which relational norms are just norms that regulate the activity of certain 'agents' with respect to certain 'patients'.²⁹ There are trivial counterexamples to this kind of analysis, since it is possible to identify relational norms that do not guide or regulate conduct towards others, as well as norms that guide or regulate conduct towards others that are not relational in the requisite sense.

²⁸ Benjamin Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 Florida State University Law Review 299, 305.

²⁹ I say it suggests this analysis because I am not sure if Zipursky is actually recommending the analysis, or if he is already assuming some kind of relationality in addition to the agent-patient analysis. It could be that he is arguing that the norms in question are *both* relational *and* regulating the behaviour of certain agents with respect to certain patients, but his formulation is ambiguous enough to suggest the alternative reading.

Many norms require or permit us to perform acts that are directed at another person or party without being relational norms. A law might be passed that requires me to deposit money into my neighbour's bank account. But it does not immediately follow that I have a legal obligation owed to my neighbour that I do so. Third-party beneficiaries provide a reliably neat example in this regard. If I promise to walk my friend Mike's children to school, then I owe the obligation to Mike, not to his children.³⁰

The example of my promise to Mike also illustrates the possibility of relational duties that do not involve acting towards or with respect to those with whom the relationship is shared. I owe the duty to Mike, but the content of the duty does not affect him directly. He is not the object of my action, although it does affect his interests. The need to distinguish between relational obligations and directed actions cannot be accommodated if we analyse relational obligations in terms of the relationality of the actions required

I have argued in this section that relational norms resist analysis into necessary and sufficient conditions. There is no set of non-relational moral properties that is both necessary and sufficient for a norm to be a 'relational'

³⁰ This is, of course, Hart's criticism of Bentham's 'benefit' theory of rights. Hart, 'Bentham on Legal Rights' (n 5) 179–182

norm. There is, however, much that we can still learn through philosophical reflection on the nature of relational obligations. By way of analogy, there is a growing acceptance in epistemology that the concept of *knowledge* resists analysis in terms of necessary and sufficient conditions. Not only can counterexamples to such attempts be readily generated,³¹ but the failure of the program is now demonstrated by ‘four decades of failed attempts’ to analyse the concept in this way.³² Still we can learn a good deal about the nature of knowledge by way of further philosophical reflection. We can ask, for instance, whether knowledge is necessarily safe from error, or whether it is closed under logical consequence. The failure of reductive analysis should not prevent us from philosophical analysis altogether. In the remainder of this Chapter, I argue that our understanding of relational norms is continuous with our understanding of the role and function of all kinds of obligatory and permissive norms in practical reasoning.

³¹ Linda Zagzebski, ‘The Inescapability of Gettier Problems’ (1994) 44 *Philosophical Quarterly* 65.

³² David J Chalmers and Frank Jackson, ‘Conceptual Analysis and Reductive Explanation’ (2001) 110 *Philosophical Review* 315, 321. See especially Timothy Williamson, *Knowledge and Its Limits* (Oxford University Press 2000) 27–33.

2.2 Relational Obligations

In this section and the next, I offer an account of relational obligations and permissions in terms of reasons for action that draws on Raz's celebrated reasons-based account of obligatory and permissive norms in terms of exclusionary reasons. The starting point for the correct analysis of relational norms is to take seriously our tendency to cite our relationships with one another—and their related duties and permissions—as reasons for action. Relational norms give us a special kind of protected reason for action. The role that relational norms play in our practical reasoning is continuous with the role of norms in practical reasoning more broadly.

2.2.1 Obligatory Norms in General

The simplest possible view is that obligations are just nominalised 'oughts'—to say that Sally has an obligation to return the library book is just to say that Sally ought to return the library book, all things considered. While this view is encouraged by the linguistic observation that 'ought' and 'obligation' are both grammatical variants within the category of deontic modality, I do not think it is

a plausible account of the role that obligations play in our practical reasoning.³³ Some philosophers do stipulate that by ‘moral obligation’ they mean something like *overall* moral requirement, and go on to use the term in that way.³⁴ In my opinion, these stipulative uses actually sit awkwardly with the way that we use the term.³⁵

In any case, relational norms do not have the same significance as the all things considered moral judgments that we typically express with verbs like ‘ought’ and ‘must’. To begin with, relational obligations may conflict with one another. I may owe it to my friend Jane not to embarrass her by dancing at the party, and make a conflicting promise to my friend Jack that I will dance with him at the party. I have conflicting relational obligations owed to Jack and Jane.

³³ See, in particular, Angelika Kratzer, ‘The Notional Category of Modality’ in Hans-Jürgen Eikmeyer and Hannes Rieser (eds), *Words, worlds and contexts: new approaches in word semantics* (de Gruyter 1981). Though Kratzer offers a unified account of modality that is meant to apply equally to deontic nouns like ‘obligation’, the actual semantic behaviour of deontic noun phrases seems not to have been studied in any depth by contemporary linguists.

³⁴ This is the approach taken by Zimmerman, for example, in Michael J Zimmerman, *Ignorance and Moral Obligation* (Oxford University Press 2014).

³⁵ Perhaps this is because I myself have become accustomed to hearing it used stipulatively in other contexts. Lawyers and legal philosophers, in my experience, overwhelmingly use the phrases ‘obligation’ and ‘duty’ to refer to a particular kind of obligatory norm that is capable of being defeated or overridden; though cf. John Finnis, ‘Some Professorial Fallacies About Rights’ (1971) 4 *Adelaide Law Review* 377. In order to resolve any ambiguity, John Broome suggests the nominalisation ‘an ought’ to refer to judgments about what, all things considered, ought to be the case; John Broome, ‘A Linguistic Turn in the Philosophy of Normativity?’ (2015) 56 *Analytic Philosophy* 1, 7.

Even if it is possible to reach conflicting all things considered practical judgements, they do not exhibit the sort of easy conflict present in the case of relational obligations. It is also worth noticing that there is no way to give the deontic modals with which we ordinarily express the all things considered conclusions to our practical deliberation, like 'ought' and 'must', a relational reading.³⁶

A more promising starting point is to offer a substantive theory of practical reasoning, and to locate the role that obligation plays within that theory. I will describe such accounts as *inferential*, because they focus on the role that obligations play in the inference from certain relevant premises through to all things considered practical judgments. The most popular inferential account of obligation distinguishes between two levels of moral requirement—obligations, which are said to have a *prima facie* or *pro tanto* quality,³⁷ and all things considered judgments about what ought or must be done. This broadly

³⁶ The closest approximation is to say that I ought, or must, do something *for T's sake* or 'as far as T is concerned' but this still falls short of clarifying that it is the *ought* itself that is related at the other person—it may just be that I ought to act on that person's interest for some other reason.

³⁷ Gardner and Macklem observe that the habit of describing obligations as 'prima facie' or 'pro tanto' is misleading. A defeated obligation is still an obligation—I still must take account of it in my practical reasoning, and my breach of the obligation gives me reason to excuse or justify my action; John Gardner and Timothy Macklem, 'Reasons' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press 2002) 467.

Rossian picture proceeds from the observation that obligations can conflict in our moral reasoning, and that these conflicts can be resolved in the process of coming to all things considered moral judgements.³⁸ Obligations are equivalent to *prima facie* ought-claims, or judgments about what I ought to do, 'other things being equal'.³⁹ Variants of this account have been offered by Roderick Chisholm, Bas van Fraassen, John Broome, and Philippa Foot, among others.⁴⁰

Another approach adds a further level of analysis—a distinction is made between obligations, on one hand, and simple reasons for action on the other. The most sophisticated version of this picture is offered by Joseph Raz in his consideration of obligatory norms.⁴¹ In this picture, the most basic units of

³⁸ WD Ross, *The Right and the Good* (Philip Stratton-Lake ed, Oxford University Press 2002). John Harty distinguishes between two rival philosophical accounts building on this philosophical picture. 'Disjunctive' accounts deny the possibility of conflicting all things considered judgments, while 'conflict' accounts embrace them. Disjunctive accounts are offered in e.g. David O Brink, 'Moral Conflict and Its Structure' (1994) 103 *Philosophical Review* 215; Paul M Pietroski, 'Prima Facie Obligations, Ceteris Paribus Laws in Moral Theory' (1993) 103 *Ethics* 489; Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990). Harty defends the conflict account; *Reasons as Defaults* (Oxford University Press 2012) 86–108.

³⁹ Harty (n 38) 67.

⁴⁰ John Broome, *Rationality Through Reasoning* (Blackwell 2013); Roderick M Chisholm, 'Practical Reason and the Logic of Requirement' in Stephan Korner (ed), *Practical Reason* (Oxford University Press 1974); Philippa Foot, 'Moral Realism and Moral Dilemmas' (1983) 80 *Journal of Philosophy* 379; Bas C Van Fraassen, 'Values and the Heart's Command' (1973) 70 *Journal of Philosophy* 5; Thomson (n 38).

⁴¹ See especially Joseph Raz, 'Promises and Obligations' in Joseph Raz and PMS Hacker (eds), *Law, Morality and Society* (Oxford University Press 1977); Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999). For a useful summary, see

practical reason are reasons for action.⁴² Obligations are then analysed as a particular kind of reason—usually described as a protected reason. According to this view, an obligation to ϕ provides its bearer with reason to ϕ and reason not to act on reasons not to ϕ (where ϕ is an action verb).⁴³ This is the particular approach that I will take as the basis for an analysis of relational obligation.

These reasons-based accounts of obligation follow Rossian accounts in providing a point of distinction between obligations and the conclusions of our practical deliberation. In the language of reasons, if the two were identical, then an obligation to ϕ would be the same as a decisive reason to ϕ . But most philosophers seem to accept that I can have an obligation to ϕ without it being the case that I ought, all things considered, to ϕ . Reasons-based accounts also provide a point of distinction between obligations and ordinary reasons for action. I may have both an obligation to ϕ and a reason not to ϕ —the stringency of obligations is evident in their ability to provide reasons not to act on these first order reasons not to ϕ .

Leslie Green, 'Law and Obligations' in Scott Shapiro and Coleman, Jules (eds), *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press 2002).

⁴² As Raz puts it, the 'the normativity of all that is normative consists in the way it is, or provides, or is otherwise related to reasons'; 'Explaining Normativity: On Rationality and the Justification of Reason' (1999) 12 *Ratio* 354, 354–355.

⁴³ Raz, *Practical Reason and Norms* (n 41) 191.

An alternative account of obligations, inherited from the work of the English jurists and evident in HLA Hart's various attempts to analyse the concept of obligation,⁴⁴ views obligations as a kind of rule or principle (what I will call a 'norm'). Hart's own account of obligation relied on the existence of a social-practice that partially constituted a norm. The problem with Hart's initial account has been well documented. I do not propose to catalogue the approach's difficulties at any length here.⁴⁵ The biggest problem for the Hartian account of rules is that valid obligatory rules may not be socially practised.⁴⁶

The reasons-based account follows the rule-based account in assimilating obligations into the category of norms. On this view, 'an action is obligatory if its performance is required by a categorical rule'.⁴⁷ These categorical rules are then themselves analysed in terms of protected reasons for action. The great strength of the reasons-based account of obligation is that it allows us to combine the

⁴⁴ HLA Hart, 'Legal and Moral Obligation', *Essays in Moral Philosophy* (University of Washington Press 1955); HLA Hart, 'Legal Duty and Obligation', *Essays on Bentham* (Oxford University Press 1982); HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 85–88.

⁴⁵ Though Kevin Toh has suggested that Hart did not actually hold a 'practice theory' of rules; 'Four Neglected Prescriptions of Hartian Legal Philosophy' (2014) 33 *Law and Philosophy* 689.

⁴⁶ Raz lists two more problems for the practice theory: the fact that the social practice account fails to distinguish between obligation imposing rules and simple reasons for action; and the failure of the account to explain the normativity of obligation. See Raz, *Practical Reason and Norms* (n 41) 53–58. Practices need not be reasons for action.

⁴⁷ Raz, 'Promises and Obligations' (n 41) 219.

insights of the account of obligations as norms with the insights of what I have described above as the inferential account. Obligations are analysed as obligatory norms, which are protected reasons for action. Those protected reasons for action then interact with other relevant reasons for action to contribute to judgments about what, all things considered, ought to be done.

Note, however, that on the reasons-based account, a further distinction arises between the reasons that the obligation constitutes and the reason for holding someone to be under the obligation in the first place.⁴⁸ Our reason for adopting an obligatory norm might be as simple as the time it saves us to act on the norm rather than considering an issue on its merits. This distinction is important for the understanding of relational norms, as my discussion below makes clear. Relational norms undeniably constitute relational reasons for action, but it is a separate question whether the reasons justifying or supporting the norm in the first instance must also be relational.

⁴⁸ Raz describes this as the ‘two-level view’ of obligation; *ibid* 218–219, 223–226. McClennen identifies Raz’s approach as a kind of ‘revisionary’ approach to rules—one based on a hierarchical model of justification. The rule is justified by an ordinary reason for action, and then replaces some of our ordinary reasons for action in the process of practical inference; Edward F McClennen, ‘The Rationality of Being Guided by Rules’ in Piers Rawling and Alfred R Mele (eds), *The Oxford Handbook of Rationality* (Oxford: Oxford University Press 2004) 225–227.

2.2.2 Relational Obligatory Norms

In this thesis I take the reasons-based account of obligation as a particular kind of categorical norm, and extend it to offer an account of relational obligations. An account of relational obligatory norms, then, begins with the observation that they arise where we cite relationships as a particular kind of reason for action—a protected reason for action. We cite our relationships as reasons for action in the same way that we cite our decisions, promises and projects as reasons for action.⁴⁹ Our relational obligations are just protected reasons for action that are grounded in our relationships in some way. My friend Serge loves to go rock-climbing. I do not like it very much but I know how much he enjoys it when I come with him. I have good reason to defer to his enjoyment from time to time, for the sake of our friendship. Our friendship even gives me a kind of protected reason for action. I have a reason to accompany him while he rock-climbs, and a reason not to act on the variety of other reasons I have not to go (my slight fear of heights, say, or the fact that there are other activities that I might enjoy on a Thursday afternoon). In fact, this kind of duty seems to enable the kind of

⁴⁹ Versions of this view are defended in Scheffler, 'Relationships and Responsibilities' (n 3); Niko Kolodny, 'Love as Valuing a Relationship' (2003) 112 *Philosophical Review* 135; Joseph Raz, 'Liberating Duties', *Ethics in the Public Domain* (Oxford University Press 1995) 18–21. For an unsuccessful but insightful critique of these approaches see Keller (n 3) ch 3.

partiality that defines friendship. Unless I am required to act in this way towards my friend, then the friendship itself would not be intelligible. Raz has observed that, in many circumstances, identifying our valuable relationships is impossible without also referring to the distinct duties that define them.⁵⁰

There are many different kinds of relationship—both natural and artificial—and many different forms of constituent duties. Sometimes relationships are defined by authorities or rulings—something that distinguishes these defined relationships from more familiar relationships like friendship or marriage, which are at most conventionally defined. School children are often paired with a ‘buddy’, usually an older student, who is instructed to provide guidance and advice to the younger student. In a sense, these relationships are purely the creation of authoritative directives—the older student is instructed to be kind and to provide advice to younger students. There is something artificial about these relationships—they do not necessarily reflect the real choices and values of the students who are burdened with them. Like ordinary relationships, however, they are defined in terms of their normative content. To say that one student is another’s ‘buddy’ is to say that they have certain obligations towards

⁵⁰ Raz, ‘Liberating Duties’ (n 49) 18–20. As I note in my discussion below, there is an apparent circularity here. As I argue later, however, this circularity is largely benign.

each other according to the authoritative directions of their teacher. The relationship between the two cannot be wholly described without referring to the different obligatory norms that define it.

2.3 Relational Permissions

2.3.1 Permissive Norms in General

An analogous reasons-based account of permissive norms can also be offered.⁵¹ It is common to distinguish between 'weak' and 'strong' permissive norms. Weak permissions occur wherever there is simply a lack of a duty not to do that which is permitted.⁵² Strong permissions are supposed to occur where there is an explicit norm permitting the action in question. Raz suggests that strong permissions (that is, permissions entailed by permission granting norms) are, like obligations, comprised of exclusionary reasons. He describes this type of permission as an exclusionary permission, in order to resolve any ambiguity in

⁵¹ Raz, *Practical Reason and Norms* (n 41) 85–97.

⁵² Georg Henrik von Wright, *Norm and Action* (Routledge 1963) 85–89; CE Alchourron and E Bulygin, *Normative Systems* (Springer 1971) 119–125.

the term 'strong permission'. Exclusionary permissions are permissions not to act on otherwise relevant reasons for action.⁵³

Raz appeals to exclusionary permissions to explain certain kinds of supererogation. So, for instance, it might be the case that on the balance of reasons I ought to donate my money and time to charity. According to Raz, if I did this, it would be praiseworthy, but my failure to do it is not blameworthy. This is explained by the fact that I have permission not to act in a way that is consistent with the balance of reasons.⁵⁴ Permissive norms, then, are a kind of exclusionary permission. They confer permissions on their bearers not to act on reasons that would otherwise apply to them. Both obligatory and permissive norms are present in relational settings.

2.3.2 Relational Permissions

Just as there are relational obligatory norms, there are relational permissive norms. Relational permissive norms are sometimes treated with undue scepticism. There is no easy way of stating relational permissions in English, except perhaps in terms of the negation of a relational obligation. The locution

⁵³ Raz, *Practical Reason and Norms* (n 41) 91–95.

⁵⁴ *ibid* 94.

'Jane is permitted to John to jive' is ungrammatical in English, though we can say 'Jane has no obligation to John not to jive'.⁵⁵ Trivially, a relational permission can be entailed by the fact that there is no relational obligation not to do a certain thing (i.e. that there is no reason to act, and no reason not to comply with reasons not to act). I am permitted to tell my friend that I like the music he plays because our friendship does not give me any obligation not to tell him such a thing.

Hohfeld thought that rights held against others may include permissions held against them—what are sometimes called 'privileges' or 'liberties'.⁵⁶ His arguments do not easily track the practical significance of the term 'right' or supposedly equivalent terms like 'privilege'.⁵⁷ Rights do not entail permissions. We may have rights to do things that we not permitted to do.⁵⁸ Nor is there any familiar practical concept corresponding to a directed or relational permission held between individuals.⁵⁹ For the sake of discussion I will reject Hohfeld's argument that the word 'right' is systematically ambiguous, and that among its meanings is the notion of a directed permission. I do, however, think that

⁵⁵ Perhaps there are adjacent formulations that can be used to state relational permission—e.g. 'As far as her relationship with John is concerned, Jane is permitted to jive'.

⁵⁶ Hohfeld (n 8).

⁵⁷ For further discussion see Kenneth Campbell, 'The Variety of Rights', *Challenges to Law and the End of the 20th Century: Rights* (Franz Steiner Verlag 1997).

⁵⁸ Enoch (n 21); Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 *Ethics* 21.

⁵⁹ Herrestad and Krogh (n 12) 504–507.

relational permissions are intelligible, and that they can be understood analogously to relational obligations.

Relational permissions can be understood as permissive norms that are constitutive of a relationship between the bearer of the permission and another person. Like our obligations, our various permissions are sensitive to our relationships with others. The nature of our relationship with others can permit us to do things that would otherwise be impermissible. Many relationships of advice, for instance, would lose their distinctive value if their participants were not permitted to speak freely to each other in ways that were rude or insensitive. Though they are less discussed than relational obligations, relational permissions are just as familiar an aspect of our lives.

Some relational norms are *exclusionary* permissions, of the type already discussed.⁶⁰ The possibility of exclusionary permissions within relationships is evident from the fact that we can act in a supererogatory fashion within a relationship. For instance, I can do things as a friend that are not required of me as a friend but which are nonetheless praiseworthy, as I arguably do when I devote a day of my weekend to helping my friend move house. My failure to do

⁶⁰ Raz, *Practical Reason and Norms* (n 41) 95–98.

this favour for my friend is not blameworthy even though on the balance of reasons I ought to help them. In the language of reasons, my friendship gives me a reason not to act on the balance of reasons that I must act on as a friend. Acting on the balance of reasons provided by my friendship would be praiseworthy. But failure to act on these reasons is permissible.

2.4 Relational Norms in Practical Reasoning

2.4.1 Relational Norms and Points of View

The *sui generis* character of relational norms should not obscure the common role that both relational obligations and other kinds of norms play in our practical reasoning. First, both kinds of norm provide reasons for action that must be factored into our deliberation about what, all things considered, we ought to do. Second, both relational norms and non-relational norms matter identically from the point of view of practical deliberation.

It is tempting to separate relational norms and relational normativity from other aspects of our practical reasoning—to deny that they can be weighed against other non-relational norms in our practical reasoning. The tension between relational and non-relational norms is supposed to be a tension between

opposing, perhaps irreconcilable, points of view.⁶¹ Often this goes hand in hand with the suggestion that, as Darwall puts it, ‘personal relationships occupy a kind of morality free zone, in which universal concerns of weal and woe and the dignity of persons either do not apply, or distort otherwise healthy personal relations’.⁶²

In her work on political obligation, for example, Margaret Gilbert argues that ‘owing...is a matter of relationship’ (between citizens, for example).⁶³ She denies, however, the possibility that the obligations that we owe to others are obligations in the same sense as our ordinary non-relational obligations. Her view is that while these obligations provide us with reason for action, they do so because they constitute a separate source of normativity altogether—what Gilbert calls a ‘source of owing’.⁶⁴ They provide a separate point of view from

⁶¹ In his ‘Persons, Character and Morality’, Bernard Williams attributes this division to Kantian traditions—‘it is not intended that these demands should exclude other and more intimate relations nor prevent someone from acting in ways demanded by an appropriate to them: that is a matter of relations of the moral point of view to other points of view’; Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge University Press 1981) ch 2.

⁶² Stephen Darwall, *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford University Press 2013) 97. Darwall attributes this view to Carol Gilligan.

⁶³ Gilbert (n 6) 393.

⁶⁴ *ibid* 400. Gilbert of course does allow that ‘all things considered rationality’ might require us to ignore these relational duties because moral concerns are overriding, but this means that the relational duties are *morally defeated*, not that they are answerable to any moral standard.

which actions are required—one that is not grounded in questions of value or our moral reasons for action.⁶⁵

I do not think this emphasis on points of view is particularly helpful. Pretheoretically, it is unappealing to separate practical reason into separate points of view.⁶⁶ It also seems non-parsimonious to speak of multiple domains of normativity where one will do. Moreover Gilbert's account has difficulty explaining the common role played by relational and non-relational obligations in many accounts of practical reason. Consider the following chain of reasoning. On the one hand, I have an obligation to save as much as possible for my own retirement. On the other hand, I have an obligation to provide my children with educational opportunity by buying them textbooks for their study. My obligation to my children is more stringent than my obligation to save for my retirement. Therefore, all things considered, I ought to buy my children their textbooks.

This chain of reasoning suggests two things. First, relational norms, like other norms, play a role in practical deliberation that precedes our all things

⁶⁵ Ibid 393–394. I find Gilbert's purported severing of value from reasons for action particularly problematic. If it were correct, it would mean we had to part with the explanatory nexus between reason and value.

⁶⁶ For a broader critique of the appeal to 'points of view' in practical philosophy see Joseph Raz, 'Incorporation by Law' (2004) 10 *Legal Theory* 1, 1–7.

considered judgments as to what ought to be done.⁶⁷ When ordinary norms conflict with relational norms, each is weighed against the other in terms of its stringency. The behaviour of obligations in conflict differs from the behaviour of our all things considered practical judgments. Relational norms and other kinds of norms share a common inferential role. Second, the example shows that we can weigh relational norms against other kinds of norm without any confusion. Each makes the same kind of contribution to the question of what we have decisive reason to do. Relational norms are answerable to general practical deliberation. In the absence of a plausible argument for treating the two as belonging to distinct and irreconcilable points of view, we ought to prefer an analysis that treats both as occupying a common role in our practical reasoning.

2.4.2 The Justification of Relational Norms

Relational norms, as we have seen, play a familiar role in practical reasoning. But norms require justification. We have norms where we have a reason for accepting them or for holding others to be under them. Norms themselves must be justified for some other reason—perhaps just the fact that they operate as time-saving or commitment devices, or that they help us to better coordinate our

⁶⁷ On this point see further Sreenivasan, 'Duties and Their Direction' (n 13) 468–475.

actions, or that they serve as a reminder of a particularly important reason for action.

The standard justification of relational norms is that these norms are necessary to realising relationships of intrinsic value. Since norms are necessary to realise the relationship, the value of the relationship justifies acceptance of the norms.⁶⁸ This raises the question of whether relational norms *must* be justified by the intrinsic value of the relationship that they constitute, or whether the value of the relationships may be instrumental. Many accounts of relational norms stress the fact that the relationships they help to realise have intrinsic value. A variety of philosophers have argued that we see relationships and their constitutive norms as providing reasons for action only because we value those relationships non-instrumentally.⁶⁹

⁶⁸ Versions of this account are offered by John Cottingham, 'Ethics and Impartiality' (1983) 43 *Philosophical Studies* 83; Raz, 'Liberating Duties' (n 50); David Miller, 'Reasonable Partiality Towards Compatriots' (2005) 8 *Ethical Theory and Moral Practice* 63; Jonathan Seglow, *Defending Associative Duties* (Routledge 2013); Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press 2002). Seth Lazar notes that Scheffler's views may be more nuanced; 'The Justification of Associative Duties' (2016) 13 *Journal of Moral Philosophy* 28, 30 fn 4.

⁶⁹ See e.g. TM Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) 161–162; Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (n 68) 6–7; Kolodny (n 49); Lazar (n 68).

I argue in Chapter 8 that we may form relationships that are justified, in whole or in part, by their instrumental value. Relationships involving teamwork provide one theoretically fertile example.⁷⁰ Sometimes we better conform with certain reasons for action by acting together than acting individually. In these scenarios our teamwork has value largely by virtue of the existing reasons with which it helps us to conform. Few would deny that our teamwork reasons are relational. In Ian McEwan's *Enduring Love*, Joe and his fellow rescuers owe it to each other to work together to keep the balloon with its child passenger from drifting away.⁷¹ They each have reasons—thoroughly relational reasons—to grip the anchor rope in tandem and try to pull the balloon down. Yet their reason for teaming up in the first place is not relational in the same way. It is an ordinary reason for action, applying to each of them individually, to try to save the child's life.⁷² Here we have relational obligations that are justified in part by value that is extrinsic to the relationship that they help to serve. Members of a team owe it to each other to act in a way that furthers the value of the team. But the reasons

⁷⁰ See especially Michael Zimmerman, 'Cooperation and Doing the Best One Can' (1992) 65 *Philosophical Studies* 283; John Gardner, 'Reasons for Teamwork' (2002) 8 *Legal Theory* 495.

⁷¹ Ian McEwan, *Enduring Love* (Jonathan Cape 1997).

⁷² Gardner (n 70).

justifying teamwork are not in themselves intrinsic to the relationship.⁷³ The possibility of instrumental relationships is discussed further in Chapter 8 of this thesis.

Some relationships do appear to have intrinsic value and to defy any kind of instrumental justification. We might nominate as candidates the relational norms that obtain between friends, between spouses, and between parents and their children. For most of us, these relationships are vitally important. Our lives revolve around these significant commitments and attachments. Many of us find it difficult to imagine life without them. The centrality of these forms of relationship to our practical lives makes a good *prima facie* case for their intrinsic value. If that is the case, then there are certain kinds of relational obligations that are justified, in part, by the value of the relationship that they help to realise. They are justified, in whole or in part, by their own value. This suggests the possibility of some kind of problematic circularity. What it actually demonstrates, I think, is that the right and the good are actually closer together than is commonly supposed. John Rawls is often credited with observing that the

⁷³ Similar reasoning can be applied to both promissory relationships and relationships of authority. This helps to defuse the problem of relationality that some have found in instrumental accounts of both; see e.g. with respect to promises Gilbert (n 21). With respect to authority see both Stephen Darwall, 'Authority and Reasons: Exclusionary and Second Personal' (2010) 120 *Ethics* 257; Scott Hershovitz, 'The Role of Authority' (2011) 11 *Philosopher's Imprint* 1. I discuss the case of authority further in Chapters 8 and 9.

specification of the right often cannot occur independently of specification of the good.⁷⁴ Rawls later invokes this entanglement of the right and the good in the course of demonstrating the ‘stability’ of his own theory of justice—his own account of justice allows for congruence of justice and the good.⁷⁵ But my discussion here points to another way in which the right and the good are far more entangled than some would like to allow—some goods, like our valuable relationships, include deontic features.

Even if we assume that that certain relationships like friendship have intrinsic value, it is still wrong to suppose that they cannot be understood or appraised from an external point of view.⁷⁶ What is a reason for me—even a special kind of reason for me—may be just as much a reason for others.⁷⁷ Others will have reason to promote my friendship with another even where I have a reason to respond to that friendship in different ways. The value of friendship gives me reason to respect and admire my own friends, while it gives others around me reason to encourage me to make more friends. Hence friendship is

⁷⁴ John Rawls, *A Theory of Justice* (Revised Edition, Belknap Press 1999) 26.

⁷⁵ *ibid* 350.

⁷⁶ Following Scheffler, the literature on special obligations often refers to accounts of relationships that allow that they have intrinsic value as ‘non-reductive’ accounts; see his ‘Relationships and Responsibilities’ (n 3).

⁷⁷ This broader reason-giving character is often overlooked in discussions of the agent-neutral/agent-relative distinction; Gardner and Macklem (n 37) section D.

often invoked to make a related point, which is that the correct way to respond to reasons is not always to promote them. In some circumstances, the correct way to respond to a reason is just to respect it, or form certain other reason-reflecting attitudes towards it.⁷⁸

The capacity for some valuable relationships to contain constitutive obligations needs further explication. I return to the issue in Chapter 3. My intention has been to demystify two features of relational obligation that I think are relatively common. First, relational obligations may be justified by non-relational considerations. Second, relational obligations are justified by the value of the relationship that they constitute. There is a habit of assuming that these two positions are mutually incompatible.⁷⁹ This need not be the case. Even those of us who are committed to the possibility of some relationships having irreducible intrinsic value ought not to deny that there are other relationships that exist because they have instrumental value.⁸⁰

⁷⁸ See Scanlon (n 69) 89; Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011) ch 11; Lazar (n 68).

⁷⁹ This habit is evident in the work of authors who insist that since we cite relationships as reasons for action, we must value them non-instrumentally. See (n 69) above.

⁸⁰ A third possibility is that some relationships, though instrumentally justified, have a value that exceeds their justifying value. This possibility is discussed again in Chapter 8 of this thesis; cf. Gardner (n 70) 503–504.

At this stage in my argument, it is important to distinguish between two senses in which an account of relational norms might be reductive. The first kind of reductive account offers an eliminative analysis of relational norms—that is it analyses relational norms in terms of a necessary and sufficient set of other, more fundamental moral properties or concepts. The second kind of reductive account is justificatory—it justifies the value of relational norms through reference to some other set of reasons. In this Chapter I have rejected the first kind of reductive account but not the second. Work on relational norms sometimes confuses these two questions. Samuel Scheffler, for instance, speaks of ‘non-reductionism’ about our special relationships, but his account of what constitutes non-reductionism sometimes elides reductive analysis and ‘reductive’ justification. He speaks both of non-reductionists attaching ‘non-instrumental value’ to their relationship and of their valuing the relationship itself.⁸¹ But, of course, we can value a relationship in itself while also acknowledging that the relationship exists for instrumental reasons.⁸²

An analogy with personal projects might be helpful here. Suppose that, in order to teach them a lesson in aerodynamics, a teacher sets some students a

⁸¹ Scheffler, ‘Relationships and Responsibilities’ (n 3).

⁸² Simon Keller also notes that Scheffler’s analysis confuses valuing a relationship with attributing non-extrinsic value to that same relationship; Keller (n 3) 55 fn. 10.

project of designing a paper plane. On the one hand, it is true that part of the justification for the project is that it will help the students learn about aerodynamics. The project is instrumentally justified. On the other hand, the project itself is a reason for action—it is not simply reducible to its justifying reasons. A student can cite the project as a reason for action, as well as citing the instrumental concerns that initially justified the project. In this way, we can combine instrumentalism about the project with non-reductionism about the project itself. The possibility of this kind of instrumentalism is defended throughout this thesis.

2.5 Conclusion

Bertrand Russell attributed his break with the British idealists to his realisation that there are irreducible relations.⁸³ We have no need for any such philosophical revolution in the theory of practical reason. The possibility of relational norms is widely (though not unanimously) accepted in ethics.⁸⁴ If we take relational norms seriously, we should avoid attempting to reduce them to more fundamental moral properties.

⁸³ Bertrand Russell, 'The Monistic Theory of Truth' in Bertrand Russell (ed), *Philosophical Essays* (Routledge 2009).

⁸⁴ For a celebrated sceptical argument see Wellman, 'Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun "My"?' (n 3).

This Chapter has introduced an account of relational norms that will be relied upon in subsequent Chapters of this thesis. After briefly introducing relational norms as an object of study, I introduced an account of the two principal types of relational norms—relational obligations and permissions—that drew on Raz’s reasons-based account of obligatory and permissive norms. I distinguished my account from a number of attempts to reduce relational norms to ordinary norms that perform some other, non-relational function. I then briefly considered the role of relational norms in practical reasoning. I argued that both relational and monadic norms played the same reason-giving role in practical reasoning. In this regard, I distinguished between relational norms as defeasible rules of practical inference and our all things considered practical judgments.

Obviously, the importance of the distinction between relational norms and other kinds of norms can be overstated. Both consist in protected reasons for action, meaning that when they are valid they prevent us from acting, all things considered, on certain reasons that would otherwise apply for us. In this regard it makes little difference whether my duty to return the book to my friend is a duty of friendship or just an ordinary duty. Careful attention does, however, help us to distinguish between two distinct kinds of norm that shape our

practical lives. Many of our obligations and permissions are distinctly relational, in the sense that they are protected reasons that are constitutive of relationships between the duty-bearer and others. The sensitivity of our reasons for action to our various interpersonal relationships is a noteworthy aspect of practical reasoning. In the following Chapter of this thesis, I examine one such set of relational norms—the norms that are constitutive of the relationship of friendship. I then answer a number of possible objections that might be raised against the account.

CHAPTER 3: NORMATIVE RELATIONSHIPS

In this Chapter, I defend the practice of identifying relationships in terms of their constitutive norms. I argue that the apparent circularity in the account is benign, and that normative relationships are intelligible objects of practical reason. My discussion also provides me with an opportunity to respond to a number of prominent objections to accounts of relationships that identify them with constitutive reasons for action. I rely throughout the Chapter on friendship as an illustration of a paradigmatic normative relationship.

Chapter 2 introduced the general account of relational norms on which I intend to rely in this thesis. Relational norms are understood as norms that are constitutive of a relationship of value between the norm-bearer and some other person. I will refer to relationships of value of this sort as *normative relationships*. Normative relationships can be identified as clusters of relational norms: the relationships between spouses, lovers, friends, parents and children are all at least partly identified by the duties and obligations that they owe to one another.

It might be thought that there was something problematic, even circular, about identifying relational norms with normative relationships in this way. We need only look at the kind of account it would offer of a relationship like

friendship. Suppose, as seems obvious, that to be a friend is, in part, to have obligations of loyalty. There is a certain kind of explanatory reflexivity here: I have a duty towards my friend because they are my friend; they are my friend because I owe them this duty. In this Chapter I argue that the account of friendship as a normative relationship is an intelligible one, and that its apparent reflexivity is benign. This is because normative relationships have value, and the obligations that constitute them are necessary to realising this value.

In large part, the purpose of the Chapter is to show that the general account of relational norms that I rely on in this thesis is fit for purpose. This is accomplished by showing that the account can be applied in the case of friendship, and that several prominent objections to the account can be overcome. Many of the arguments I make on behalf of my account of friendship could be made, *mutatis mutandis*, on behalf of analogous accounts of other relationships. I have chosen friendship because of its practical significance and familiarity. I begin, in section 3.1, by offering a brief account of friendship as it is constituted by a minimal set of obligations, permissions, and shared history. In section 3.2 I reflect on the intelligibility of identifying friendship in terms of certain norms that partly constitute it. I argue there a number of ways on which it can be shown that the apparent circularity is unproblematic. I defend the view

that friendship is a good that is partly constituted by certain norms. In section 3.3 I discuss several common objections this account and argue that they can be overcome. In section 3.4 I turn towards considering the significance of my account for the understanding of relational norms in law.

3.1 Friendship as a Normative Relationship

A Euthyphro-like dilemma confronts anyone who wants to offer a philosophical account of relationships of affection. Does our affection for another derive from their value, or does the other's value derive from their affection?¹ In the philosophical literature on relationships, this is often referred to in terms of the division between theories that see affection as a 'bestowal of value', and theories that see affection as an 'appraisal of value'.² It is also tempting to adopt a theory in which friendship's value consists in being a fitting object for affection.³ I will not attempt to resolve this debate here. It is too broad for me to do it justice, and I believe my account of friendship could accommodate any of these views. Still the problem gives a good insight into the varieties of theoretical responses available

¹ *Euthyphro* 6E11–11B1 in John M Cooper and DS Hutchinson (trs) *Plato: Complete Works* (Hackett Publishing Company 1997). The problem is restated with respect to love in Harry G Frankfurt, *The Reasons of Love* (Cambridge University Press 2004) 58–59.

² For a summary of the division see Bennett Helm, 'Love' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2013, 2013) <<http://plato.stanford.edu/archives/fall2013/entries/love/>>.

³ TM Scanlon, *What We Owe to Each Other* (Harvard University Press 1998) 88–90.

to friendship. Both approaches demonstrate the extent to which identifying right conduct within friendships involves identifying the good, and *vice versa*. Friendships, as objects of value, rely on certain constitutive duties that give them their particular character. They need this particular structure in order to be intelligible, so that their value can be realised and maintained.⁴

I will now offer an account of friendship in terms of the various norms that define it. I defend the claim that friendship is defined by certain constitutive norms, and then reflect on a number of features that distinguish friendship as a normative relationship. Friendship is reciprocal; it is defined by certain regulative ideals that stipulate how friends should ideally act towards one another; it is also defined by certain shared histories of interaction.

3.1.1 Friendship and its Constitutive Norms

When discussing friendship, it is hard to avoid the view—predominant in the romantic imagination of the modern age—that friendship is not rationally governed. In Harry Frankfurt’s words, ‘there are no necessities of logic or rationality that dictate what we are to love’.⁵ There is an element of truth in this

⁴ See Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) 40–42.

⁵ Frankfurt (n 1) 47.

romantic account, though it is not ultimately successful. First, before friendship itself comes into existence, it will often be associated with certain protean mental states that are not in themselves rationally governed. There is something that it is *like* to be in a state of love or affection towards another. Call this state of fondness for others *friendliness*. We can suppose for the sake of argument that friendliness is simply a mental state, similar to pleasure or pain. And perhaps, like these hedonic states, friendliness cannot be rational or irrational.⁶ However, our desires to be in or avoid these states are answerable to reason. This means that we can often intentionally modulate our experience of such states over time—usually indirectly. We can choose whether or not we will allow ourselves to be in situations that allow us to develop friendliness.⁷ Still, friendliness is not friendship.⁸ I may be in a state of friendliness with many people who are not my friend. For friendship to occur, more is required.

⁶ On the distinction between hedonic states and meta-hedonic desires see Derek Parfit, *On What Matters*, vol 1 (Oxford University Press 2011) 52–56.

⁷ I am grateful to Les Green and Grant Lamond for pressing me to make this point more clearly.

⁸ The ambiguity in the meaning of the word ‘love’ complicates the philosophical discussion of love, since its use may refer to either the mental state (‘he loves her’), or to the relationship (‘they are in love’). There is no such ambiguity in the meaning of ‘friendship’.

Moreover, many of the reasons associated with the attitudes of friendship are not capable of being followed directly. We have reasons to respect and admire our friends, but it does us little good to try to respect or admire them. Nor does it make sense for us to try to choose those whom we respect and admire. Most of our friendships develop organically and are sustained by conditions of intimacy that allow for friendship to flourish. Usually friendship does not feel like work. When it does, we may infer that something has gone wrong.

Nonetheless, the romantic view of friendship is not sustainable. Friendship is rationally governed, and consists in certain core norms. For one thing, we can choose those with whom we become friends. While we might not be able to alter our fondness for some people, we can choose whether or not we put ourselves in situations where we possess such fondness towards them. We can also choose whether or not we express this fondness in our actions. Friendship consists in a certain core of expressive obligations.

Friendship undoubtedly also consists in certain reason-governed attitudes. Minimally, it is required that friends regard each other as giving them reason for bearing goodwill towards them, and for wanting good things to

happen to the friend for their own sake. This is something like Aristotle's own requirement that friendship contain 'goodwill', or *eunoia* (εὐνοία).⁹ Most modern accounts of friendship have endorsed this requirement.¹⁰ Moving beyond *eunoia*, it is also arguable that certain basic 'expressive requirements' constitute friendship.¹¹ That is, in order for relationships to develop into or remain friendships, friends must act in a manner that expresses their good will towards each other. It is not enough to possess certain attitudes. A friend who failed to act loyally would fail to meet the basic requirements of friendship.

It is also plausible that friendship is in part defined by certain permissive norms. Friendship releases us from certain obligations that we might have with respect to strangers. For instance, we are often permitted to be honest with our friends in a way that would otherwise be inappropriate. These permissions are explained, not by the absence of a reason not to perform the permitted act, but by the presence of strongly permissive norms that help us to realise friendship.

⁹ Aristotle, *Nicomachean Ethics* (Roger Crisp ed & tr, Cambridge University Press 2000) 1156a.

¹⁰ For a useful summary see Bennett Helm, 'Friendship' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2013, 2013) <<http://plato.stanford.edu/archives/fall2013/entries/friendship/>>.

¹¹ The phrase is taken from R Jay Wallace, 'Dispassionate Opprobrium: On Blame and the Reactive Sentiments' in Rahul Kumar, R Jay Wallace and Samuel Freeman (eds), *Reasons and Recognition: Essays on the Philosophy of TM Scanlon* (2011). But see also Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 155–156.

Friendship is constituted by norms that provide reasons to exclude from consideration other reasons for not acting in a certain way.¹² Though I do not discuss permissive norms at any length in this Chapter, it is important to recognise that it would be impossible to fully define friendship without them.

3.1.2 Reciprocity

Friendship is a reciprocal relationship. It is characterised by a state of mutual liking or affection. Scanlon contrasts friendship, understood as a state embodied by mutual or reciprocal attitudes, with a relational state that he terms 'fanship'.¹³ The requirement of reciprocity distinguishes friendship from a state of admiration towards another person, who may not even be aware of our attitudes towards them.

Other kinds of reciprocal relationship differ in the nature of their reciprocity. Where friendship ideally displays what might be described as an equality of affect, other reciprocal relationships do not. The ideal form of the teacher-student relationship is characterised by certain conjoined attitudes that are reciprocal in the sense that each is appropriately adjusted for the other. The

¹² Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999) 89–91. See Chapter 2.

¹³ Scanlon (n 3) 89.

care and concern that is expected of a teacher is reciprocated by the respect and admiration that we expect of a student.

As the above discussion indicates, not all relationships are reciprocal. On some views of love, love is not necessarily reciprocal.¹⁴ One may love another without being loved in return.¹⁵ Promissory relationships are not reciprocal either. My promising something to you does not necessarily impose any obligations on you. The distinction between non-reciprocal relationships and reciprocal relationships does not matter much for the study of the broader category of relational obligations. Non-reciprocal relationships can still be valuable—they can still provide us with relational reasons for action. My love for someone may still provide me with protected reasons for action, regardless of whether or not my love is reciprocated.

¹⁴ Though so called 'union' views of love argue for reciprocity. E.g. Robert Nozick, 'Love's Bond', *The Examined Life: Philosophical Meditations* (Simon & Schuster 1989).

¹⁵ Les Green also pointed out to me that some loving relationships may be imperfectly reciprocal, as W.H. Auden clearly anticipated when he implored: 'if equal affection cannot be/let the more loving one be me'; WH Auden, 'The More Loving One', *Homage to Clio* (Random House 1960).

3.1.3 Friendship as an Ideal

It is important to distinguish the norms of friendship as it actually occurs from those norms that stipulate friendships as an ideal form.¹⁶ There are many aspects of an ideal friendship that are not features of our actual friendship. Friends, for example, are ideally patient and tolerant. But in actual practice there are limits to what we will tolerate, even from our friends. The ideal forms of friendship also provide us with certain reasons for action. Many of the obligations associated with friendship are grounded in the recognition that we should strive to emulate friendship in its ideal forms.¹⁷ The obligations of friendship reflect friendship in its ideal forms. We may fault others for not aspiring to meet these ideals.¹⁸

Friendship may not correspond to a *single* ideal. There are many different kinds of ideal friendship, which correspond to a variety of varying constitutive

¹⁶ Kant is sometimes credited with inventing the concept of a *regulative ideal* in the first *Critique* (which he contrasted with constitutive ideals); see e.g. his Appendix to the Transcendental Dialectic; Immanuel Kant, *Critique of Pure Reason* (Paul Guyer and Allen Wood trs, Cambridge 1998) 590–692. See further Dorothy Emmet, *The Role of the Unrealisable: A Study in Regulative Ideals* (St Martin's Press 1994). On ideals as reasons for action see Kimberley Brownlee, 'Reasons and Ideals' (2010) 151 *Philosophical Studies* 433; Kimberley Brownlee, 'Moral Aspirations and Ideals' (2010) 22 *Utilitas* 241.

¹⁷ Occasionally ideal norms of this sort make their way into law. The Australian Family Law Act, for instance, stipulates that one of the principles underlying the legislation is that 'parents should agree on the future parenting of their children'; Family Law Act 1975 (Cth) 60B(2)(d). This states an ideal, it does not impose a legal duty on parents' behalf to agree in all cases.

¹⁸ Brownlee, 'Moral Aspirations and Ideals' (n 16) 253–256.

norms and regulative ideals. Some friendships may emphasise collegiality, for instance, where others emphasise fidelity. I think it is likely, though, that all ideal forms of friendship will be defined by the *eunoia* requirement. Perhaps the different forms correspond to different expressions of this ideal. A collegial friendship, for example, will contain constituent norms that express the ideal goodwill that exists between friends who are working together for a common cause. Relationships of fidelity, by way of contrast, will contain expressive norms of loyalty.

3.1.4 Histories of Interaction

Friendships are partly dependent on some shared history of interaction between friends. Friends need not be geometrically proximate, but it is impossible to conceive of a friendship between two persons who have never interacted and form no plans to interact with one another. Many friendships arise through accidental interactions. They unfold over time, as each party becomes more aware of the other's virtues and the pleasure that arises in their company.

This last point is suggestive of the fact that friendships might also be *shaped* by shared history, and constituted by the fulfilment or abandonment of previous normative demands that parties placed on one another. Adapting one's

account of friendship to fit this feature of human relationships would add what seems to be an unnecessary level of detail for my purposes.¹⁹ All I will stipulate here is that, to exist in the first place, friendship requires some degree of shared interaction—either present or historical.

I am now in a position to summarise my view of friendship. A friendship, for my purposes here, is a relationship of value between persons with a shared history of interaction that is constituted by certain reciprocal obligations of good will. Friends are required to do and to want things for each other for each other's sake. This means that friends are obliged to possess certain attitudes towards each other, and to comply with certain expressive obligations that demonstrate these attitudes. Friendship is also defined by certain regulative ideals. There are many properties of an ideal friendship that are not realisable within actual friendships. Ideal friendship does, however, provide one source of justification for the norms that define friendship. Having offered this summary of friendship as a normative relationship, I will now expand on the various ways in which friendship as a normative relationship can be shown to be rationally intelligible.

¹⁹ See further Niko Kolodny, 'Which Relationships Justify Partiality? General Considerations and Problem Cases', *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010); Niko Kolodny, 'Which Relationships Justify Partiality? The Case of Parents and Children' (2010) 38 *Philosophy and Public Affairs* 37.

3.2 Explanatory Reflexivity and External Intelligibility

Thus far I have been offering a particular conception of friendship as a normative relationship defined by certain constituent deontic features. In this section of the Chapter I observe that this account demonstrates the intelligibility of friendship as a social form. As the *Euthyphro*-type dilemma that arises with respect to friendship demonstrates, friendships involve a certain kind of explanatory reflexivity. We cite, as a reason for acting as a friend, the friendship itself: our reason for acting as friends is the simple fact that we are friends. On the other hand, if we did not act as we should towards our friends, we would not have a friendship.

Two confusions might arise from this apparent circularity. First, it might be thought that the circularity suggests something troubling and problematic about the analysis of friendship as a normative relationship. This first objection can be met rather neatly by observing that many different kinds of goods have constitutive deontic features.²⁰ Competitive games, for instance, are partly defined by the rules (those conferring permissions, rights and duties) that

²⁰ Explanatory reflexivity is a feature of almost all social roles; see GA Cohen, 'Beliefs and Roles' (1966) 67 *Proceedings of the Aristotelian Society* 17; Michael Hardimon, 'Role Obligations' (1994) 91 *Journal of Philosophy* 333. This is further discussed in Chapter 7.

players impose on one another.²¹ A game that was completely lacking in rules would not be identifiable as a game—we could not distinguish it from any other kind of activity. Rather than threatening their intelligibility, these deontic features help to realise the goods in question. Without the constitutive obligations, rights and permissions, the particular value of the goods would not be realised. The value of the game, of course, exceeds the simple value of complying with the rule. Similarly, the constitutive duties make a contribution to the relationship, and the value of this contribution exceeds their individual value. The duties help to distinguish the relationship in question—they help to make it identifiable as a form of activity that has value to its participants.

Second, it might be thought that the fact that relationships provide participants with special reasons for action threatens the external intelligibility of the relationships. If we cannot justify the practice in any way, it must be unintelligible to all but those who are internal to the practice. An example of this second confusion can be found in the work of scholars who take the apparent circularity in explanation of normative relationships to indicate something profoundly important. Darwall, for instance, writes that an important part of

²¹ For further discussion see Thomas Hurka and John Tasioulas, 'Games and the Good' (2006) 106 *Proceedings of the Aristotelian Society* 237.

morality is defined by the internal point of view we adopt as members of the moral relationship we share with others.²² All of these reasons for action are fundamentally relational, or ‘second-personal’. These reasons cannot be understood from a point of view that is external to the relationship.²³ More esoterically, Weinrib has claimed that the relationships that embody the private law resist any external justification—private law ‘has no external referent’.²⁴ If the relationships that embody private law are to be justified, they must be justified from within.

If there are indeed relationships that are incapable of external justification of any sort, then these sorts of views might be vindicated. Responding to Darwall and Weinrib’s claims would require us to look, in more detail, at the respective relational claims made by both private law and common-sense morality. With regards to most relationships, however, there seems to be little difficulty in finding further reasons that allow us to at least partly explain our reasons to act as a member of that relationship. We can accept that the reasons of friendship demonstrate a kind of autonomy and ‘motivational non-transparency’

²² Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press 2006).

²³ *ibid* 12.

²⁴ Ernest Weinrib, *The Idea of Private Law* (Revised, Oxford University Press 2013) 14.

for those who participate in the friendship.²⁵ We can do so without risk of vicious circularity. This is because the reasons that justify friendship, our reasons for regarding friendship as valuable, and the reasons that we have for pursuing friendship, are all distinguishable from the reasons for action internal to friendship itself.

In the remainder of this Chapter I suggest a number of ways in which we might accommodate friendship as constituted by certain reasons for action without needing to regard this explanatory reflexivity as problematic or as rendering our relationships rationally unintelligible. First, we can distinguish between one's reasons for seeking and participating in a certain relationship and the reasons that issue once we are involved in the relationship. Friendship takes our existing reasons for action and turns them into something constitutive of friendship. Second, we might distinguish between the perspectives of someone who is internal to the relationship and those of us who are external to it. Relationships are, after all, just as much reasons for the rest of us as they are for those who belong to them: as external observers, we have reason to respond to relationships in a way that would be inappropriate for those internal to the

²⁵ The phrase 'motivational non-transparency' is borrowed from Gardner's review of Weinrib; John Gardner, 'The Purity and Priority of Private Law' (1996) 46 *The University of Toronto Law Journal* 459, 459.

relationship. We can consider the value of the relationship in a way that those inside the relationship may not. Finally, we can distinguish between friendship as an existing practice and friendship as an *aim*. For instance, many of the obligations we associate with friendship are derived from a telic ideal of friendship. The ideal of friendship is something we have reason to aim towards, and to shape our existing practices around.

3.2.1 Ordinary Reasons and Constitutive Reasons

It is important to distinguish between those reasons for action that constitute friendship, and the reasons for action that lead us to form friendships in the first place. I call those reasons required for the explanation of friendship *constitutive* reasons. On the other hand, there are reasons we have for forming friendship in the first place. Many of our reasons for acting as friends appear to be reasons that we would have had in any case. For instance, the pleasure I experience in my friend's company gives me reason to spend time with them. I would have this reason regardless of whether or not they were my friend, because they are an interesting person with whom I enjoy spending time. Often when friendships are forming, they do so naturally, without any effort on anyone's behalf, because we act on these ordinary reasons.

It is tempting to think that the reasons that we associate with friendship are not internal to friendship. They just reflect reasons that we have to respond to one another's worth, or reasons that we have because we enjoy each other's company and value the time we spend together. In other words, it might be argued that the presence of these reasons is all that is needed to explain friendship—there is no need to appeal to friendship itself as a reason for action. But these reasons on their own cannot explain how friendship gives rise to partiality. They do not explain why we choose to spend time with our friend over spending time with other people whose company we enjoy. There are many people whose company I would enjoy, and I have equal reason to spend time with any of them. That someone is my friend gives me a special kind of reason to spend time with them. The kind of partiality that we associate with friendship can only be explained if friendship is a source of higher-order reasons for action, which protect and amplify our initial reasons for pursuing the friendship.

Relationships are associated with certain constitutive obligations. These constitutive obligations are protected reasons for action.²⁶ That is, they are a

²⁶ This is the account of duty and obligation that is developed in Raz, *Practical Reason and Norms* (n 12). Reasons are facts. The same reason may act as a reason *for* many different candidate actions. That it is raining is a reason. This reason is a reason for taking an umbrella with me. It may also be a reason for driving to work. But it is a singular reason; *ibid* 17–20.

reason to ϕ and a reason not to act for other reasons not to ϕ .²⁷ Once they are recognised, relationships provide us with certain constitutive obligations that amplify our existing, ordinary reasons for action.

The existence of both a constitutive obligation and an ordinary reason means that it is possible for friendship to amplify reasons that we would have had in any case, because the protecting reason will not only directly protect the protected reason, but indirectly protect the initial reason. The kind of amplification of reasons that I am relying on is not unique to relationships. It can occur when an ordinary reason provides the justifying reason for any protected reason. My limited time gives me a reason to decide quickly whether or not to purchase shares in company A or B. My decision to buy shares in A, once made, is an ordinary protected reason to buy shares in A. This is an ordinary protected reason.²⁸ But note that it serves to protect, not just the reason that I have in virtue of my decision, but my existing reason for buying shares in A.

²⁷ Raz has sought to clarify what it is to act *for* a reason. Exclusionary reasons do not (necessarily) preclude agents from considering other reasons for action. They do, however, exclude the agent being motivated by those reasons. Raz seeks to elucidate the distinction by invoking two terms of art: compliance and conformity; Raz, *Practical Reason and Norms* (n 12) 179. Instead of Raz's terminology, I have opted in this Chapter to distinguish between 'acting in conformity with', and 'acting for'.

²⁸ *ibid* 65–72.

The obligations constitutive of friendship often amplify the reasons we have for becoming friends in the first place. They do this by excluding certain reasons not to act on those initial justifying reasons. In this way friendship appears to turn an ordinary reason into a relational constitutive reason. It provides a protected reason that seems to amplify my existing reasons by excluding other reasons from deliberation.²⁹ I may enjoy a person's company, which gives me a reason to spend time with her. But the friendship that we form may then appear to protect this other reason, and give me reason to comply with my reason for spending time with my friend rather than complying with other reasons that I might have. In this way, valuable relationships take an ordinary reason for action, and turn it into a reason for action that is constitutive of the relationship.

²⁹ My argument here has relied on Raz's notion of protected or exclusionary reasons. Jonathan Dancy has argued for the possibility of reasons that, rather than *excluding* (in his words, *disable*) other reasons, simply attenuate or intensify them. For ease of discussion I have ignored this intriguing possibility. I think that it is plausible that some relationships intensify some reasons and attenuate others, rather than excluding them. It is interesting to think of how an account that allowed for reasons of this sort might differ from the one I offer here. See Jonathan Dancy, *Ethics Without Principles* (Oxford University Press 2004) 39–52. For a useful formalisation see John Harty, *Reasons as Defaults* (Oxford University Press 2012) 111–146. Harty makes the important point that it is wrong to see exclusionary reasons as maximally strong attenuating reasons. For an argument that partiality within relationships is explained by intensifying reasons see Simon Keller, *Partiality* (Princeton University Press 2013) ch 5.

Rather than appealing to our reasons for action, the question can also be addressed in terms of how friendship, as a good, relates to its component goods. Friendship has what Thomas Hurka refers to as ‘higher-order’ value.³⁰ One prominent view of intrinsic value holds that one good that is comprised of certain other intrinsic goods will not necessarily hold the same value as the sum of its component goods. An ordinary good’s value to me may be enhanced by the fact that they are associated with friendship. Pleasure in someone’s company is always valuable, but pleasure in a friend’s company has even higher value. This view is associated with G.E. Moore’s ‘principle of organic unities’.³¹ But one need not go so far as accepting Moore’s principle to see that friendship has a value above and beyond the value of the various goods we associate with friendship.³² Even if one thinks that value is in some way summative, the value of friendship will be separate and distinct from the value of its component goods.³³ (There

³⁰ Thomas Hurka, ‘Value and Friendship: A More Subtle View’ (2006) 18 *Utilitas* 232.

³¹ GE Moore, *Principia Ethica* (Cambridge University Press 1903) 96.

³² A point noted that has also been noticed by Thomas Hurka, *Virtue, Vice, and Value* (Oxford University Press 2003) 180–190; ‘Value and Friendship’ (n 30).

³³ As Zimmerman notes, there is nothing mysterious about saying that wholes have properties that their distinct parts lack—this is just what is known in metaphysics as the problem of emergent properties; Michael J Zimmerman, *The Nature of Intrinsic Value* (Rowman and Littlefield 2001) 136. (In other words, if there is a principle of organic unities, its proponents must show how it differs from a principle of emergent values.)

may, of course, still be a true principle of organic unities, but I do not need to appeal to it here to make my point.)

3.2.2 Internal and External Appraisal

The reasons that issue from friendship create diverse demands on our attention depending on our own position with respect to the friendship. The attention they require from members of the friendship itself will differ from the attention that they require from the rest of us. Sometimes the result of these differing perspectives can have an almost paradoxical quality.

Friendship is undoubtedly constituted by certain obligations. But it will often be inappropriate for friends to act out of recognition of these duties. They may even have reason not to act out of recognition of friendship. Many of the obligations of friendship would be best achieved if friends focused on the reasons that they had for becoming friends in the first place. Our reasons for enjoying each other's company, for instance, are likely to be expressed in actions that will incidentally conform with the obligations of friendship. If I act out of obligation towards my friend, then I am not acting in accordance with the sense of good will—Aristotle's *eunoia*—that is characteristic of friendship. Aristotle recognised that the virtuous friendship is one based on people wishing 'good

things to those they love, for their sake'.³⁴ The attitude we take towards what is good for our friend is the same attitude we would take towards that which is good for ourselves: 'each, then, both loves what is good for himself, and returns like for like in what he wishes and in giving pleasure'.³⁵ Obligations are used to buttress friendship, to help us to act in accordance with the reasons we have as a friend. They do not necessarily comprise reasons we should conform with directly. Suppose that, upon realising that it is my friend's birthday, I elect to buy him a gift only out of consideration of the fact that I am obligated to do so. Viewed one way, this scenario seems to present a variation of Williams's 'one thought too many'.³⁶ To think in terms of obligation, in my friend's case, is already to have had one thought too many. It would be disconcerting for my friend if he discovered that my gift had been presented only out of obligation. Why not, he might ask, present the gift out of consideration of the delight it would bring him, or out of recognition of his virtue, or in reciprocation for the joy he has brought me on other such occasions? For the friends themselves, obligations are often better ignored. Far from being most apparent to participants

³⁴ Aristotle (n 9) 150; 1158a.

³⁵ *ibid.*

³⁶ Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge University Press 1981) 18.

within friendship, many of the obligations that constitute friendship will be better appreciated by external observers of the friendship.

External observers can have as many reasons to respond to friendship as those within the relationship. We might have reason to encourage a lonely colleague to pursue a friendship with someone for the sake of his own happiness, for example. Even where we recognise reasons that are grounded in friendship, we can respond to them in ways that would be inappropriate for the friends themselves. If I see a friendship blossoming between two strangers, I may discourage others from interfering, or otherwise try to create space for the friendship to develop without hindrance. Friends are required to give the reasons of friendship their special attention, but observers of friendship may also respond to reasons of friendship in a host of auxiliary ways.

Notice, too, that the external point of view is the one from which it seems most appropriate to appraise the value of friendship. Even those within a friendship often find themselves attempting to detach themselves from their own internal commitment to assess the precise value and direction of their relationship. This may be true even if we agree with the contention that friendship is intrinsically valuable—that it is valuable for its own sake.

Friendship gives us reason to possess attitudes associated with the appraisal of value. External observers of friendship can still respond to friendship by forming appropriate evaluative attitudes. We may admire the friendships of others for example. We may also desire to have friendships of our own, or to emulate the friendships of others that we perceive to be closer to ideal.

3.2.3 Friendship as an Aim

The character of friendship as an *aim* demonstrates that there is nothing particularly problematic about the idea that friendship is constituted by obligations that are derived from the value of friendship itself. As I have argued, the value of friendship is something that we can appreciate from a position external to the relationship. (In fact, a full understanding of the value or disvalue of a particular friendship may require us to take such an external position). In order for friendship to be something that is good, it must be capable of being externally defined. Otherwise we would not know that it was a good to be aimed towards.³⁷ Even within existing friendships we are inclined towards actions that will help us to emulate the practices of friendship as an ideal. That friendship is capable of constituting an aim of our conduct helps to dissolve any apparent

³⁷ See Joseph Raz, 'Liberating Duties', *Ethics in the Public Domain* (Oxford University Press 1995) 41–42.

problematic circularity. Friendship comprises obligations—it would be impossible to give an account of friendship that did not involve referring to these obligations. But it is precisely because friendship comprises certain obligations that it can exist as a good in its own right for us to aim towards.

According to Raz, friendship is able to function as an externally defined aim because it belongs to a category of ‘social forms’—goods that are defined by the existence of certain social conventions.³⁸ I will not discuss this hypothesis at any length here. Many sources of value do seem to be in part constituted by conventional social activity—we could not understand friendship or family without the existence of social conventions to build upon or differentiate.³⁹ But it also seems possible to me that two individuals could create the conditions of a valuable relationship even in the absence of social conventions to define it.⁴⁰ There may be value in rejecting social constraints and approaching the relationship uninhibited by any sense of convention and propriety. These two

³⁸ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 307–313.

³⁹ This point is stressed by Raz at a number of points in both *The Morality of Freedom* (n 38) and *The Practice of Value* (Oxford University Press 2003). See also Velleman’s discussion of ‘Sociality and Solidarity’ in J David Velleman, *Foundations for Moral Relativism* (OpenBook Publishers 2013). Both Raz and Velleman plump for the idea that the social-dependence of value allows for a moderate kind of relativism about value —note that Raz describes his own view as social dependence without relativism, but it is unclear how far apart his own view is from what Velleman describes as relativism.

⁴⁰ A point raised by Don Regan in his reply to Raz in Donald Regan, ‘Authority and Value: Reflections on Raz’s ‘Morality of Freedom’’ (1988) 62 *Southern California Law Review* 995.

possibilities are in tension with each other, and I do not quite see how to resolve the tension. In this Chapter I will ignore the problem and simply take it for granted that friendship is able to function as an externally defined aim in some form or other.

3.3 Common Objections

I have argued that friendship is valuable, presumably intrinsically valuable, and that it is constituted by certain duties that are in part justified by the value of the relationship. It remains to be shown that this account can respond to a number of potential objections that are frequently levelled against it. Once a sufficiently nuanced view of the relationship between value and practical reason has been adopted, these objections can be overcome. These objections show that the view of friendship as constituted by certain relational obligations can succeed once the right qualifications are made concerning the value of friendship and its relation to our reasons for action. Broadly, the purpose of this section of my discussion is to show that my chosen account of friendship can respond to the charge that it is a poor fit for the role that friendship actually plays in our practical reasoning. In particular, I am worried about the charge (often raised by those sympathetic to

romantic views of friendship) that a view of friendship that sees it as constituted by certain obligations is too demanding.⁴¹

3.3.1 The Alienation Objection

One popular objection draws on Bernard Williams's famous objection, directed, in different forms, at both consequentialist⁴² and Kantian ethics,⁴³ that those theories alienate us from many of the commitments and attachments that we hold most dear. In its broadest form Williams's objection acts as a challenge for moral theory. We, the theorists, are asked not to trivialise the ordinary concerns of wives, fathers, and friends. Nor are we to suggest that their ordinary ways of thinking about their projects, commitments and attachments are fundamentally misguided, or worse, pernicious. I take Williams's challenge to be the broadest possible criticism of the kind of account I have offered here.

My response to Williams's basic objection is to point towards the distinction between internal and external points of view of a relationship that I introduced above. I think Williams is right that in many circumstances for a

⁴¹ For an example of a romantic account of friendship that invokes Williams's argument see Frankfurt (n 1) 37.

⁴² As in, e.g. 'A Critique of Utilitarianism' in JJC Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge University Press 1973).

⁴³ See Williams (n 36) 1–19.

friend to think in terms of obligation or permission is to have one thought too many. Friends are often better ignoring their obligations towards each other than attempting to conform with them directly. They may even have a higher-order obligation not to attempt to comply with these obligations. This does not mean that the obligations do not exist. They will still be evident to an external observer who wishes to offer a normative explanation of friends' conduct towards each other. Williams's objection fails to pay sufficient attention to the distinction between the reasons that it is necessary for us to attend to directly, and reasons not requiring our direct attention but nonetheless capable of being noticed by an external observer.

Buried somewhere in Williams's broader challenge are two possible further arguments against the value-based account of friendship. Variations on both arguments can be found in Scanlon's invocation of friendship in order to question teleological theories of value.⁴⁴ First, Scanlon argues that theories that promote friendship as a good do not adequately explain our perceived reasons to act for friendships' sake. Noting that many proponents of teleological theories of value nonetheless endorse friendship as an intrinsic good, Scanlon notes that 'a person who values friendship will take herself to have reasons, first and

⁴⁴ Scanlon (n 3) 87–94.

foremost, to do those things that are involved in being a good friend'.⁴⁵ Scanlon argues that these reasons do not have a teleological form: they are not of a form that involves promoting friendship as a good. I will refer to this first objection, following Darwall,⁴⁶ as 'the wrong kind of reasons' objection.⁴⁷ Second, Scanlon argues that if friendship were regarded as a value in itself, and not something that it is simply correct for us to value, then we would have a duty to promote it in strange ways: 'we would not say that it showed how much a person valued friendship if he betrayed one friend in order to make several new ones, or in order to bring it about that other people had more friends'.⁴⁸ Scanlon is here making two, distinct, criticisms of teleological theories of the value of friendship. Fortunately there are good responses available. I outline my responses to both challenges below.

3.3.2 The Wrong Kind of Reasons Problem

In my account of friendship I have repeatedly insisted that friendship has value, and that the reasons and obligations internal to friendship itself may be partially

⁴⁵ ibid 88.

⁴⁶ Darwall *The Second-Person Standpoint* (n 22).

⁴⁷ Darwall is taking the usual 'wrong kind of reasons' objection to fitting attitude theories of value and turning them back on the critic.

⁴⁸ Scanlon (n 3) 89.

derived from friendship itself. This account appears to give rise to a variation of the wrong kind of reasons problem. True friendship permits us to act only according to those reasons that friendship deems admissible.⁴⁹ If I pour my friend's glass of wine before my own only because I am worried about the quality of the wine and I want to see my friend's reaction upon drinking it, then I am not acting as a friend should. It is the wrong kind of reason for acting in this way. The same could be said if I pursued a friendship with someone, not for that person's sake, but because friendship in the abstract is valuable.

There are a number of problems with levelling this kind of objection against the account of normative relationships that I have defended. To begin with, we can have reasons for action that are not reasons to promote value. Even if reasons are ultimately *derived from* value, it is not true to suggest that we only have reasons where reasons exist to promote value.⁵⁰ The very structure of

⁴⁹ Stephen Darwall takes this particular instantiation of the wrong kind of reasons problem to be particularly pressing for noncontractualist accounts of value, which ignore the 'second-personal' character of the reasons that relationships like friendship issue. He dubs this 'Strawson's Point'. See, *inter alia*, *The Second-Person Standpoint* (n 22) 15.

⁵⁰ See e.g. Parfit (n 6) section 34; Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011) 211–224. Obviously, I am making a highly contested assumption here. But it is beyond my capacity to defend the thesis that there are values that we do not have reason to act on. Those inclined to reflexively doubt the thesis might think about cases involving virtues like courage or benevolence—courage is valuable, but the value of courage is no reason to act courageously; John Gardner and Timothy Macklem, 'Reasons' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press 2002) 547.

friendship suggests that this is the case. Precisely because friendship is valuable, we have reasons to act for the sake of our friend. While the existence of these reasons is derived from the value of friendship, they do not seek to promote that value.⁵¹

Second, the objection suffers from the presumption that we can only conform to reasons by giving them our direct attention. Friendship may be a good, and that may give us reasons to act in certain ways towards our friend, but it by no means follows that we will better comply with those reasons by giving them our constant attention. It will normally be better to foster an environment of shared value, and to be disposed to act for the good of our friend.⁵²

Often the special attention and care that we are asked to give to those close to us is justified in terms of the efficiency of focussing on those with whom we share special ties. This approach to justifying the special requirements resembles a kind of moral risk-management. Frank Jackson compares the concern we demonstrate for our nearest and dearest to crowd controllers

⁵¹ Raz, *From Normativity to Responsibility* (n 50) 218.

⁵² Peter Railton, 'Alienation, Consequentialism, and the Demands of Morality' (1984) 13 *Philosophy and Public Affairs* 134.

focussing on sectors of special concern, so that each controller focuses on the sector with which they are acquainted.⁵³

Such a position can seem cold and unsatisfying. I would say that, unadorned, it *is* cold and unsatisfying.⁵⁴ It suggests, among other things, that when the moral stakes are high enough, it is not just permissible to ignore the love and affection you have for another person but morally mandatory. Fortunately, this type of problem can be supplemented with a suitably nuanced theory of practical reason. Our relationships provided us with higher-order reasons for action. We have reason, not just to act as a friend, but reason not to act on some reasons that are inimical to friendship. The existence of such exclusionary reasons not only explains our *partiality*, but our distaste for deliberation that calls into question this partiality.⁵⁵ Once we account for exclusionary reasons of this sort, the circumstances in which we know for sure that it is the correct thing to abandon our friends and family in pursuit of a moral cause will be very rare indeed. Thus the father who is primarily concerned with

⁵³ Frank Jackson, 'Decision-Theoretic Consequentialism and the Nearest and Dearest Objection' (1991) 101 *Ethics* 461.

⁵⁴ This is, incidentally, why arguments such as Jackson's, which rest on the idea that friendships are based on prospective moral judgments about what is likely to have the best consequences, are incomplete. They do not even abstractly track the reasoning that we would expect people employ, as Jackson himself acknowledges; *ibid* 475.

⁵⁵ Railton (n 52) 31.

feeding his hungry children has good reason to ignore admonitions to the effect that it would be better if his children went hungry for a day so that he can donate money to anti-malarial research. (None of this is meant to deny that it is possible to take this sort of argument for partiality too far, and to attempt to use it to justify actions that are largely selfish and myopic.⁵⁶)

A broader view of the moral significance of friendship pushes us towards pluralism about the permissible reasons that we have for acting as a friend should. It is wrong to suppose that we will always better conform to reasons by being directly attentive to them, even reasons that arise out of a relationship as virtuous and as tightly woven into the fabric of the good life as friendship.⁵⁷ In the case of friendship, for example, it may be that we occasionally act out of self-interested desire to see our friend happy, and at other times that we act out of the rather moralistic recognition that the good of friendship gives us reason to attend

⁵⁶ What should we make of situations in which the constitutive reasons associated with our relationships no longer serve the good? This is also the problem raised by the possibility of partiality that is directly, collectively self-defeating (see Derek Parfit, *Reasons and Persons* (Oxford University Press 1984) 100–103.) This raises questions about value that would take me too far afield. But I think that it is always better in one way to do as friendship demands, even where our reasons to act as friends are defeated by stronger reasons. Adjacent issues are discussed in Chapter 9 of this thesis.

⁵⁷ To suppose otherwise is to succumb to what Gardner and Macklem describe as the ‘rationalist myth’; (n 50) 461.

to our friend's desires, no matter the inconvenience, and to exclude reasons that we might have for acting otherwise.

3.3.3 Perverse Incentives

Scanlon suggests a second problem. If friendship is a good in itself, and our reasons for acting as a friend are derived from the value of friendship, then would not this create perverse incentives on our behalf? Would it not become morally obligatory, for example, to dissolve a friendship where it was thought that it would free us up to pursue several more friendships of equal worth? This objection suffers from the same underlying problems regarding its conception of the relationship between value and practical reason. To begin with it makes the assumption not only that the sole reasons we have are to promote value, but that the promotion of value involves its maximisation or aggregation. I have already argued that it is not the case that the only reasons we have promote value. It thus follows that it is not the case that the only reasons we have are for the maximization or enhancement of value.⁵⁸

Again, appealing to the distinction between internal and external views of friendship can help to resolve the questions. From an external point of view, it

⁵⁸ Raz, *From Normativity to Responsibility* (n 50) 214–215.

does seem to be true that, on the view I have offered, it will be better to have two friends than to have one. Value does seem comparative in this way. But conceding this does not badly threaten my account. Even if two friends are better than one, the picture of practical reason I have defended does not create room for a view that gives me reason to act poorly towards one friend for the purpose of making another. Nor does it mean that I have any reason to give the pursuit of further friendships my direct attention. Other things being equal, someone external to friendship may indeed regard having two friends as better than having one. But it would be a serious misjudgement for a friend to internalise this kind of detached appraisal and to treat it as guide for action.

3.4 Normative Relationships and Artificial Norms

Some normative systems are artificial, in the sense that they do not seem to belong to natural normative systems like norms of morality or epistemic rationality but are instead created by officials and institutions. Legal norms are artificial, as are the norms of football, *boules* and bridge.⁵⁹ Nothing prevents

⁵⁹ The usual way of distinguishing artificial norms from non-artificial norms is by distinguishing between norms which depend on social facts for their validity and norms that do not: Leslie Green, 'Positivism and Conventionalism' (1999) 12 *Canadian Journal of Law and Jurisprudence* 35; John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *The American Journal of Jurisprudence* 199; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 41–45; cf. Kevin Toh, 'An Argument

artificial normative systems from designating that certain relationships have irreducible value when they do not, in fact, have such value. Artificial norms may import an artificial axiology,⁶⁰ and such an artificial axiology might extend to the creation of certain relationships of purported value. There may be nothing actually valuable about the relationship between jailor and jailed, or inspector and inspected. But the value of these relationships can be presupposed by the artificial norms that identify them.

This observation is important because it allows a better understanding of why, for the external observer of artificial normative systems, it is impossible to detach the roles and relationships that they recognise from the duties that they impose. Artificial norms sometimes presuppose the value of certain relationships where the relationships themselves are difficult to explicate or respect without identifying the obligations that constitute them.

Instruction can be found in the apparent circularity in Lord Atkin's famous enunciation of the neighbourhood principle of negligence in *Donoghue v*

Against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)' (2008) 27 *Law and Philosophy* 445.

⁶⁰ The way in which legal rules protect legal value is explored fruitfully in the titular essay in John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) 1–16. See also Joseph Raz, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1.

Stevenson.⁶¹ Atkin LJ's reasoning in that judgement demonstrates how the problem that threatens my account of relational obligation can emerge.

At present I content myself with pointing out that in English law there must be, and is, some general conception of *relations giving rise to a duty of care*, of which the particular cases found in the books are but instances...The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions that you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - *persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected* when I am directing my mind to the acts or omissions that are called in question.⁶²

In his answer to the question 'who then, in law, is my neighbour?' Atkin LJ gives some idea of the muddle in which he has found himself. We can see in his answer the culmination of a growing tension between two competing views

⁶¹ *Donoghue v Stevenson* [1932] AC 562 (HL).

⁶² *ibid* 580; emphasis added.

of neighbourhood. On the first view, the view that he introduces at the beginning of the famous passage, there is some state of affairs, 'relations', which have a value 'giving rise to a duty of care'. On the second view, which he gives as his solution to the problem, it is just the opposite. We locate the relationship by having regard to the question of whom 'I ought reasonably to have...in contemplation'. When Atkin LJ begins, he seeks to find the relationship of value that grounds these duties. His solution is to find the relationship in the duties themselves. Atkin LJ might not have known it, but in his judgement he has hit upon one of the oldest questions in ethics: the question of priority between the right and the good.

The difficulty that Lord Atkin and others have had in delineating the principle of neighbourhood that acts as a foundation for the law of negligence is precisely a result of the sort of unclarity that results from the imposition of an artificial relationship of value—one that does not correspond to any familiar category of moral relationship. The conceptual confusion wrought by the doctrine of negligence results, at least in part, from the inability of the judiciary to elucidate a sufficiently clear account of the relationship of proximity that is said to ground the duties in question. What, exactly, is the nature and value of

the relationship which these duties are supposed to compose?⁶³ Consideration of these issues would take me too far afield from the present topic of discussion (I return to the issue in Chapter 6), but they demonstrate the difficulty faced by courts when they invoke normative relationships that are supposed to rest on familiar relationships of responsibility.⁶⁴

3.5 Conclusion

This Chapter has sought to expand on the idea that our relationships of value are defined in part by their constituent deontic features. The apparent reflexivity in this account was revealed, after some reflection, to be unproblematic. While some relationships are defined in part by the presence of constituent obligations, those obligations can still be derived from the value of the relationship. This is unproblematic, in part, because we can give a good account of how friendship can convert existing reasons for action into reasons that issue from friendship itself. Relationships can also often be appraised and justified from the

⁶³ For an attempt to delineate the legal relationships that are said to ground duties in the law of negligence, see Christian Witting, 'Duty of Care: An Analytical Approach' (2005) 25 *Oxford Journal of Legal Studies* 33.

⁶⁴ Hence the allegation that this kind of negligence reasoning is just policy reasoning in disguise, that the 'bald phrase "relationship of proximity" has no content'; Jane Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998) 61.

perspective of an external onlooker. Relationships make specific rational demands on their members. But they are still capable of providing reasons for the rest of us. Importantly, they can provide us with reasons of support and appraisal, and reasons to aim towards having our own relationships by emulating the success of others.

My discussion in this Chapter has focused on friendship as a paradigmatic example of a normative relationship. Other relationships will differ, both in the grounds of their value, and in the obligations that are said to constitute them. Friendship simply provides an ideal starting point for discussion, because we all have some understanding of its value and the demands that it places upon us. In the final section of the Chapter, I discussed some implications that my study of normative relationships and relational norms might have for our understanding of law as a normative system. This issue is revisited in Part II of the thesis, when I consider the incorporation and enforcement of relational norms in law. In the next Chapter of this thesis, I consider the problem of attributing rights within certain normative relationships in which acknowledging rights is inappropriate. Ordinarily, where there are relational obligations, there are corresponding rights. In certain circumstances, however, we are reluctant to assert that we have rights

against our friends and loved ones. I consider a variety of possible philosophical explanations of this reluctance.

CHAPTER 4: RELATIONSHIPS WITHOUT RIGHTS

In Chapters 2 and 3 of this thesis, I introduced an account of relational norms, which I identified as norms constitutive of a relationship of value between the bearer and another person. In Chapter 2, I argued that relational norms cannot be reductively analysed in terms of the function of the rights with which they correlate. In this Chapter, I make the further argument that certain kinds of relational norms do not correlate with rights.

Several philosophers have been willing to entertain the possibility that we can owe duties to one another without those duties correlating with rights. Examples that have been cited include duties of mutual aid, duties of reciprocation and gratitude, and duties of friendship. In this Chapter, I consider three philosophical explanations of the fact that these duties do not correspond to rights. The first candidate explanation hinges on the claim that rights are necessarily enforceable. I argue that this explanation fails. Some rights are unenforceable. The second possible explanation is that these obligations do correspond to rights, but that we are reluctant to assert that they do so for pragmatic reasons—for example, because rights are conventionally associated with enforcement. I argue that this explanation is plausible, but that it cannot fully account for the problem cases. A third type of explanation requires an

account of how duties can be owed to others in a sense other than the rights-based sense. I offer my own version of such an account, based on the assumption that rights are grounded in the interests of individuals.

My discussion in this Chapter proceeds in three sections. In the first section, I introduce the examples that motivate my discussion. In the second section, I consider the three candidate explanations of the problem cases, and argue for my own preferred explanation. In the third section of this Chapter, I consider the significance of my arguments for the understanding of legal rights. Description of rights and duties in law must account for normative relationships—in some cases the constituent norms of the relationship have explanatory priority over the rights from which they are derived. This discussion supports arguments that are made in greater detail in Parts II and III of the thesis.

A quick methodological note is in order before I begin: it is possible simply to stipulate that whenever an obligation is owed to someone it correlates with the other person's right. Some authors have even claimed that this stipulation is a methodological necessity. They allege that our language concerning rights and what we owe to one another is too loose and inflexible for our judgments concerning whether something is owed to another to be

informative.¹ I am not convinced that this kind of stipulation is a helpful way of responding to the problem cases I consider below.

My own view is that it is appropriate for any philosophical account of rights and duties to pay attention to ordinary usage. We should be wary of overly stipulative usage of ordinary language terms. Surely an important part of the project of developing a useable philosophical account of rights is to do justice to our own judgments about when it would be appropriate to use the language of rights. It is equally true that it is possible to pay too much attention to ordinary usage. Inevitably the choice of a preferred explanation involves straddling the divide between ordinary usage and moral theory.² An appropriate theory of rights should be informed by the demands of both ordinary usage and ethical theory. The explanations of the problem cases that I consider below offer different attempts to reconcile these demands.

¹ This kind of methodological suspicion of ordinary language is easy to find in the literature. See e.g. John Finnis, 'Some Professorial Fallacies About Rights' (1971) 4 *Adelaide Law Review* 377, 386; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1919) 35; Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights* (Oxford University Press 1998) 22.

² Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 186.

4.1 The Problem Cases

Amongst those who study moral and legal duties that we owe to others, it is common to invoke a strict logical equivalence between these obligations (often described as ‘directed duties’) and rights.³ S is said to owe an obligation to T to ϕ if and only if T has a right against S to ϕ (where S and T are agents and ϕ is an action verb). This relationship is often described as the Hohfeldian ‘correlativity thesis’ or ‘correlativity axiom’, as it formed the basis of Hohfeld’s widely influential logical parsing of rights-talk.⁴ (The puzzle I am considering here arises with respect to those rights that correlate with duties—rights that Hohfeld would have referred to as ‘claim rights’ or rights ‘in the strict sense’.⁵) What I will call ‘problem cases’ occur where duties relate the duty-bearer to another person, but

³ For recent literature see Rowan Cruft, ‘Why Is It Disrespectful to Violate Rights?’ (2013) 113 *Proceedings of the Aristotelian Society* 201; MH Kramer, ‘Refining the Interest Theory of Rights’ (2010) 55 *American Journal of Jurisprudence* 31; Matthew H Kramer, ‘Some Doubts About Alternatives to the Interest Theory of Rights’ (2013) 123 *Ethics* 245; Simon Cabulea May, ‘Moral Status and the Direction of Duties’ (2012) 123 *Ethics* 113; Simon Cabulea May, ‘Directed Duties’ (2015) 10 *Philosophy Compass* 523; Gopal Sreenivasan, ‘Duties and Their Direction’ (2010) 120 *Ethics* 465; Leif Wenar, ‘Rights and What We Owe to Each Other’ [2013] *Journal of Moral Philosophy* 375; Leif Wenar, ‘The Nature of Claim Rights’ (2013) 123 *Ethics* 202. For dissenting views see Tim Hayward, ‘On Prepositional Duties’ (2013) 123 *Ethics* 264; Marcus Hedahl, ‘The Significance of a Duty’s Direction: Claiming Priority Rather Than Prioritizing Claims’ (2013) 7 *Journal of Ethics and Social Philosophy*.

⁴ Hohfeld (n 1) 24.

⁵ Hohfeld (n 1).

where these duties seem to fall outside the kind of right-duty pairings that Hohfeld envisaged.

The problem cases that I consider all involve situations in which there is apparently a duty owed to another, but in which we are reluctant to assert that the other person has any rights against the duty-bearer. Consider the following examples taken from contemporary philosophical discussions by Rowan Cruft, Leif Wenar, and Joseph Raz:

- I owe it to my partner to be faithful, but they do not have a right that I be faithful (Cruft).⁶
- If I help you cross the road, you owe me a duty of gratitude, but I do not have a right to your gratitude (Cruft).⁷
- I owe it to a friend to try to repair the consequences of a gaffe I have made, but they have no right that I do so (Wenar).⁸

⁶ Cruft, 'Why Is It Disrespectful to Violate Rights?' (n 3) 217.

⁷ *ibid* 209. Raz uses a similar example involving a duty to compensate out of gratitude in *From Normativity to Responsibility* (Oxford University Press 2011) 210.

⁸ Wenar, 'The Nature of Claim Rights' (n 3) 214.

- I owe a duty to my aunt to inquire after her health, but she has no right that I do so (Raz).⁹

I will stipulate that these cases are *problem cases*. You might not agree that these cases are problematic, or you might think only some of them are. I myself find some of the examples more problematic than others. (I tend to think that my partner does have a right that I be faithful, for example). But for the sake of my discussion here, I will assume that they are problematic. I make this assumption because at least some philosophers are reluctant to assert that there is any right, and according to the correlativity thesis there ought to be such a right.

I want to explore whether there might be a suitable philosophical explanation of these problem cases.¹⁰ These problem cases suggest that there is some sense in which we can owe duties to others, but in which the person to whom the duty is owed can have no correlative right against us. Moreover, the exploration of these problem cases helps to dispel several confusions that often

⁹ Raz, *From Normativity to Responsibility* (n 7) 210.

¹⁰ To put it another way, I want to explore the possibility that these philosophers have not simply made some obvious conceptual mistake. All of them concede that we might be able to owe duties to others in a none-rights based sense, and I wish to investigate the plausibility of this position.

attend the study of rights (such as the association of rights with enforcement or demand).

The problem cases have certain common features. Several writers have observed that they involve duties that are a matter of *relationship* between the parties.¹¹ Each of the duties in question arises in the context of some sort of direct relationship—some history of interaction or pattern of exchange between the duty-bearer and the person to whom the duty is owed. I will suggest, below, that our reluctance to assert that there are rights in these cases can be attributed to the nature of the relationships in question. This reluctance might either be pragmatic—there might be some other reason associated with the context of assertion that makes us reluctant to assert or rely upon rights—or it might tell us something about the nature of rights and the contexts in which they arise. Before considering either of these possibilities, however, I consider an alternative explanation—one that I do not regard as a promising account of the problem cases.

¹¹ See Raz, *From Normativity to Responsibility* (n 7) 110; Margaret Gilbert, 'De-Moralizing Political Obligation', *Joint Commitment: How We Make the Social World* (Oxford University Press 2013) 393.

4.2 Enforceability

One popular explanation of our reluctance to assert that these relational obligations correlate with rights is their lack of enforceability. This way of thinking about rights has pedigree. Hart once suggested that it was ‘hard to think of rights except as capable of exercise’.¹² In recent work both Wenar and Cruft hypothesize that rights are duties that are enforceable on behalf of the person to whom the duty is owed.¹³ Other authors, like Darwall and Skorupski, have similarly analysed rights in terms of what may be ‘permissibly demanded’ on someone’s behalf.¹⁴ Unfortunately, I think that accounts that stress the enforceability of rights are unlikely to succeed. Rights are not necessarily enforceable. The fact that the duties in question are unenforceable cannot explain why they do not correlate with rights on behalf of their bearers.

‘Enforceability’ is a vague term and it presumably encompasses a variety of possible actions in support of a right. Wenar makes it clear that he regards the term as encompassing various kinds of action that may be taken on the right-

¹² HLA Hart, *Essays on Bentham* (Oxford University Press 1982) 185.

¹³ Cruft, ‘Why Is It Disrespectful to Violate Rights?’ (n 3) 209; Wenar, ‘The Nature of Claim Rights’ (n 3) 214, fn. 24.

¹⁴ For theories that make permissible ‘demand’ central to their account of rights see Stephen Darwall, ‘Bipolar Obligation’ in R Shafer-Landau (ed), *Oxford Studies in Metaethics*, vol 7 (Oxford University Press 2012); John Skorupski, *The Domain of Reasons* (Oxford University Press 2010) XII.3, XIV.6.

bearer's behalf, depending on the context in which the duty is owed, 'either by compelling performance or by penalising non-performance'.¹⁵ With respect to legal rights, enforceability is defined widely to include not only actions to prosecute a breach of a duty in criminal law, but actions to remedy the costs of non-conformity with a duty in contract or tort. In conventional morality, enforceability can be taken to include a variety of actions taken by the right-bearer or on their behalf—the application of social pressure or sanctions, the issuing of demands, or the expression of disapproval.¹⁶ Duties need not actually be enforced to correlate with rights, but it must at least be *prima facie* permissible to enforce them.

It is important to distinguish accounts that identify rights with enforceability from those theories of rights that identify them with powers of enforcement or waiver on behalf of the right-holder (so-called 'will' or 'choice' theories of rights).¹⁷ Unlike enforcement theories, will theories of rights identify

¹⁵ Wenar, 'The Nature of Claim Rights' (n 3) 214.

¹⁶ There are certain undertones of the Hartian theory of obligations in this account. Hart allowed for a constitutive role for social pressure in his theory of obligations. A crucial distinction is that where enforcement theories of rights identify rights with *permissions* to apply social pressure, Hart appears to identify obligations with the actual application of pressure; HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 85–88.

¹⁷ Prominent will theorists include Hart, Wellman, and Steiner; HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175; HLA Hart, 'Bentham on Legal Rights' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (Oxford University Press

rights with duties coupled with normative powers of enforcement or waiver possessed by the actual right-holder. They typically do not allow that the duties may be enforced by anyone other than the right-holder. On the other hand, theories that identify rights with enforceable duties allow for a variety of different kinds of permissible enforcement by a variety of different persons. Enforcement is offered as a necessary condition for a duty to correlate with a right, and not a sufficient condition. Will theorists, on the other hand, tend to make the stronger claim that the power of waiver or enforcement is both necessary and sufficient for the possession of a right.¹⁸

At first glance, lack of enforceability provides an appealing explanation of the problem cases that I have been discussing. They are, after all, situations in which we would be reluctant to enforce the obligation in any way—we would be reluctant to intervene to tell a friend that they must be grateful, or to force someone to reciprocate their friend's kindness. This reluctance is instructive. It tells us something about either the nature of rights or the nature of the relationship in which they are asserted.

1973); Carl Wellman, *Real Rights* (Oxford University Press 1995); Hillel Steiner, *An Essay on Rights* (Blackwell 1994); Hillel Steiner, 'Working Rights', *A Debate Over Rights* (Oxford University Press 2000).

¹⁸ Kramer, 'Rights Without Trimmings' (n 1) 62.

Unfortunately, I do not think that lack of enforceability succeeds as an explanation of the problem cases. There are relatively clear counterexamples that demonstrate that some rights are not enforceable. These counterexamples are available in both morality and law. In law, one clear counterexample is provided by non-appellable legal errors. There are errors of law that are not what administrative lawyers call 'errors of jurisdiction'.¹⁹ Consider the following scenario: an applicant has a legal right that a court decides her case in a particular way. The judge decides incorrectly, thus breaching the applicant's legal right. In many jurisdictions the judge's error will not be appellable unless it amounts to a jurisdictional error. The duty owed to the applicant has been breached, but there is no remedy or penalty for the breach.²⁰ The applicant has no remedy or mechanism of enforcement for the breach of their right. There are other examples where the law seemingly recognises the breach of a right without intervening to enforce the right or to enforce secondary duties arising from non-compliance. The doctrine of diplomatic immunity, for example, grants certain

¹⁹ The question of whether or not there could be errors of law that are not jurisdictional errors was, and to a certain extent still is, a vexed one in British administrative law. There is in any case no conceptual problem with distinguishing between errors of law that are errors of jurisdiction and those errors of law that are not. For a helpful introductory discussion see Timothy Endicott, *Administrative Law* (3rd edn, Oxford University Press 2015) ch 9.

²⁰ Similar cases are considered by Raz and Hart (though Hart is discussing legal duties rather than legal rights); Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) 256; Hart, *The Concept of Law* (n 16) 66–71.

officials the immunity to breach rights that others hold against them—they can violate legal rights without threat of sanction.²¹

Even within critical morality, it is sometime impermissible to enforce certain rights because it is otherwise undesirable to allow enforcement. Consider, for example, the problems presented by certain kinds of offensive speech. Certain kinds of speech violate the rights of others not to be insulted, but we do not necessarily allow for the enforcement of these rights. We have moral rights against others that they not insult us in various ways, but those rights are not always enforceable. Unless the infringements present particularly grave threats to our safety or reputation, we might even have a duty to see to it that they are not enforced. Even where others have been disrespectful and insulting, in violation of our rights not to be insulted or disrespected, it might be desirable to allow them to continue to do so if they choose, and to abstain from complaints against them. The possibility of rights that are unenforceable is also evident in relational settings. Children have the moral right to certain standards of care from their parents, but, unless their parents' standard of care reaches tragic levels of negligence or criminality, we will abstain from enforcing their rights, even

²¹ This and other examples are discussed in Ori J Herstein, 'A Legal Right to Do Legal Wrong' (2013) 34 Oxford Journal of Legal Studies 21.

through the application of social pressure. Very often, we ought to mind our own business, since our intervention is likely to be unhelpful or even counter-productive.²²

For these reasons, enforceability is the wrong place to look for an explanation of why certain kinds of duties owed to others do not correlate with rights. Nonetheless, the association of rights with enforcement is instructive—it will usually be desirable to enforce the duties that correspond with rights, for the very simple reason that the reasons for having the duty will also be reasons for enforcement. Where rights are concerned, moreover, the duties that correlate with them will usually reflect some important about the right-holder—their status or interests. The protection of the individual will often justify the enforcement of the duties in question.

It is also important to note that we are not only reluctant to enforce rights in the problem cases, we are reluctant to assert their existence: *enforceability* should not be confused with *assertability*. Assertions are what J.L Austin called ‘constative statements’—statements that report an already existing state of

²²

See Chapter 7.

affairs.²³ For a right to be enforceable, its existence must be assertable. But in some contexts the assertion of a right is distinct from enforcement. It is possible to assert that a right exists without attempting to enforce the right in question, just as it is possible to assert the existence of a duty without attempting to enforce the duty. It is possible to say, for instance, that our friend has a duty to look after his parents, while also disclaiming any attempt to impose that duty upon him or to influence his decision-making. We might assert the existence of such a right to a third-party when the friend is out of earshot, for instance. The problem cases are not merely cases where some of us are reluctant to enforce the right; they are cases where we are reluctant to assert or assent to the right's existence.

Given the failure of enforceability theories, I suggest that we need to look elsewhere for an explanation of the reluctance to assert rights in the problem cases. In the remainder of this Chapter, I consider two plausible explanations, both of which draw on common features of the problem cases. The first is that our unwillingness to assert that there are rights in the problem cases is explained by the presence of certain social norms that make the assertion of rights in these circumstances impolite or impolitic—I will describe these explanations as

²³ JL Austin, *How to Do Things with Words* (Clarendon Press 1975) 4.

'pragmatic' explanations. The second explanation draws upon Raz's observation that rights are grounded in interests that are sufficient to justify duties. In certain circumstances, the relationship between the parties prevents us from recognising one party's interests as a justification for the duty in question. The putative rights do not exist because they cannot act as reasons for recognising the duties in question. In the next section, I consider the pragmatic explanations of the problem cases. I then argue that the justificatory explanation is preferable.

4.3 Pragmatic Explanations

Pragmatic explanations rely on certain assumptions about what rights assertions communicate in social settings. They concede it is true that our friends have rights to our gratitude. We are, however, reluctant to assert or assent to those rights because of what doing so typically communicates to others, or because doing so would violate some other norm of propriety. We have the rights in question, but we do not assert them because it would be in some way inappropriate to do so. Our reluctance to assert the fact that the problematic relational obligations are owed to others as of right is a matter of what is, in some way, communicated when we do so.

There are two different possible pragmatic explanations of the problem cases. The first explanation is that while rights are not, strictly speaking, enforceable, they are conventionally or conversationally associated with enforcement. An assertion that a friend has a right to discretion might be thought to imply an intention to compel the friend to be discreet.

A second possible explanation is that, in the problem cases, some other contextually salient norm prevents assertion of the right—perhaps asserting the right would be impolite, or counterproductive. The right is there—it is just impolite to observe that it is there. As Raz argues in a different context, ‘conventions about the propriety of poking one’s nose in other people’s affairs are mere matters of etiquette or of good manners, and cannot affect underlying moral rights.’²⁴

Consider, by way of analogy, a situation at a dinner party where the host’s apartment is poorly heated, and where I know that this is because the host is struggling with money and cannot afford to turn on the heater. It may be true to assert that the apartment is cold, but it would be wrong to do so, because doing so would offend the host, or because it might be taken to imply that I want him

²⁴ Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 20) 258.

to turn the heater on when I know he cannot afford it. My reluctance to assert that it is cold is not because I am worried that I would be asserting something untrue. It is either because I would be violating a norm of etiquette, or because I would be implying that he ought to turn the heater on, which I do not wish to imply.

I will consider each of these possible explanations in turn. The advantage of the pragmatic explanations of the problem cases is that they are compatible with the thesis that rights and those obligations that we owe to one another are logically equivalent. It does not depart from the orthodox analysis of duties that we owe to one another as duties that correlate with rights. There will be some of these rights that we will be reluctant to rely upon or assert, but this does not change the fact that the rights exist. The existence of the rights is accepted, and our reluctance to assert their existence is explained in another way.

4.3.1 Rights Assertions Imply Enforceability

The first possible pragmatic explanation is that rights are associated with enforceability, though not necessarily enforceable. We are therefore reluctant to assert the existence of rights in the problem cases because our audience will take such assertion or assent as an attempt to enforce the rights in question.

I have doubts about this explanation of the problem cases, though I am not sure that they are compelling. These doubts are illustrated by examples where the rights in question are asserted but where there is still an inclination to say that what is asserted is false. I can easily imagine a friend felicitously asserting, in reply to my suggestion that I have a right to his gratitude, 'That's false. I might owe it to you be grateful, but you have no *right* that I be grateful.' In other words, it seems to me that asserting rights in these problem cases would not be problematic simply because of what is communicated. The problem with these assertions is with the semantic content of the assertion—what is asserted is strictly false.

Other observations seem to show that the pragmatic explanation is implausible. Our unwillingness to assert the rights in question cannot be a matter of simple conversational implicature. In the problem cases, we *are* willing to

assert that a duty is owed to the right bearer. But duties are also characteristically enforceable. Moreover, if our reluctance to assert rights in these problem cases were simply a matter of conversational implicature, it would be possible to cancel the unwelcome implicature. I could say, to my friend, ‘I have a right to your gratitude, but I don’t want you to be grateful’, thus avoiding any unwelcome implicature to the effect that I am trying to force her to be grateful.²⁵ I do not think that what is objectionable about asserting rights in these problem cases can be overcome by cancelling any unwelcome meaning. Even when the speaker disavows any attempt to enforce the right, their reliance on the right is still objectionable.

Nor can our reluctance to assert rights in these problem cases be explained by some conventional implication that the right will be enforced. Conventional implicatures are, typically, ‘assertorically inert’.²⁶ Someone who replies to an assertion like ‘He’s an Englishman but he’s brave’ with ‘No. That’s wrong’ is typically thought to be denying the assertion that the Englishman in question is brave. They do not wish to deny the contents of the assertion—merely the

²⁵ On the detachment and cancellability tests for conversational implicature see HP Grice, *Studies in the Way of Words* (Harvard University Press 1989) 44; Michael Blome-Tillman, ‘Conversational Implicatures (and How to Spot Them)’ (2013) 8 *Philosophy Compass* 170.

²⁶ See Christopher Potts, ‘Into the Conventional-Implicature Dimension’ (2007) 2 *Philosophy Compass* 665.

implicature in question. If a speaker wishes to dispute the conventional implicature to the effect that Englishmen are unlikely to be brave, they will need to work harder to make their denial of this implication clear. They will need to say something like ‘that’s true, but I resent the implication that Englishmen aren’t brave’. In the problem cases, we want to deny, not the conventional meaning of the rights-attribution, but the rights attribution itself. The denial is a straightforward denial of the contents of the rights-assertion. A friend who tells me that they have a right to my gratitude can expect the straightforward denial of the contents of their assertion. I am not inclined to reply, ‘that’s true, but you can’t force me to be grateful’.

4.3.2 Asserting the Rights Would Be Improper

Another set of explanations rest on the idea that, in the relevant situations, the rights cannot be asserted because doing so would be impolite or improper—it would violate some other relevant norm that defines the relationship. I might be reluctant to tell my friend that I have a right to his gratitude, not because I do not have such a right, but because the norms of friendship make it the case that it would be improper, even self-defeating, to insist upon my rights in such a setting. The norms of friendship are based upon the constitutive ideal of good-

will.²⁷ Each is supposed to want the best for the other for the other's sake. It would be contrary to this ideal for friends to assert their rights, because it is antithetical to the very ideal of friendship to rely upon one's rights. Jeremy Waldron offers a more general elaboration of this problem when he says that to assert one's rights is 'to distance oneself from those to whom the claim is made; it is to announce, so to speak, an opening of hostilities; and it is to acknowledge that other warmer bonds of kinship, affection and intimacy can no longer hold'.²⁸

I agree that in many of the scenarios discussed it would be inappropriate to assert or rely upon putative rights. But I do not think that this inappropriateness accounts, on its own, for the problem cases. Asserting rights in the problem cases does not seem *merely* impolite or imprudent. My own judgment in at least some of the problem cases is that the putative right does not exist—not that asserting the rights in question would be in some way inappropriate. A friend asserting his right to gratitude is certainly being rude and inappropriate, but they are also in some way mistaken—they certainly have an interest in gratitude, but their interest, for whatever reason, does not ground a right.

²⁷ I am relying on a view of friendship that I defended at greater length in Chapter 3.

²⁸ Jeremy Waldron, 'When Justice Replaces Affection: The Need for Rights' (1988) 11 *Harvard Journal of Law and Public Policy* 625.

If the pragmatic explanation of the problem cases were true, then as external observers we should not be reluctant to attribute rights in those cases.²⁹ It might be wrong for friends to rely on their rights against one another, but surely it is not wrong for us, as persons external to the relationship, to concede that they do have such rights. The objections to the assertion of rights in the problem cases were raised in the context of philosophical discussion, not within the context of an actual friendship or actual reciprocation. Moreover, it would usually be equally improper for friends to rely on the duties that they owe to one another, but this does not stop us from acknowledging the existence of the duties in question.

Perhaps one of the pragmatic explanations of our reluctance to acknowledge rights in these problem cases is the best in a set of unsatisfying explanations. Certainly those who are wedded to a strong formulation of the correlativity thesis, according to which all obligations owed to others correlate with the rights of counterparties against the duty-bearers, will prefer either of the pragmatic explanations. I do think that they are preferable to explanations of the problem cases that directly invoke enforceability as a necessary criterion for the

²⁹ I accept, of course, that not everyone is equally reluctant to assert the existence of rights in these situations, but the comments by the philosophers identified above with respect to the problem cases demonstrate that at least some people are.

existence of rights. But, in my opinion, there is another more plausible kind of explanation for those cases. It involves an explanation of how we might have obligations owed to one another in a sense that is distinct from the normal right-obligation pairings, and which explains why rights will not arise in the problem cases.

4.4 The Justificatory Explanation

An alternative set of explanations of the problem cases is available. Broadly speaking, these explanations involve two components. The first component is an account of the way in which a duty could relate us to others in something other than the rights-based sense. The second component is an account of why rights fail to obtain in the problem cases. To provide an example of one kind of explanation that I do not pursue here, a number of authors have argued that a significant set of moral relationships is determined by what we could justifiably do to others.³⁰ It is plausible to think that what we owe to others as a matter of interpersonal justification and what we owe to others as a matter of right are

³⁰ Nagel, for instance, suggests in 'War and Massacre', that 'if the justification for what one did to a person had to be put to him specifically, rather than just to the world at large, that would be a significant source of restraint' (on moral theory); Thomas Nagel, 'War and Massacre' (1972) 1 *Philosophy and Public Affairs* 123, 137.

distinct.³¹ Explanations of this sort inevitably draw us into the realm of substantive moral theory—they raise questions about the intelligibility of various ways of conceiving of moral relationships, and the extent to which different theories of rights are compatible with these conceptions.

The explanation of the problem cases is that they involve situations where the constitutive norms that define the relationship between the parties are incompatible with rights as reasons for accepting duties or for holding others to be under the duties in question. The constitutive norms of the relationship defeat or undercut the right as a reason for the duties, thus negating the existence of the right. I will describe this candidate explanation as the ‘justificatory’ explanation. It relies on three distinct theses: first, that we can have obligations that we owe to one another in what I call the ‘relationship sense’; second, that a right exists if and only if it is grounded in an interest that is a sufficient reason for an individual to accept the existence of an obligation or set of obligations; and third, that certain kinds of relationship defeat or undercut putative rights where they are antithetical to the character of the relationship in question.

³¹ An argument to this effect is offered in Nicolas Cornell, ‘Wrongs, Rights, and Third Parties’ (2015) 43 *Philosophy and Public Affairs* 109. The argument is endorsed by Scanlon in TM Scanlon, ‘Reply to Leif Wenar’ (2013) 10 *Journal of Moral Philosophy* 400.

4.4.1 Owing in the Relationship Sense

I argued above that the duties involved in the problem cases were duties that parties owed to one another as a matter of relationship. It is important that any non-rights based explanation of the duties distinguish them from rights-based duties. One way of accounting for these duties is to say that they are constitutive of the relationship in question. In the case of friendship, for example, the value of friendship consists partly in holding friends to be under various obligations to one another. In the case of obligations of gratitude, the obligations arise through a particular history of interaction between the two parties.³² Call this account of the particular obligations in question an account of what it is to 'owe' an obligation in the *relationship sense*. S has an obligation to ϕ owed to T in the *relationship sense* if the obligation is partly constitutive of some relationship between S and T. In other words, S owes an obligation to T in the relationship sense just in case it is one of those relational norms considered in Chapters 2 and 3 of this thesis.

³² On relationships and histories of interaction see further Niko Kolodny, 'Which Relationships Justify Partiality? General Considerations and Problem Cases', *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010); Niko Kolodny, 'Which Relationships Justify Partiality? The Case of Parents and Children' (2010) 38 *Philosophy and Public Affairs* 37.

I think that this account is plausible. It can be reconciled with the observation that, as Margaret Gilbert puts it, owing 'is a matter of relationship...my owing is a fact about me and some other person'.³³ Few of us would doubt that certain special relationships—like those of friendship, loyalty, charity, or gratitude, create duties on our behalf to those others with whom we share the relationship. Some, like Gilbert and Wallace, have gone further. They argue that owing in the relationship sense is the primary sense in which obligations can be owed to others.³⁴ Obligations owed in the relational sense are thought to be the paradigmatic or central case of obligations owed to others. For my purposes here, I do not need to rely on so strong a claim. It suffices that the relationship sense is one sense in which obligations can be owed to others.

4.4.2 Rights as Justifications

The explanation of why rights fail to arise in the problem cases begins with the observation that rights are philosophically tied to what Cruft refers to as 'individualistic justification'.³⁵ The most famous account of rights in terms of

³³ Gilbert (n 11) 393.

³⁴ R Jay Wallace, 'Duties of Love' (2012) 86 *Aristotelian Society Supplementary Volume* 175; Gilbert (n 11).

³⁵ For a summary of the concept see Rowan Cruft, 'Why Is It Disrespectful to Violate Rights?' (2013) 113 *Proceedings of the Aristotelian Society* 201, 206–207.

individualistic justification is Raz's account, according to which a right exists if and only if the right-holder's interest is 'a sufficient reason to hold some other person(s) to be under a duty'.³⁶ This is the account I will rely on here, though, as Cruft observes, there is no reason that a proponent of the view that rights are justified by some individual feature could not accept some alternative thesis about the grounds of rights—they might alternatively be grounded in the status of the individual right-holder, for instance.³⁷

The account of rights as justifications draws a distinction between the practical function of rights (or at least the practical function of the grounds of rights) and the practical function of duties. According to Raz's account of duties, duties act as a kind of protected reason for action.³⁸ Since rights correlate with duties on behalf of others, it is tempting to suppose that the interests that ground them consist in protected reasons for action of the same sort.³⁹ But the interests that ground rights, on the account favoured, are not reasons for action at all. They are reasons for accepting the duties—reasons associated with the value of accepting the obligations in question. A promisee's right to have a promise kept

³⁶ Raz, *The Morality of Freedom* (n 2) 166.

³⁷ Frances Kamm, *Intricate Ethics* (Oxford University Press 2007) ch 7,8.

³⁸ Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999) 49–84.

³⁹ cf Leif Wenar, 'Rights' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2011, 2011).

is grounded in their interest in having the promise kept, which enables the right to act as a reason for accepting the duty to keep promises.⁴⁰ Rights thus correlate with duties without performing the same function in practical reasoning. The type of reason that they constitute is a key point of distinction between rights and duties. Rights reflect the value of appealing to an individual's interests in the process of justifying a duty or set of duties. If there is no value in appealing to these interests in justifying the duty, there is no right.

This distinction in terms of the reasons for action is crucial to the explanation of why rights fail to arise in the problem cases. Raz makes clear that where the existence of an interest is incapable of supporting the required duty, there will be no right.⁴¹ An interest grounds a right only if there is a sound argument from the existence of that interest to the existence of a duty on behalf of some other person. If a friend's interests in friendship are unable to ground any of friendship's constitutive duties, then there will be no right that a friend conforms to these duties. Recognising the duty of friendship as a result of an individual's interest works against the value of friendship in many

⁴⁰ Raz, *The Morality of Freedom* (n 2) 173–176; cf Joseph Raz, 'Is There a Reason to Keep a Promise?' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014).

⁴¹ Raz, *The Morality of Freedom* (n 2) 184.

circumstances.⁴² If the interest of a friend is sufficient to justify the action, then what value resides in the friendship? Friends ideally acknowledge the constitutive duties of friendship as issuing directly from the existence of the relationship. They do not need to defer to one another's interests in the relationship. The interest is therefore incapable of grounding any right that my friend act in conformity with their obligations of friendship.

4.4.3 Rights and Defeating Considerations

The argument against recognising rights in the problem cases can now be stated more directly. A right exists just in case it is grounded in an interest that is a reason for someone to accept a certain duty. If a putative right is grounded in an interest that ought not to act as such a reason, it is no right at all. According to Raz, 'when the conflicting considerations altogether defeat the interests of the would-be right-holder, or where they weaken their force and no one could be justifiably held to be obligated on account of those interests, then there is no right'.⁴³ In certain circumstances, the value of a relationship as a source of duties between two persons may act as a decisive reason not to recognise a party's

⁴² On the failure of certain values to create reasons for action due to self-defeat see John Gardner and Timothy Macklem, 'Reasons' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press 2002) 256–257.

⁴³ Raz, *The Morality of Freedom* (n 2) 184.

interest as a reason for the duties in question. This is the final step in the explanation of the problem cases. Rights must be grounded in interests that are reasons for people to accept the duties in question. If they cannot function as reasons to accept the duties in question, the interests involved cannot ground rights.

Consider the norms that define relations of gratitude—there is something deeply problematic about recognising a duty to be grateful because someone has an interest in our gratitude. The value of the relationship itself gives us reason not to rely on the interest as a reason for accepting the duties involved. Gratitude must arise because of the interactions that warrant it. Nor can one recognise a duty to reciprocate for any reason other than the reason that one originally has for reciprocating. Some norms that are constitutive of our interpersonal relationships have a similar structure. Friendships and romantic relationships often impose requirements on their members to act out of recognition of the value of the relationship. This prevents us from recognising interests as reasons supporting various duties of love or friendship. It seems plausible to argue that a spouse does not have a right that the other spouse is faithful, for instance, because we have good reasons not to recognise an interest in their being faithful as an appropriate reason for holding anyone to be under

such a duty. The duty to be faithful is constitutive of the relationship that the parties have willingly chosen—and it demeans that relationship to speak of spouse’s ‘interests’ in each other’s fidelity.⁴⁴

By way of analogy, the fact that I will look good in the eyes of others cannot provide a reason for accepting a duty to make amends to my friend for an insult I caused him. It might provide an additional reason for conforming with the duty, but it is not a reason supporting the imposition of a duty in the first place. A variety of considerations make it a reason of the wrong kind for accepting the duty. If I complied with this reason directly as a reason for making amends to my friend, I would not have the proper attitudes of a friend. The duties of friendship give me reason not to recognise my self-interest as a reason for accepting the duties of friendship. They undercut any reason that my self-interest gives me to accept the duty in question. The problem cases involve situations where attending directly to the interests of one of the parties would be similarly inapposite.

It is important to note, in this context, the difference between having a duty to act on or for an interest and having a duty that is justified by an

⁴⁴ As I indicated at the beginning of this Chapter, I am not personally sympathetic to this argument, but it seems to me like a plausible interpretation of the claim that spouses owe it to each other to be faithful without having rights to such fidelity.

individual's interest.⁴⁵ Friends routinely act on or in each other's interests, but they do not do this *only* because it promotes their friends' interests. Conversely, I may act to promote the interests of others who are not my friend. What distinguishes friendship from, for example, charity or benevolence, is my recognition of the friendship as the source of my reason to do so. In other words, it is not acting on or promoting the interest of a friend that is self-defeating, but recognising a friend's interest as the ground of a duty to so act. Moreover, the interest is unnecessary for the justification of the duty. The only requisite justification for duties of friendship, presumably, is that they are constitutive of friendship. And friendship has its own value above promoting individual interests.

It is also worth observing that the problem cases I have been considering are relatively rare. Ordinarily, relationships are not incompatible with the recognition of individual interests as the ground of the duties in question. Only in very rare circumstances will the existence of a duty be incompatible with recognition of the interests in question. A relationship will not act to defeat or undercut an interest as a reason for accepting a certain duty. We can recognise

⁴⁵ I elaborated on the distinction between acting on an interest and acting on a duty justified by an interest in more detail in Chapter 2. Very broadly, I act on an interest when I am motivated to act by the interest. I act on a duty justified by an interest when the interest supports the duty *regardless* of my motivation for compliance.

interests as the ground of rights within a variety of relationships.⁴⁶ Children have interests in the love and support of their parents that are capable of supporting duties on the parents' behalf.⁴⁷ Spouses have interests in certain standards of treatment from their partners and former partners. In the vast majority of cases, forming attitudes based on these interests might be undesirable—we might prefer that parents love their children unreservedly, not because they have an interest in such love—but it is not *universally* inappropriate. Whether or not the interests in question are capable of grounding a right will depend on the nature of the relationship and the broader desirability of having regard to those interests. It is better to have a parent who accepts a duty to love their children out of recognition that their child has an interest in being loved than a parent who does not accept such a duty. Such a person is still, in an important sense, acting permissibly, even if they are not a very good parent. (We would rather that they recognised the duty to love their child because they are their child.) There are reasons not to recognise the child's interest as grounding a right, but these reasons are not decisive. The child's interests in having a loving parent are more urgent than the considerations that would defeat those interests.

⁴⁶ Some of these cases are discussed in greater depth in Chapter 7 of this thesis.

⁴⁷ The case for such a right-duty relationship is made in S Matthew Liao, 'The Right of Children to Be Loved' (2006) 14 *Journal of Political Philosophy* 420.

A variety of difficulties present themselves for any account on which rights are grounded in individual interests. The most notable difficulty arises in the analysis of rights that are or appear to be justified by their social value. Property rights, for instance, are said to be justified at least in large part by the social value of having an institution for the acquisition and disposition of property.⁴⁸ There are a variety of other kinds of rights that appear to be justified by their social value—the right to free speech, or the rights of journalists or police officers, for example. These issues are explored at greater depth in the context of normative relationships in Chapter 7. For the time being, I will simply note that I think that this challenge can be met. The objection draws too neat a distinction between individual and social interests. Once the relationship between individual and collective interests is properly understood, the problem can be dissolved, at least in large part.⁴⁹

A further drawback for the justificatory explanation is that it is a departure from the Hohfeldian correlativity thesis, which many authors have found useful, even indispensable, for the analysis of rights in both morality and

⁴⁸ Rowan Cruft, 'Against Individualistic Justifications of Property Rights' (2006) 18 *Utilitas* 154.

⁴⁹ See also Joseph Raz, 'Rights and Individual Well-Being', *Ethics in the Public Domain* (Oxford University Press 1995); Joseph Raz, 'Liberating Duties', *Ethics in the Public Domain* (Oxford University Press 1995).

law.⁵⁰ As I noted at the beginning of this Chapter, it is a stipulation of this account that all duties owed to others are logically equivalent to claim rights held against the duty-bearer. Some will find this departure from the correlativity thesis more troubling than others do. To begin with, departing from the correlativity thesis as it applies to a certain category of obligations owed to others does not affect its application to most of those obligations.⁵¹ Moreover, the correlativity thesis is not immune from philosophical argument.⁵² It is as open to criticism as any other philosophical claim. Still, for those scholars who are committed to the correlativity thesis as it applies to all relational norms, the pragmatic explanation will be preferable to the alternative I have proposed here.

⁵⁰ It would be futile to attempt to cite the authors working in a broadly Hohfeldian tradition anything other than selectively. See Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 *Law and Philosophy* 347; Finnis (n 1); Kramer, 'Rights Without Trimmings' (n 1); Kramer, 'Refining the Interest Theory of Rights' (n 3); Kramer, 'Some Doubts About Alternatives to the Interest Theory of Rights' (n 3); Gopal Sreenivasan, 'A Hybrid Theory of Claim Rights' (2005) 25 *Oxford Journal of Legal Studies* 257; Sreenivasan 'Duties and their Direction' (n 3); Steiner, *An Essay on Rights* (n 17); Steiner, 'Working Rights' (n 16); Carl Wellman, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Rowman & Allanheld 1985); Wellman (n 17); Leif Wenar, 'The Nature of Rights' (2005) 33 *Philosophy and Public Affairs* 223; Wenar, 'The Nature of Claim Rights' (n 3).

⁵¹ It is interesting to note in this regard that both Cruft and Wenar, who otherwise accept a strict formulation of the correlativity thesis, reject its application to unenforceable directed duties.

⁵² For selected criticisms of the correlativity thesis see David Lyons, 'The Correlativity of Rights and Duties' (1970) 4 *Noûs* 45; Ronen Perry, 'Correlativity' (2009) 28 *Law and Philosophy* 537; Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, vol 21 (Oxford University Press 1980) 179–181; Raz, *The Morality of Freedom* (n 2) 183–186.

The justificatory explanation of the problem cases also vindicates the observation that the duties in question cannot be enforced. Allowing someone to act on their own behalf (or acting on someone's behalf) to enforce a duty typically involves recognising their interests as a justification for enforcement. For the very reason that it is wrong to recognise rights in the problem cases, it is also wrong to see the rights as capable of enforcement. Enforcement theories are not extensionally wrong—where a duty owed to another does not correlate with a right, it will also for the same reason be unenforceable. The mistake of enforcement theories is to see enforceability as somehow characteristic of all rights.

4.5 Rights and Legal Relations

In a broader sense, this Chapter has considered the extent to which we can share normatively significant relationships with others that are not defined by correlative rights. My discussion has, for the most part, centred on examples drawn from familiar moral situations in which the language of rights seems inappropriate. I believe these scenarios demonstrate the risk of developing excessively juridical views about moral reasoning. Some moral philosophers rely heavily on legal analogy. Both Thompson and Darwall, for instance, have purported to discern a rule-based 'bipolar normative order' in moral thinking

that mirrors the structure of ‘relations of right’ in private law.⁵³ An explicit analogy is drawn in this framework between the power to enforce a duty in private law and an ‘individual authority’ to enforce a right through resort to various reactive attitudes, including resentment.⁵⁴ My discussion in this Chapter is meant to demonstrate the difficulties of imposing this kind of juridical conception on our moral relationships. The tendency to view rights as enforceable—to associate the possession of a right with the permission to claim or demand or otherwise apply social pressure—reflects this kind of excessively legalistic view of our moral relationships.⁵⁵ I began this Chapter by outlining some of the difficulties with these views.

The problem cases also demonstrate the risk of developing excessively formal explanations of legal doctrine. Aspects of law, particularly the private law, are sometimes said to involve moral relationships that possess an immanent or self-evident ‘relational’ character.⁵⁶ Instead of simply appealing to the relational character of some aspect of law or legal doctrine, we should strive to

⁵³ Michael Thompson, ‘What Is It to Wrong Someone? A Puzzle About Justice’, *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Clarendon Press 2004); Darwall (n 13).

⁵⁴ Darwall, ‘Bipolar Obligation’ (n 14) 35–36.

⁵⁵ A fact noted by Raz in his ‘Legal Rights’ (1984) 4 *Oxford Journal of Legal Studies* 1.

⁵⁶ See Chapter 4.

identify, in addition to the constitutive rights and duties that we associate with the relationship, the reasons that support or justify them. The law is a scheme of practical reason: just as it incorporates rights and duties it incorporates the relationships and values of which those rights and duties are partly constitutive. In many cases, the individual rights and duties are derived, in part, from the fact that the relationship they define has a distinct value. The rights of children, for instance, are unintelligible unless we have some understanding of the constitutive rights and duties that define the parent-child relationship. Our rights and duties in law may demonstrate a certain kind of sensitivity to the nature of our various normative relationships.⁵⁷

It is certainly true that legal relationships invariably involve the recognition of rights. The law is, by its nature, concerned with holding persons to be under duties (and very often enforcing those duties) in a distinct way that involves the recognition of the various interests that protect the duty. Aspects of both the public and private law are especially concerned with bestowing powers on designated individuals and officials to impose or enforce these rights. Merely observing, however, that legal relationships involve correlative rights and duties tells us very little about the nature of these rights or duties—about their scope,

⁵⁷ The 'relationship sensitivity' of the private law is discussed at greater length in Chapter 6 of this thesis.

content or justification. In the next three Chapters, I will examine the justification and form of normative relationships as they are incorporated or upheld by legal officials. The poverty of simple appeals to the 'relational' form of various legal positions is reiterated throughout Part II of this thesis.

4.6 Conclusion

In this Chapter I have considered a number of scenarios in which it appears we can have obligations owed to others that do not correlate with others' rights. I described these scenarios as 'problem cases'. I considered three explanations for these problem cases. The first candidate explanation was that rights are, by definition, enforceable. Since the duties in question are unenforceable, it is claimed that they cannot correlate with rights. I rejected this explanation on the grounds that there are readily available counterexamples in both morality and law. According to the second set of explanations that I considered, there are correlative rights in these problem cases, but we are reluctant to assert them due to pragmatic considerations in certain contexts. I expressed some reservations about the pragmatic explanations—I do not think that they fully account for the problem cases. I then considered a third explanation for the problem cases. According to this explanation, the problem cases arise where the duties in question require us to act in recognition of the value of the relationship itself,

without reference to individual interests. Because rights must be justified on individual grounds, they are antithetical to the character of these particular relationships. I concluded by offering some thoughts on the significance of the arguments made in this Chapter for the philosophical explanation of relational norms in law and legal doctrine. The subject will be discussed in greater detail in Parts II and III of this thesis.

PART II

CHAPTER 5: RELATIONAL NORMS AND THE LIMITS OF LAW

In Part I of this thesis, I offered a general account of relational norms. At various stages in Part I, I indicated possible implications for the philosophical understanding of law. In Part II of this thesis, I apply the account of relational norms to legal norms. I begin, in this Chapter, with a general consideration of the incorporation of relational norms in law.

Some scholars have noted that the law's interest in our relational norms is theoretically significant.¹ But very few scholars have devoted much time to sustained discussion of relational norms in law. To some extent, this reflects traditional scholastic prejudices. Many legal scholars (at least those who are not simply Holmesian sceptics about law's deontic features) are accustomed to thinking about the law in terms of familiar concepts like *right* and *duty*. Questions relating to the value and content of our relationships with others are generally thought to fall outside of the proper concerns of legal scholarship. I view this as unfortunate. The law, as I understand it, is a complete but

¹ For example Hart noted that the various powers conferred by law make one of law's 'great contributions to social life'; HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 27–32.

idiosyncratic scheme of practical reason.² Just as the law recognises and gives effect to various rights and duties, it can incorporate and give effect to valuable relationships and their constitutive norms. Because legal reasoning is just a specific instantiation of practical reasoning, it should not surprise us that some legal norms are relational norms. The account of relational norms offered in previous Chapters can be applied, *mutatis mutandis*, to relational norms that have been incorporated in law.

I think there is a further explanation for the lack of attention given to the relational norms in law. Many relational norms are only incorporated into the law indirectly or derivatively. The most basic constitutive norms associated with relationships like parenthood and friendship are seldom incorporated directly into law. They are often recognised, but seldom directly incorporated into the law as legal norms. In this Chapter I attempt to explain the law's treatment of relational norms. I argue that the law often upholds relational norms only indirectly, and that its failure to uphold familiar relational norms can be explained by principled limits to the law that are widely recognised.

² This claim is of course contestable. I do not mean to deny that there are those who have alternative understandings of how the law relates to practical reason.

Nonetheless, there is much the law can do indirectly to improve our relationships and encourage the adoption of new relational norms.³

In section 5.1, I discuss the various ways in which incorporation by law may affect or give effect to relational norms. In two subsequent sections, I consider at greater length the principled limits on the law's ability to incorporate relational norms. In section 5.2, I begin with a discussion of parents' duties to love their children—the duty to love our children is treated as a paradigm example of a relational norm that is not upheld in law. In section 5.3, I argue that the failure to uphold this duty is illustrative of a variety of different considerations that limit that law's ability to uphold relational norms, particularly those norms that govern our attitudes towards one another. In section 5.4, I consider the ways in which the law might nonetheless act to improve our various normative relationships, often indirectly.

By relational norms, I mean those obligations, permissions and powers that are constitutive of a relationship of value (or normative relationship) that I

³ At times throughout this Chapter I will personify the law, by, say, referring to 'the law's' reluctance to uphold relational norms. This should be read as an elliptical reference to the attitudes of the legal officials who create and apply the law; see Joseph Raz, 'Authority, Law And, Morality', *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1995); John Gardner, 'How Law Claims, What Law Claims', *Law as a Leap of Faith* (Oxford University Press 2012).

discussed in Chapters 2 and 3 of this thesis. As I have already acknowledged, there are weaker senses of the word 'relational', and norms are sometimes said to be relational whenever they can be related to another party. Some lawyers have suggested that the law can be analysed in terms of combinations of legal relationships in this weaker sense.⁴ But these norms are not all relational in the sense that interests me. Rather than being any legal fact that can be described in terms of two parties, a normative relationship is a relationship between two parties that the law takes to be valuable, and which is constituted in part by certain norms that bind the parties.

In this Chapter I treat the duty of parents to love their children as a paradigmatic example of a duty that the law is reluctant to incorporate directly. Unfortunately, my discussion sometimes proceeds at a level of abstraction that does not allow for full consideration of the pressing social concerns that arise with respect to the family. Many women and children still live in family environments that are unsafe and unsuitable. Even in otherwise secure family environments, the burdens of labour are often unfairly shouldered by women.

⁴ This is one way of interpreting Wesley Hohfeld's various commitments; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1919); see also Lars Lindahl, *Position and Change: A Study in Law and Logic* (Synthese 1977). (Though Lindahl, at least, allows for be some legal positions that are not relational—those that are constitutive of what he calls 'one-act types'; *ibid* 85–122.)

Though I revisit these issues in the final section of this Chapter, I cannot give them the attention they deserve.

5.1 Incorporation

To begin with, it is important to note that the concept of *incorporation* is a problematic one in legal philosophy. The law may incorporate relational norms in a variety of ways, not all of which result in the norms in question becoming legal norms. Consider the various relationships of influence invoked in contract doctrine, which give rise to a presumption of undue influence on behalf of one of the parties.⁵ These relationships are not defined or created by law, they are merely invoked by the law as belonging to categories of established relationship that are presumed to give rise to influence. The norms which define these various relationships are no more creations of the law of contract than principles of arithmetic are part of the law of taxation. They are antecedent moral norms that are recognised by the law and given due effect, but which do not in virtue of that recognition become legal norms.⁶ Moreover, the law readily recognises that these relationships are governed by attitudes that are not in themselves imposed

⁵ *Allcard v Skinner* (1887) 36 Ch D 145 (CA)

⁶ Joseph Raz, 'Incorporation by Law' (2004) 10 *Legal Theory* 1.

or regulated by legal institutions.⁷ (These relationships are often said to be characterised by the ‘trust and confidence’ that each reposes in the other.⁸) Merely giving recognition and legal effect to these norms and their significance does not make them legal norms.

It is also possible that at some point of incorporation these relationships may cease to be moral relationships incorporated in law, and become legal relationships. Many of the norms that define the relationship between a lawyer and their client are defined by the law, and not simply incorporated in their pre-legal form. In Chapter 3, I noted that the relationship of ‘neighbourhood’ invoked by the law of negligence has become one such relationship, in that it is now defined by a complicated diversity of constitutive norms that little resemble any familiar moral category.

A final possibility is that the law may *create* certain unfamiliar relationships, which it claims to be valuable and which it defines in terms of certain stipulated constitutive norms. Certain relationships, like the relationship

⁷ This suggests that the law is often more willing to recognise or refer to attitudinal norms than to uphold them. Preference is giving to enforcing the norms that are expressive of the attitudes in question (in this case, trust and confidence). I return to this point below.

⁸ *Bristol & West Building Society v Mothew* [1996] EWCA Civ 533; [1998] Ch 1, 16-18 per Millet LJ. See also *Johnson v Buttress* (1936) 56 CLR 133, per Latham CJ at 119.

between trustee and beneficiary, or agent and principal, are purely creatures of law. Ordinarily these relationships might be classified as ‘relationships’ in a looser sense—but the law clearly values them, and clearly recognises certain constitutive duties owed from one party to the other.

These different forms of incorporation all raise distinct problems for legal officials. But my focus in this Chapter is on a specific kind of incorporation—incorporation of norms as legal duties, to be upheld, interpreted and where necessary enforced by the courts as standards of behaviour. Many relational duties fail to be incorporated as legal duties, even though they may be incorporated in other ways. Courts have no problem acknowledging that parents have a duty to agree on parenting decisions, wherever possible, but they do not impose a legal duty to cooperate. Likewise, friends do not have legal duties to be honest with each other, nor to keep the promises that they make to one another. There is likewise no legal duty to be a good parent, even though the law is happy to recognise that many people ought to be better parents.⁹

⁹ See Hedley J’s comments *Re: L (Care: Threshold Criteria)* [2007] 1 FLR 2050 (FD), [50]. I return to discussing these comments below.

Legal duties are typically enforceable duties.¹⁰ In some peculiar cases, there are legal duties that are not enforceable, but these cases are rare. Whenever a legal duty is recognised, there will be pressure on courts and legal institutions to enforce the duty in some way. Many of the concerns that constrain the recognition of legal duties relate to the difficulties that arise from enforcing those duties. As I shall argue, difficulties with enforcement often provide good or sufficient reasons not to uphold duties in law.

In section 5.3 I discuss some of these principled limits to the legal recognition of relational norms. For the large part, the law's reluctance to uphold relational norms can be explained by the theoretical limits of law's ability to intervene in our private lives. It does not follow, however, that our various normative relationships are none of the law's business. There are many ways in which the law can and does intervene without accepting the norms in question as legal norms.

¹⁰ The literature on enforcement and the nature of law is vast and I do not intend to add to it here, but see Hart (n 1) 38–39; John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 266–270; Grant Lamond, 'Coercion and the Nature of Law' (2001) 7 *Legal Theory* 35; Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999) 157–162; Frederick Schauer, *The Force of Law* (Harvard University Press 2015).

5.2 The Duty to Love Our Children

I will focus here on the duty of biological and adoptive parents to love their children, ignoring, for the purposes of discussion, the interesting question of whether we have a duty to see to it that all children are loved.¹¹ The claim that we have a duty to love our children is as close to uncontroversial as it is possible to get. Nonetheless, some philosophers are troubled by the suggestion that we have a duty to love of any sort. The source of this philosophical discomfort resides in either of two concerns. First, it is often claimed that love is not rationally governed and thus not rationally governable.¹² It looks like a category error to argue that we have a duty to love that arises because of the value of love—something akin to claiming that we have a duty to see the colour blue or to enjoy the taste of oysters. Love is a matter of emotional taste, and just as our tastes may freely change so might our disposition to love. Second, it is often claimed that we cannot have duties to do things that are beyond our control. Even if love is rationally governed, it is usually beyond our control to determine who it is that we love. Because conformity with the duty would fall outside of our control, we cannot have a duty to love our children. As Kant puts it in *The*

¹¹ Matthew Liao argues that there is a general duty to ensure that children are loved that extends beyond the parent-child relationship. I find this quite plausible, but will ignore this issue here; S Matthew Liao, *The Right to Be Loved* (Oxford University Press 2016) ch 5.

¹² See e.g. Harry G Frankfurt, *The Reasons of Love* (Cambridge University Press 2004) ch 2.

Groundwork, 'love is a matter of feeling, not of willing, and I cannot love because I will to, still less because I ought to (I cannot be constrained to love); so a duty to love is an absurdity'.¹³

Neither of these objections to the duty to love is successful.¹⁴ It is true that many of the emotions we associate with love are involuntary. I do not wish to dispute this observation.¹⁵ My own view of the word 'love' is that it may well be ambiguous between a mental state (the state associated with some kinds of romantic love, for example) and an attitude that is directed at the person who is loved.¹⁶ But in either sense, love is involuntary. In poetry and in literature, and even in philosophy, romantic love has long been compared to madness or a disease. (In the *Phaedrus* Plato describes love as a type of madness.¹⁷) The same can easily be said of parents' love for their children, which can appear intense

¹³ Immanuel Kant, *The Metaphysics of Morals* (Mar Gregor (tr), Cambridge University Press 1996) 161 (Ak. 6: 402).

¹⁴ For lengthier defences of the duty to love our children, as well as some of the more difficult ethical questions it raises, see S Matthew Liao, 'The Right of Children to Be Loved' (2006) 14 *Journal of Political Philosophy* 420; S Matthew Liao, 'The Idea of a Duty to Love' (2006) 40 *Journal of Value Inquiry* 1. Both arguments are reiterated in his book *The Right to Be Loved* (n 11).

¹⁵ cf Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) 11.

¹⁶ A corollary of the observation that love is an attitude that is directed at another individual is that love is a non-propositional attitude. Paris's love for Helen cannot easily be reduced into Paris loving a set of propositions about Helen.

¹⁷ *Phaedrus*, 249d-257b in John M Cooper and DS Hutchinson (trs) *Plato: Complete Works* (Hackett Publishing Company 1997) 527-533.

and irrational. Many of the moments in which love grips us are not of our choosing—as when we see the object of our love across a crowded room, or when we hold a new-born for the first time. However, it does not follow that love is not rationally governed or that we are incapable of conforming with our duties to love.¹⁸

First, even construed as a mental state, love may be valuable, and that may give us reason to pursue loving mental states. In this respect, love may resemble other mental states like pain and pleasure and (on some views) knowledge.¹⁹ All of these mental states have value or disvalue, and their value or disvalue gives us a reason to be in or avoid those states. There is nothing resembling a category mistake in the argument that we have duties to love. The states themselves may not be rationally governed, but our higher-order desires to be in or avoid those states may well be more or less reasonable.²⁰

¹⁸ For a persuasive critique of the ‘no-reasons’ view of love, see Niko Kolodny, ‘Love as Valuing a Relationship’ (2003) 112 *Philosophical Review* 135, 142–146. A reasons-based view of normative relationships was defended in Chapter 3.

¹⁹ For a sustained argument that knowledge is a mental state see Timothy Williamson, *Knowledge and Its Limits* (Oxford University Press 2000).

²⁰ cf Parfit on meta-hedonic desires; Derek Parfit, *On What Matters*, vol 1 (Oxford University Press 2011) 55–64.

Second, even if love were completely involuntary, it would not follow that we could not conform with the duty to love. The duty to love is not different to the duty to be in or avoid other involuntary states. We arguably have a duty to avoid putting ourselves in certain mental states associated with pain. Those states themselves are involuntary—they do not fall within our direct control. It does not follow that the duty to avoid putting ourselves in certain painful states is a particularly hard one with which to conform. For the most part, conformity with the duty involves avoiding intentional acts of self-harm, as well as, perhaps, avoiding certain kinds of risky activity that are likely to result in harm. The duty to love may very well be difficult to conform with intentionally. But it is implausible to think that all duties are, as a matter of necessity, capable of direct conformity. There obviously are some who think that they must, and for them it will be difficult to accept that there is a duty to love. But there are good reasons to reject this view of moral norms.²¹ In any case, those who are sympathetic to the view that conformity with duties must fall under our direct control, are welcome to substitute a duty to *try* to love, where I will simply speak of a strict duty to

²¹ Of course the most celebrated argument for rejecting this view belongs to the titular essay in Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge University Press 1981). On luck in law see David Enoch, 'Moral Luck and the Law' (2010) 5 *Philosophy Compass* 42; AM Honoré, 'Responsibility and Luck' (1988) 104 *Law Quarterly Review* 530; Matthew Kramer, *Where Law and Morality Meet* (Oxford University Press 2008) 249–294.

love. Many (though not all) of the arguments I intend to make could apply equally to a duty to *try* to love our children.²²

For most of us, the love that we feel for our children is spontaneous and involuntary, and to talk of loving our children intentionally seems to understate the immediacy of our affection for them. It does not follow, however, that there is no way in which we can intentionally conform with a duty to love our children. Matthew Liao distinguishes between two ways in which we can comply with a duty to love our children. The first involves methods of ‘internal control’, whereby we reflect on our reasons to motivate ourselves to have certain emotions, and ‘external control’, which involves ‘placing ourselves in situations in which we know that we would probably experience particular emotions’.²³ The second kind of control seems to me to be particularly significant. We can conform with the duty to love our children indirectly, by putting ourselves in situations which cultivate our fondness and affection for them. We can maintain

²² The most notable exception to this proviso arises from the rule of law concerns discussed in the following section. As I will point out, the strict duty to love our children raises *some* rule of law concerns that the duty to try to love does not.

²³ Liao, *The Right to Be Loved* (n 11) 106–107.

our own wellbeing, and shape our lives around theirs, so that we will be disposed to love them.²⁴

It might be thought to be surprising, then, that there is no legal duty to love our children in any legal system of which I am aware—the prospect of a legal duty to love our children strikes people as bizarre.²⁵ The law certainly recognises that good parents love their children—it is a sort of regulative ideal that governs the formation and application of the law.²⁶ Courts and social workers certainly have regard to ideal standards of parenting, but they stop short of formulating those standards as legal duties. For instance, it has long been recognised in English law that children are *best* brought up with their natural families.²⁷ This kind of tacit recognition of the value of a loving environment is very common in family law, but no *duty* is directly imposed on biological parents to raise their children. There are also many associated legal duties—duties that I will characterise as *expressive* of the importance of the duty

²⁴ *ibid* 111–113.

²⁵ As an aside, I think the implausibility of a *legal* duty to love is a source of a lot of objections to the idea of a moral duty to love. I hope that my arguments in this Chapter help to make the idea of a moral or non-legal duty to love more plausible, by drawing attention to important distinctions between legal and non-legal duties.

²⁶ On regulative ideals as relational norms, see Chapter 3.

²⁷ See *Re KD (A Minor: Ward) (Termination of Access)* [1988] 1 AC 806 (HL), per Lord Templeman at 812.

to love. Various areas of law impose a variety of positive duties on parents with respect to their children—parents are expected to provide for their children’s good health and education and financial wellbeing.²⁸ Parents’ failure to conform with these duties may result in state intervention, in civil penalties, and (in extreme and tragic cases) in their being held criminally responsible. But there is no legal norm that imposes a duty on parents to love (or even to try to love) their children. As Hedley J expressed it, in a much-quoted decision, ‘society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate, and the inconsistent’.²⁹ This willingness to tolerate different standards of parenting, bordering on ‘the barely adequate’ is obviously inconsistent with imposing a legal duty on parents to love their children.

I referred above to legal duties that are expressive of the duty to love. By ‘expressive’ duties, I mean those duties that arise because a person has an attitude or emotion. For instance, we expect friends to act in a certain manner that is befitting of the admiration and respect that they have for each-other. The

²⁸ See e.g. s 7, Education Act 1996 (UK); ss2-3 Children Act 1989 (UK), s 1, Child Support Act 1991 (UK).

²⁹ *Re: L (Care: Threshold Criteria)* [2007] 1 FLR 2050 (FD), [50].

duties that arise as a result are expressive of these attitudes.³⁰ Instead of upholding the duty to love itself, the law tends to focus on a host of associated duties that are expressive of a parent's love for their child. It upholds the expressive duties, and not the attitudinal duty that has explanatory priority over these other duties, and which may even constitute an ideal around which these more minimal legal norms have been shaped. With respect to the duty to love our child, for instance, the law focusses on the kind of behaviour normally thought to be expressive of our love for our children. The law will readily uphold duties to act in the child's best interest,³¹ but it will refrain from requiring parents to have the attitudes that the requisite actions normally express.

We can easily imagine the kind of laws that could be enacted in an attempt to incorporate a legal duty to love our children. Legislatures could make it a crime not to love our children, enact a tort of neglecting to love, or allow children to petition the court for specific performance of their parents' affections. The duty to love might even be incorporated into family law—as part of a minimum threshold of care that must be met if children are to stay with their natural parents. Yet the law does not do any of these things. Even in family law,

³⁰ On expressive norms in friendship see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 250–261.

³¹ The Children Act 1989 (UK), s 1.

the courts are willing to tolerate parenting that meets some minimum standard of adequacy, even when that falls well short of a loving relationship.³² We can readily envisage some of the difficulties that would accompany any of these interventions. At what times, and for what duration, would a failure to love amount to a crime or a tortious wrong? How would parents who are incapable of loving their children go about trying to change their situation? What, moreover, are the alternatives? Sometimes the only option the state can provide for children who are not loved is another environment where they are separated from their original parents, and may be equally unloved.

The absence of a legal duty to love is instructive. It is suggestive of several ways in which the normal limits that apply to the legal recognition of norms particularly limit the law's ability to incorporate relational norms. Here I will speak of three general limits to the legal incorporation of norms: concerns related to autonomy, intimacy and effectiveness. All three concerns sometimes militate against the inclusion of relational norms in law. Obviously some of my discussion is, of necessity, stipulative. I will embrace conceptions of moral and political ideals that are themselves controversial, and open to further debate. The purpose of this Chapter is not to engage in a lengthy debate about the nature of

³² *Re: L (Care: Threshold Criteria)* [2007] 1 FLR 2050 (FD) [50].

limits to legal incorporation. Rather, it is to demonstrate that these limits, plausibly construed, have implications for the incorporation of relational norms in law.

Nor will I consider all the possible principled restraints on the law. It is often claimed that legal intervention is limited by concerns of public reason and state neutrality,³³ or by the rights of individuals to engage in wrongdoing.³⁴ I will not attempt to offer an exhaustive consideration of such principles. I focus here on three concerns. All three concerns demonstrate the way in which the character of law affects the incorporation of relational norms. They also function as partial explanations of the fact that many of the relational obligations found in law are expressive obligations, rather than the more fundamental constitutive obligations from which they are derived. The law makes no provision for our duties to love our children, to be loyal to our friends, or to be faithful to our spouses. The law does, however, often offer indirect recognition of these relationships and their worth. Very occasionally, it may even act indirectly to improve them. The

³³ E.g. John Rawls, *Political Liberalism* (Columbia University Press 1993).

³⁴ D Enoch, 'A Right to Violate One's Duty' (2002) 21 *Law and Philosophy* 355; Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 *Ethics* 21. For arguments that there is a right to parent, and that this right restrains state intervention in certain kinds of parental wrongdoing; see Harry Brighouse and Adam Swift, 'Parents' Rights and the Value of the Family' (2006) 117 *Ethics* 80; Liao, *The Right to Be Loved* (n 11) 7.

principles I consider below go some way towards demonstrating why this is the case.

5.3 Limits to Incorporation

I will discuss three considerations that prevent the incorporation of relational duties as legal duties. The first set of concerns relate to the need to preserve and promote autonomy. Because interventions to incorporate relational duties as legal duties would threaten individual autonomy, they are often undesirable. The second set of concerns relate to intimacy. Our most valued relationships are intimate relationships, and they depend on certain conditions of privacy and unobtrusiveness to flourish. In attempting to enforce relational duties like the duty to love, the law intrudes on the very conditions of intimacy that these relational norms require. The final set of concerns is more pedestrian but no less interesting—they are concerns based around the law's effectiveness. Even if intervention were otherwise desirable, there is good reason to think it would not have its intended effect.

5.3.1 Autonomy

Our relationships play a special role in our autonomous self-government and self-creation. They do this in several ways. To begin with, they provide the

conditions in which we can flourish and exercise our autonomy in a valuable way. Secondly, our relationships often are the product of our choices, and thus are the immediate consequence of our autonomous decisions. Thirdly, our personal relationships are fundamental to our identities, and are thus reflections of our status as autonomous beings. Because the promotion and protection of autonomy is a fundamental concern of liberal states, the law's methods of intervention reflect this concern. Concern for individual autonomy is reflected both in the need to uphold the rule of law, and in its broader reluctance to intervene in ways that harm or fail to promote individuals' autonomy. I will discuss each area of concern and its application to the incorporation of relational norms in turn.

5.3.1.1 Autonomy and the Rule of Law

The rule of law is an ideal according to which law should be capable of guiding behaviour.³⁵ Legal norms that live up to the rule of law ideal are efficient in the guidance of conduct. Following Fuller's lead, the rule of law is often disambiguated as a set of desiderata that may be employed as a yardstick for determining whether or not the law is functioning well *qua* law: legal norms

³⁵ It is a mistake to think that the rule of law is an ideal that exclusively applies to legal rules—it also applies to the legal officials who create and apply the law, and various other legal institutions and procedures; Joseph Raz, 'The Rule of Law and Its Virtue', *The Authority of Law* (2nd ed, Oxford University Press 2009).

must be prospective, public, clear, generally applicable, and so on.³⁶ Failure to adhere to these desiderata does not disqualify norms from being legal norms, but it does indicate that they are in some way deficient. Importantly, conformity with the rule of law promotes the autonomy of the law's subjects. When legal officials respect the rule of law, then their subjects are better able to plan their lives around the obstacles and intrusions that the law places in their way.

Respect for the rule of law entails that conformity with legal duties should be within the direct control of subjects. If the law directs its subjects to do something, then it ought to be possible for subjects to intentionally do that same thing. It is, for this reason at least, unjust to hold parties to be under duties that lie beyond their voluntary control.³⁷ These concerns have particular significance for the way in which the law responds to relational norms. If a party has done all that they can to love their children, but cannot, either due to some innate deficiency on their behalf (like a severe mental illness) or even simply because their children are difficult to love, it is unjust to hold them legally responsible for this failure.

³⁶ Lon L Fuller, *The Morality of Law* (Yale University Press 1969) 33–38. For alternative lists, see Raz, 'The Rule of Law and Its Virtue' (n 35); Matthew H Kramer, *Objectivity and the Rule of Law* (Cambridge University Press 2007) ch 2.

³⁷ On noncompliance as a source of injustice see John Gardner, 'Some Rule-of-Law Anxieties about Strict Liability in Private Law', *Private Law and the Rule of Law* (Oxford University Press 2014).

Rule of law concerns explain part of legal officials' reluctance to directly uphold relational norms. Many relational norms are strict norms. We expect our friends to enjoy our company. A failure on their behalf to conform with their duty to do so will dissolve the friendship, regardless of whether or not they intended to enjoy our company. These norms raise rule of law concerns because there is no way of being sure that we can conform with them—there is little I can do to guarantee that I will not someday simply stop enjoying my friend's company. I noted above that on my view, the duty to love our children is a strict duty. It is not properly construed as a duty to try to love our children, but as a duty that we must conform with regardless of our own control over the outcomes. So the father who suffers severe depression, and withdraws from his children, is still blameworthy even when the depression is beyond his control. If this is the case, then the strictness of the duty goes some way towards explaining its incompatibility with the rule of law. In many cases, conformity with this and other relational norms lies beyond our direct control. They are not norms that efficiently guide the behaviour of their subjects.

Even though the strictness of the duty to love raises particular rule of law concerns, even a duty to *try* to love our children might not fare much better from a rule of law perspective. It is not clear how parents are meant to try to love their

children. An instruction to try to love is not necessarily any clearer than an instruction to love. There are a variety of ways in which we might conform with the duty to try to love our children, and simply incorporating such a norm would offer very little guidance to the law's subjects. If the law offers no guidance as to how we might try to do so, we are unlikely to be in a better position, from the point of view of the rule of law, than if we had simply been commanded to love our children. Many relational norms are vague or imperfect. They fall short of the standard of clarity that is expected of legal norms.³⁸ Friends are required to be loyal to one another, but it can be unclear what loyalty means. Children are required to be attentive to their parents, but how much attention is sufficient? The relational norms that belong to social morality are often open-ended. Friends differ in the degree and kind of loyalty that they expect of one another, for instance. But this kind of diversity of standards within the same class of relationship is anathema to the law.

Many of the expressive duties that are upheld by the law, on the other hand, raise no such rule of law concerns. It is usually within someone's control whether they make maintenance payments for their children, whether they allow children regular contact with their other parents, or whether they make

³⁸ Fuller (n 36) 63–65.

appropriate decisions concerning their children's health and wellbeing. Very often these duties are such that, if we intend to conform with them, conformity is within our grasp. They are more suitable for legal enforcement.

The rule of law cannot explain all of the reluctance to uphold relational norms like the duty to love. The rule of law is just one virtue among many that the law can exhibit—its desiderata are the desiderata of efficiency, and not those of complete moral virtue. Often, faced with a choice, we should choose the law that is just or good over the law that is efficient.³⁹ Given the advantages likely to fall to children who are loved over children who are not, there may be a compelling case for the law to intervene in spite of the rule of law difficulties presented by doing so. Rule of law concerns provide, at best, a partial explanation of the law's unwillingness to incorporate the duty to love.

5.3.1.2 The Promotion of Autonomy and the Prevention of Harm

Promotion of the rule of law is not the only way in which a concern for autonomy limits legal intervention. The law is concerned with the protection and promotion of autonomy in other ways. The harm principle, for instance, requires that coercive intervention in a person's life be justified either by the prevention of

³⁹ Raz, 'The Rule of Law and Its Virtue' (n 35).

harm to the autonomy of others or the promotion of that individual's autonomy.⁴⁰ But the harm principle is not exhaustive of the ways in which the law may express concern for individual autonomy—various kinds of intervention are justifiable if they contribute to broader social conditions of autonomy.

A tension appears when considering legal intervention in our relationships and the promotion of autonomy. It is true that the concerns about autonomy limit the law's incorporation of a variety of norms that are normally thought to constitute our valuable relationships. But the same concerns may also *support* the incorporation of relational norms in certain circumstances. On the one hand, autonomy is constitutive of many of our personal relationships—many relationships are defined, in part, by the fact that the parties have chosen them, and by recognition of parties' abilities to quit relationships just as readily as they initially pursued them. If the law intervenes to protect or uphold relational norms, then it threatens the voluntariness of the relationship, which was one reason for valuing the relationship in the first place.

⁴⁰ I am relying on Raz's interpretation of the harm principle in Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 401–431.

On the other hand, normative relationships are an almost indispensable part of our self-creation.⁴¹ Perhaps some individuals can choose to sustain an autonomous life that is devoid of special attachments, but they will be rare indeed.⁴² Within intimate relationships, our wrongdoing may threaten the autonomy of others. Relationships, when they are going well, promote our security and wellbeing, and thus help to create an environment of informed choice. Enforcing various relational norms thus may well fall within the principled purview of the law, at least as far as the promotion of autonomy is concerned. The value of our autonomous choices has to be weighed up against the value that many relationships have in creating such an environment of choice to begin with. In the context of parental relationships, parents also have a duty to foster their children's autonomy—to provide them with sufficient conditions for becoming the authors of their own life. The duty to love is necessary for realising an environment that fosters children's appreciation of their own capacity for autonomous self-creation.

As a result of this tension the law faces a dilemma when it offers legal protection of our autonomous choices. On the one hand, the law needs to give

⁴¹ This argument is made in greater depth in Chapter 7.

⁴² cf J David Velleman, *Foundations for Moral Relativism* (OpenBook Publishers 2013) 71–87.

support to the various institutions that allow for people to live autonomous lives. On the other, if it intervenes directly to uphold these institutions, it risks negating the voluntariness that makes them valuable. Analogues of this dilemma are found elsewhere in the law—for instance in the law governing contractual obligations. Contracts provide one form of institutional support for autonomous choices. It is important that the law take steps to prevent the abuse of contract, perhaps even by compelling performance of the contract.⁴³ On the other hand, intervening to uphold a contract undermines its voluntariness, thus undermining the initial justification for intervention.⁴⁴ Contract law offers a partial solution to this problem by requiring that parties exhibit an intention to create legal relations. The doctrine of consideration is also said to provide parties with a clear mechanism with which to indicate their intention to be legally bound.⁴⁵

⁴³ For a summary of the debate concerning the application of the harm principle to contractual remedies, see Dori Kimel, *From Promise to Contract* (Oxford University Press 2003) ch 4.

⁴⁴ This tension leads Raz to conclude that compensating individuals for non-performance, rather than enforcement, is the proper goal of contract law; Joseph Raz, 'Promises in Morality and Law' 95 *Harvard Law Review* 916, 934.

⁴⁵ Support for this partial theory of the doctrine of consideration is offered by Atiyah, Fuller and Fried; PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford 1979) 448–453; Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, Oxford University Press 2015) 38–39; Lon L Fuller, 'Consideration and Form' 41 *Columbia Law Review* 799.

Kimel characterises parties' ability to determine whether or not their agreements are legally binding as a kind of 'freedom *from* contract'.⁴⁶ Law can enhance our ability to control our lives by giving us the further ability to determine whether or not we wish to rely on the law. One way of interpreting these requirements—and other form requirements that distinguish between promises and agreements that are legally binding and those that are not—is that they allow parties to determine when they want their various obligations to be legally binding.⁴⁷

It might be thought that people should be given the opportunity to decide whether or not their relationships have the effect of creating legal obligations. This is one way of characterising the historical role played by the legal institutions that traditionally governed our relationships, such as the marriage contract—those who have made a life-long commitment to one another may choose whether or not they want that commitment to have legal effect with respect to their partners and their children.⁴⁸ But this is no longer an appropriate

⁴⁶ Kimel *From Promise to Contract* (n 43) 135–142.

⁴⁷ This point is made by Kimel, in comparing the institutions of marriage and contract; Dori Kimel, 'The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model' (2007) 27 *Oxford Journal of Legal Studies* 233.

⁴⁸ Jeremy Waldron argues that the special legal status of marriage is a 'threat to autonomy', because the same sorts of decisions made by non-monogamous couples (or, for that matter, same-sex couples) do not receive legal recognition; Jeremy Waldron, 'Autonomy

characterisation, if it ever was. There is growing recognition, largely as a result of increased focus on the kinds of injustice that may flourish within the family, that a person should not be able to walk away from their accrued responsibilities towards their partners or children simply because they are unmarried, or have shown no intention to create such legal duties.⁴⁹ Various laws enforce parents' requirements to provide for their children, and for their former spouses, regardless of whether or not they opt to marry.

It is possible that the value of one individual's autonomy, and the law's reasons to promote it, might be outweighed by other considerations. This is especially clear in the case of relationships with and around children, in which parental autonomy is of less importance. The interests of the child (including their own interests in securing conditions of autonomy) take moral and legal precedence. Parental relationships certainly have an autonomous aspect—many people in developed societies make an active choice to become parents. But unlike other relationships, the moral burdens of parenthood, once assumed,

and Perfectionism in Raz's Morality of Freedom' (1988) 62 Southern California Law Review 1097, 1149–1152. But at best this is an argument for expanding the scope of marriage law. It is not that the law is threatening autonomy, but that it is selectively promoting it.

⁴⁹ The contractual regulation of marriage is critiqued expertly in Carol Pateman, *The Sexual Contract* (Stanford University Press 1988) chapter six.

cannot be easily dissolved simply because parents wish. A good deal of social pressure is placed on parents not to quit their parental responsibilities.

Anne Alstott characterises parenthood as a relationship that imposes ‘no exit’ obligations.⁵⁰ Continuity of parental care provides the conditions necessary for children to flourish. A society committed to promoting autonomy recognises that providing these conditions for children has priority over the interests of parents in shaping their lives as they otherwise might.⁵¹ Alstott’s arguments with respect to continuity of care could easily be repeated with respect to the duty to love. Parental love is highly desirable, if not indispensable, for allowing children to pursue worthwhile lives.⁵² Outside of hard cases, where parents are unwell or unable to help their children due to exigent circumstances (such as the need to escape violent or abusive relationships) we recognise that parents should secure these conditions for their children.

On balance, the promotion of autonomy offers little assistance in explaining the law’s failure to uphold the duty to love our children. The duty to

⁵⁰ Anne Alstott, *No Exit: What Parents Owe Their Children and What Society Owes Parents* (Oxford University Press 2004).

⁵¹ *ibid* 37–41.

⁵² For a summary of the empirical research on the benefits of a loving environment see Liao, *The Right to Be Loved* (n 11) 75–100.

love, in some form or other, is constitutive of all our most cherished relationships—when we conform with such duties, our lives go well. If there was a way in which the duty could be successfully incorporated into law, I believe that incorporation would inevitably follow. Suppose that a drug could be administered that enabled all parents to experience love for their children. It seems plausible that—aside from the risk of unintended consequences—parents would have a moral duty to take such a drug.⁵³ If such a drug were widely available, then it seems to me that the case for legally incorporating a duty to take such a drug would be reasonably strong. Though such an intervention would certainly impede on the autonomy of parents, the positive contribution it would make to the autonomy and wellbeing of their children is clear.

Could it be that though it cannot explain the failure to uphold the duty to love our children, there are other interventions that considerations of autonomy militates against more clearly? For instance, do concerns with autonomy give us reason for abstaining from upholding a duty to love our spouses and friends? It

⁵³ For discussion of parental ‘love-drugs’ see S Matthew Liao, ‘Parental Love Pills: Some Ethical Considerations’ (2011) 25 *Bioethics* 489. For an argument that parents have a moral duty to take so-called ‘love-drugs’ that enable them to love *each-other*, rather than their children, see Brian D Earp, Anders Sandberg and Julian Savulescu, ‘Natural Selection, Childrearing, and the Ethics of Marriage (and Divorce): Building a Case for the Neuroenhancement of Human Relationships’ (2012) 25 *Philosophy and Technology* 561. These authors do not consider whether or not there ought be a legal duty to take ‘love drugs’ in either case.

is certainly true that these relationships are fundamentally defined by the fact that they are chosen. Autonomy plays a greater constitutive role in these relationships than in the parental relationship, and the desire to promote the value of individual choices inevitably militates to some degree against legal enforcement of these duties. Many relationships derive their value in part from the recognition that the other person may, if they wish, choose to stop loving us or cease to have any good-will towards us. The risk that they might do so is one that we may be said to have taken upon ourselves—it forms part of the shape of benefits and burdens that we have willingly imposed upon our lives.

But this line of argument can only take us so far. The very fact that they are chosen demonstrates the harm that can be done within these relationships. We can do great harm—much greater than is commonly imagined—to those to whom we have made solemn commitments and who have made similar commitments to us. There is growing philosophical recognition of the indispensability of social connections to the wellbeing of adults, as well as children.⁵⁴ Children’s right to be loved may just be a particularly pressing

⁵⁴ See in particular Kimberley Brownlee, ‘A Human Right Against Social Deprivation’ (2013) 63 *Philosophical Quarterly* 199; Kimberley Brownlee, ‘Ethical Dilemmas of Sociability’ (2015) 28 *Utilitas* 1.

instance of a general right to form intimate social connections with others. Cruelty and neglect *within* relationships can be uniquely devastating.

The constitutive role of autonomy within does not diminish our vulnerability to certain kinds of grave harm. Concerns around the promotion of individual autonomy do militate against the legal recognition or enforcement of relational norms, but they do not do so in a clear or unambiguous fashion. This is especially the case in relationships customised by conventional vulnerability, like the parent-child relationship, but the point may be extended somewhat to apply to other kinds of intimate relationships.

5.3.2 Intimacy

As the preceding comments suggest, considerations of autonomy cannot entirely be divorced from concerns related to intimacy. Our capacity for self-government is also reflected in a capacity to choose those with whom we develop various kinds of intimacy. Many of our most valuable relationships are intimate relationships. Many relational duties, like the duty to love, are therefore duties that are expressive of conditions of intimacy and affection. Intimate activities, says Julie Innes, 'derive their meaning and value from our love, care, or liking'.⁵⁵

⁵⁵ Julie C Innes, *Privacy, Intimacy, and Isolation* (Oxford University Press 1996) 96.

We might alternatively say that intimate acts are expressive of the value of these core attitudes. In any case intimate relationships have a distinct value that is not present in the case of relationships that lack equivalent intimacy (which is not to say that they necessarily have a greater value).

To begin with, many kinds of legal intervention are damaging to intimacy, precisely because they threaten the conditions necessary for intimacy to flourish. Intimacy requires privacy and unobtrusiveness. Ordering someone to love, care or like may instead make them more inclined to be resentful or mean-spirited. It may remove the very conditions in which they could see to it that these intimate attitudes are realised. Robert Gerstein speculates that there is a kind of observer-effect within our intimate relationships: *any* intrusion of outsiders means that 'the fragile unity of the experience is broken'.⁵⁶ This claim seems to me to be too strong. Our intimate relationships are strong enough to endure certain kinds of intrusion. But we need not accept any claim as strong as Gerstein's in order to take his point. It is enough to note that conditions of privacy are valuable

⁵⁶

Robert S Gerstein, 'Intimacy and Privacy' (1978) 89 Ethics 76, 77.

because they allow for the promotion of intimacy, and that legal intervention threatens these conditions.⁵⁷

In addition, in liberal societies many of our most valued intimate relationships are valued precisely because of the constitutive role played by individual choice, by spontaneity and lack of compulsion.⁵⁸ Innes identifies a distinct value in recognising individuals as ‘emotional choosers’.⁵⁹ In doing so she relies on a distinction between ‘rational’ and ‘emotional’ choice that some will find philosophically suspect. But the point remains that our emotional choices have a particular value to us that other kinds of choice do not. We value, in particular, the way in which emotional choices are made. Consider the value of many loving relationships—loving relationships have value not only because they are voluntary, but because they arise spontaneously (sometimes accidentally) and in a way that is unimpeded by intrusion or instruction. A decision to stay in a loving relationship out of fear of sanction is unlikely to offer much comfort to those who seek our love. We expect love to be voluntary, and an enforced duty to love is unattractive even as a second-best solution.

⁵⁷ This ‘instrumental’ argument for the value of privacy—as necessary for the realisation of intimacy is made in Charles Fried, ‘Privacy’ (1968) 77 *Yale Law Journal* 475; James Rachels, ‘Why Privacy Is Important’ (1975) 4 *Philosophy and Public Affairs* 323.

⁵⁸ Raz, *The Morality of Freedom* (n 40) 390–395.

⁵⁹ Innes (n 55) 105–106.

5.3.3 Effectiveness

A final set of concerns relate to the effectiveness of legal intervention within relationships. Certainly, the law should intervene to prevent violence and extreme neglect. But it is less clear that other forms of intervention are likely to be effective. Even if intervening to uphold duties to love and care for others were otherwise defensible, there is good reason to doubt that it would achieve its intended outcomes. At the best of times, the law is a particularly blunt instrument with which to hold individuals under duties to act. Legal regulation can have a high moral cost, or unintended side-effects, which may limit the desirability of that regulation.⁶⁰ In many cases, the legal intervention might simply be futile—by the time that intervention is available, there is little that can be done to prevent or remedy the harm.

Limits to the law of this sort arise from the unwanted effects of intervention. In the case of relational norms and their incorporation in law, these considerations are particularly salient. A great deal of unintended harm might result from the law's intervention in our various personal relationships. Legal intervention is often seen as a last resort, not simply because the law is reluctant

⁶⁰ Edwards assimilates these considerations into his general disambiguation of the harm principle; see in particular his 'clumsiness argument' James Edwards, 'Harm Principles' (2014) 20 *Legal Theory* 253, 259–262.

to intrude in the private sphere, but because of the inherent costs of ineffective intervention.⁶¹ On many occasions the law rightly recognises that its intervention in the family, however well intended, will make parties worse off while failing to have its intended effect. According to the so-called ‘no-order principle’ under the *Children Act*, the interests of the child place a broad limit on the court’s use of its powers of enforcement, so that no court order should be made ‘unless it considers that doing so would be better for the child than making no order at all’.⁶² As a baseline for court intervention this test looks permissive—all that is required is a finding that intervention will lead to a slight improvement in the child’s interests. In practice, it is an exacting test. It allows for situations in which one or both parents are simply slightly disinterested, or in which they will fail either to love their child or to express that love. There are many situations in which the court will not intervene because its intervention will make a deeply sad situation even sadder. Parents may agree on certain medical treatment which, though it does not serve the child’s interest, will not be sufficiently worrisome to justify judicial intervention because the burden of passing the no-order principle cannot be met.

⁶¹ See further Alstott (n 50) 41–44.

⁶² The Children Act 1989 (UK), ss1(5).

Effectiveness concerns provide clear reasons for being reluctant to intervene in the family, even where there is a chance to advance a child's interests.⁶³ A contact order might encourage one or both parents to treat a certain amount of contact as sufficient, rather than a legally recognised minimum. The presence of a clear court order might crystallise a certain arrangement, and make parents unwilling to negotiate with one another flexibly with their mutual love for the child in mind. Court enforcement may lead to additional hostility between the parents, which will inadvertently reduce the child's wellbeing. In each case, the costs of intervention may well outweigh the putative benefits.

Concerns about effectiveness seem to play a large role in the law's reluctance to intervene to enforce parental duties. In a perfect world we might even recognise that parents have a legal duty to love their children. In reality there is little chance that this sort of legal intervention in the life of the family would be effective. There is a far greater risk that such intervention will be counterproductive. There is little point in compelling people into intimacy that they are for whatever reason reluctant to give.

⁶³ Though some have thought that the principle itself is badly worded, and results in unnecessary and avoidable harm; Sarah Phillimore and Amanda Drane, 'No More of the "No Order" Principle' [1999] Family Law 40. Even those who query the principle do not dispute the assumption that intervention is in many ways undesirable, and that it is preferable to allow parties to resolve situations amongst themselves.

5.4 How the Law May Improve Normative Relationships

I have dwelled here on some of the principled limits on the law's ability to uphold relational norms. It does not follow, and it should not be thought to follow, that relational norms that are not incorporated in the law are none of the law's concern. In fact, the law may often intervene *indirectly* to improve our relationships. It may do so to bolster the social acceptance of new relational norms.

The claim that the law might be used to improve morality strikes many of us as puzzling. After all, law is normally thought to depend upon morality, not the other way around—moral norms are often thought to have explanatory priority over legal norms.⁶⁴ But there are a variety of ways in which morality might depend upon law, especially those aspects of morality that are socially constituted, or which rely on social convergence around a certain practice.⁶⁵

⁶⁴ This is a theme of much contemporary jurisprudence, but see e.g. John Finnis, Joseph Raz, and John Gardner; Finnis (n 11) 1; John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) ch 6; Raz, 'Authority, Law And, Morality' (n 3).

⁶⁵ See further AM Honoré, 'The Dependence of Morality on Law' (1993) 13 *Oxford Journal of Legal Studies* 1.

Leslie Green, in a recent paper that is relevant to my discussion here, has considered at length the use of law to improve *social* morality.⁶⁶ He argues that in certain circumstances, it is both possible and desirable to create legal norms that are designed to improve the moral practices of the society governed by those norms.⁶⁷ It is tempting to think that Green's insights cannot apply to what might be called 'ideal' or 'critical' morality.⁶⁸ In the case of many of our most meaningful relationships, however, their constitutive norms are at least in part dependent on being socially practised. They belong to what Raz describes as the 'social forms'.⁶⁹ Insofar as these social forms contribute to the value of our lives, morality has an unavoidable social aspect. It follows that where our critical or ideal morality has a social aspect, the law may improve our ideal morality.

Green offers, as one example of the law's ability to improve social morality, its potential to improve prevailing norms with respect to sexual

⁶⁶ Leslie Green, 'Should Law Improve Morality?' (2013) 7 *Criminal Law and Philosophy* 473.

⁶⁷ I am assuming that terms like 'social morality' and the 'morality practiced by a society' are relatively clear, but these ideas are soundly unpacked by Green; *ibid* 475–478.

⁶⁸ For his part, Green stipulates that the law is not able to change 'ideal morality', though he acknowledges that the law may 'change social facts which, together with ideal morality, change positive norms'; *ibid* 486.

⁶⁹ Raz, *The Morality of Freedom* (n 40) 307–313.

consent.⁷⁰ To the extent that the law improves the prevailing social morality around sexual consent, it has the potential to protect or reinforce the constitutive norms of many varieties of sexual relationships. This is one example of law's ability to improve social morality directly. Marital relationships, as they were once interpreted by social morality, contained a constitutive permission for non-consensual sex between partners. The criminalisation of marital rape has doubtless played a role in shifting the constitutive social norms that govern sex within marriage.⁷¹

It might be objected that Green's argument neglects the displacement cost of legal intervention to modify social norms. When the law intervenes to promote (even indirectly) certain social norms that are deemed to be valuable, it risks weakening the very norms that it is designed to protect. If the law intervened to indirectly encourage people to be polite, for instance, then it would risk weakening existing social practices designed to support norms of etiquette. It might lead the society in question to develop excessively legalistic attitudes to the norms in question. Norms around sexual consent provide one example of

⁷⁰ Green (n 66) 489–494.

⁷¹ Anyone who doubts that marital rape was once socially permissible need only read Glanville Williams's execrable defence of the exemption, written as recently as 1991: Glanville Williams, 'The Problem of Domestic Rape: Part I' (1991) 141 *New Law Journal* 205; Glanville Williams, 'The Problem of Domestic Rape: Part II' (1991) 141 *New Law Journal* 246.

this—an excessive focus on marital rape might displace the development of certain social norms designed to ensure that married couples have sex that is aimed at conforming with certain ideals—not just the minimum standards permitted by law. People might cease to sanction impolite behaviour in other, socially moderate, ways. Green’s argument does not ignore these risks conceptually, since he admits the possibility of intervention that is self-defeating or instrumentally undesirable, but they are not given much emphasis in his empirical discussion.

I do not think that this concern should dissuade us from using the law to improve social morality. Not all kinds of legal intervention will displace existing social norms—some of them might strengthen them by encouraging social re-evaluation. The kinds of intervention that Green has in mind, moreover, are those which are usually designed to remedy a situation in which attempts to improve social morality in other, more moderate, ways have been unsuccessful. Legal intervention sometimes offers a less than ideal form of intervention when other forms of social intervention have failed. However undesirable, this intervention can still be preferable to the status quo.

Social norms which govern spousal arrangements with respect to their children offer a further example of the law's potential to improve our normative relationships indirectly. The family has traditionally functioned as an institution that has furthered the subjugation of women, which has restricted women's autonomy and denied them equal status with their partners.⁷² There is a strong case for legal interventions that are designed to improve the social norms that are commonly believed to constitute the family.

The burdens of conforming with the duty to love, and its expressive counterparts, are often distributed unevenly. We have duties to care for our children, who cannot care for themselves, and whose interests thus warrant a special priority. The burdens of conforming with these duties are often distributed unjustly between the sexes.⁷³ Women are often left with the burdens of loving and caring for children. They are often inadequately compensated for this work, which further prevents them from pursuing worthwhile options outside of providing care. This creates what Muller-Okin refers to as a 'cycle of

⁷² This tension between liberal concerns and the traditional institution of the family is deftly exposed by Susan Moller-Okin in *Justice, Gender, and the Family* (Basic Books 1989). For a less optimistic critique of the liberal tradition see Pateman, *The Sexual Contract* (n 49).

⁷³ For two arguments (in very different contexts) that the distribution of duties and their benefits can be a kind of distributive injustice see John Gardner, 'What Is Tort Law For? Part 2. The Place of Distributive Justice', *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014); Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press 2002) 56–65.

socially caused and distinctly asymmetric vulnerability' that falls almost uniquely upon wives and mothers.⁷⁴ In this respect at least, the family has historically been a distinctly illiberal and unjust institution. There has been much very valuable scholarship done over the past several decades that demonstrates the role played by social understanding of the family in the subjugation of women, and in the inculcation of illiberal values in children.⁷⁵

A law which required parents to split their labour and effort with respect to their children evenly would be draconian, harmful, and difficult to enforce. It would be objectionable for transgressing all three of the principled limits on legal incorporation that I considered above. But the law can do many other things besides incorporating such a norm directly into law. It can, for example, lower the age at which schooling begins, and ensure that parents have access to adequate and affordable child care arrangements. It can mandate the employers provide both maternity and paternity leave to their employees. It can give tax-breaks to companies that provide mothers and fathers with flexible working arrangements, or provide various financial incentives for women to enter the

⁷⁴ Okin (n 72) 138. See also Pateman, *The Sexual Contract* (n 49) 116–153.

⁷⁵ The literature on liberalism and its treatment of women and the family, particularly Rawlsian liberalism, is now vast. For a useful summary see Debra Satz, 'Feminist Perspectives on Reproduction and the Family' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2013, 2013) <<http://plato.stanford.edu/archives/win2013/entries/feminism-family/>>.

workforce.⁷⁶ More radically, it could be mandated that spouses are equally entitled to each other's earnings, or companies could be compelled to provide flexible work arrangements.

There are, of course, good reasons to be sceptical of the traditional institutions of marriage and the family, and there are equally good reasons to be sceptical about the prospects of supposedly liberal legal intervention designed to secure their improvement.⁷⁷ Those who are committed opponents of the institutions will object that moderate reform can only conceal the poisonous roots of an institution that ought to be long dead.⁷⁸ Pateman concludes that 'the feminist victory is continuously subverted by entanglement with contract'—and contractual arrangements concerning marriage and the family are clearly amongst her intended targets.⁷⁹ If this critique is correct then there is little to be gained with legal intervention of any sort—it is better to let the institutions embodied by marriage and the nuclear family die on the vine. I do not mean to

⁷⁶ See the proposals made in Okin (n 72) 170–186.

⁷⁷ See e.g. Claudia Card, 'Against Marriage and Motherhood' (1996) 11 *Hypatia* 1; *The Sexual Contract* (n 49) 166–188.

⁷⁸ Elizabeth Brake sets out some of these feminist critiques, and ably proposes a number of liberal responses *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford University Press 2012) 112–120. Some of these concerns are, of course, echoed in queer and transgender critiques of marriage, which Brake also discusses.

⁷⁹ Pateman, *The Sexual Contract* (n 49) 188.

forestall this line of criticism here, though I do not find it persuasive. The possibility of indirect intervention demonstrates that, so long as we have these institutions, it is possible to improve them in a variety of ways that fall short of direct enforcement of changes envisaged. These improvements might fall well short of the political ideal, but they could still be worth securing.

The law's capacity to promote relational norms indirectly shows one way in which liberal principles might be reconciled with the observation that the family is—or has historically been—an illiberal institution. Any reluctance to intervene in our various normative relationships directly may be construed, less as a function of a deep concern to preserve the sanctity of the 'private' sphere,⁸⁰ and more as recognition of the profound limits of the law to directly achieve the kinds of social change that many critics of the family rightly envisage. There is much that the law can and should do indirectly to promote this change, but intervention in the form of enforcement of these changes is seldom desirable. The observation that there are limits to the law's ability to uphold relational norms should not be seen as necessarily conservative. We can still promote change—

⁸⁰ cf Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy' in Stanley Benn and Gerald Gaus (eds), *Public and Private in Social Life* (Croom Helm 1983).

even radical change—in those relational norms that are accepted and practised within a community.

5.5 Conclusion

This Chapter has considered many of the various philosophical issues raised by the incorporation of relational norms in law. I began with a brief discussion of the variety of ways in which the law might be said that the law incorporates relational norms. I considered several ways in which the law might incorporate those norms. I then discussed the extent to which three well-known principles restrained the law's ability to uphold relational norm.

I focussed throughout this discussion on the norms that define the relationship between parents and their children—in particular, the duty to love. I began by examining parents' duties to love their children. I then considered the rationale for restraining from incorporating this duty in law. This provided an opportunity to discuss a variety of considerations that limit the desirability of incorporating relational norms into law. Finally, I discussed several ways in which the law might nonetheless improve our normative relationships—often indirectly—by encouraging the social acceptance of new constitutive norms. There is much the law can do to encourage the social reconstitution of the

family—to ensure that the family life is not simply a convenient excuse for patterns of behaviour that are illiberal or unjust. This demonstrates the ways in which the law can act to support and promote normative relationships indirectly, without directly upholding or enforcing them.

The specific arguments that I have made in this Chapter are important to the overall argument of this thesis. Though relational norms are important to the understanding of law, their legal form and content are inevitably modulated by the law's unique strengths and weaknesses as an instrument of social control. In the remaining two Chapters of Part II, I continue to discuss the incorporation of relational norms in law. In the next Chapter of this thesis, I consider the extent to which the private law is defined by the incorporation of the relational norms. In Chapter 7 of the thesis, I consider the extent to which certain roles and responsibilities within relationships are protected by legal rights. My discussion here has paved the way for these later Chapters, by putting certain constraints on the legal recognition of relational norms in a broader philosophical context.

CHAPTER 6: RELATIONSHIPS AND CORRELATIVITY IN PRIVATE LAW

This Chapter is a discussion of relational norms in private law. In this thesis, I take it for granted that there are aspects of the law that cannot be understood relationally. Many accounts of the private law nonetheless stress that the private law is defined by the presence of relational, 'bilateral' or 'bipolar' obligations that connect plaintiff and defendant. This Chapter examines the justification, content and theoretical significance of these relationships in private law. I make two related arguments. First, I argue that the private law is not exhausted by the incorporation of pre-existing relational norms, though such norms are indispensable to the philosophical explanation of some private law doctrine. Second, I argue that appeals to the 'relationality' or 'correlativity' of legal positions risk concealing otherwise substantive theoretical disagreement about the content and justification of private law norms.

Private law is sometimes said to be defined exhaustively by a relationship of correlativity that exists between plaintiff and defendant. The plaintiff's rights correlate with duties of equivalent content on behalf of the defendant. It is in the

private law that correlativity obtains its purchase.¹ An emphasis on correlativity is indulged by the form of the civil trial, in which plaintiff is pitted against defendant with the judge acting as a kind of ‘agent’ of enforcement.² Theoretical accounts of the private law take, as their undisputed starting point, the bilateral structure of the civil trial. They exploit what Peter Cane has memorably referred to as the ‘pathology of the legal system’.³

In the first section of the Chapter, I consider the argument that the private law is constituted by the incorporation of pre-existing relational norms. I argue that although the private law does incorporate norms that are constitutive of relationships, and that this is of some philosophical significance, there are norms in private law that are not relational in any familiar sense. In the second part of the chapter I consider three varieties of correlativity that could be said to define the private law, and argue that none of these accounts offers a substantive account of private law relations that is self-evidently correct.

¹ Peter Cane, ‘Corrective Justice and Correlativity in Private Law’ (1996) 16 *Oxford Journal of Legal Studies* 471, 481–482.

² On the judge as an ‘intermediate of justice’, see Aristotle, *Nicomachean Ethics* (Roger Crisp ed & tran, Cambridge University Press 2000) bk V, ch 4.

³ Peter Cane, ‘The Anatomy of Private Law Theory: A 25th Anniversary Essay’ (2005) 25 *Oxford Journal of Legal Studies* 203, 211; cf Ernest Weinrib, *The Idea of Private Law* (Revised, Oxford University Press 2013) 105.

Though it may seem trite, I think that this last argument is important. Theorists of private law have sometimes referred to the ‘correlative’ character of private law as if it were not in need of any further explication. According to Weinrib, correlativity is not ‘in the heavens’, but ‘before our very noses’; corrective justice theory ‘merely takes the most manifest aspect of private law—that liability links plaintiff and defendant—and works out its theoretical implications’.⁴ The existence of divergent interpretations of the norms that relate plaintiff and defendant puts paid to the idea that the theoretical significance of the correlative relationships that define private law is in any way self-evident.

My argument proceeds in four sections. In Section 6.1, I discuss conceptions of the private law in terms of the relationship between plaintiff and defendant in slightly greater detail. Section 6.2 considers the argument that the private law is defined exhaustively by what this thesis has called relational norms. In Section 6.3, I consider three different formulations of the relationship of correlativity that exists between plaintiff and defendant in private law. First, I reintroduce Hohfeld’s purificatory version of the correlativity thesis or

⁴ Ernest J Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice’ (2001) 2 *Theoretical Inquiries in Law* 15.

‘correlativity axiom’.⁵ I then discuss the type of correlativity attributed to private law by theorists like Weinrib who emphasise private law as a body of norms of corrective justice connecting juridical parties.⁶ I describe this, following Weinrib, as ‘bipolar correlativity’. The third, and final, formulation of correlativity that I consider in Section 6.3 is the correlativity of the rights of plaintiffs—conceived of as individual entitlements, and the particular duties that they justify towards the right-bearer.⁷ I will describe this third formulation of correlativity as ‘justificatory correlativity’.⁸ Each of the three accounts of correlativity enables the description of private law in terms of the right-duty pairings that connect plaintiff and defendant, but each account allows for partly divergent theoretical explanations of these relationships. In Section 6.4 I offer some further reflections on the

⁵ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1919). On Hohfeld’s thesis as a ‘purificatory’ thesis in deontic logic see Matthew Kramer, ‘Rights Without Trimmings’ in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights* (Oxford University Press 1998).

⁶ Ernest Weinrib, *Corrective Justice* (Oxford University Press 2012) ch 1; Weinrib, *The Idea of Private Law* (n 3) 5.

⁷ See especially Kenneth Campbell, ‘The Concept of Rights’ (University of Oxford, Faculty of Law 1979); Neil MacCormick, ‘Children’s Rights: A Test Case for Theories of Rights’ (1976) 62 ARSP: Archiv für Rechts-und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy 305; DN MacCormick, ‘Rights in Legislation’, *Law, Morality and Society* (Clarendon Press 1977); Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988).

⁸ cf Kramer’s ‘justificational correlativity’ discussed in (n 5) 37. Note that Kramer is not himself interested in ‘justificational correlativity’; instead he is trying to interpret various claims made by Dworkin and others about the correlation of rights and duties, and settles on ‘justificational correlativity’ as a useful label for their concern.

significance of these various formulations for theoretical explanations of private law.

6.1 Relational Conceptions of Private Law

Private law is often said to be defined exhaustively by the rights that we hold against one another and the correlative duties that we owe to one another.⁹ The most lucid examples of this approach can be found in philosophical treatments of the law of torts, though many theorists who discuss correlativity in private law make it clear that they intend their discussion to apply to the entire law of obligations.¹⁰

Correlativity is invoked in pursuit of what might be called *relational* conceptions of legal doctrine.¹¹ Jules Coleman suggests, for instance, that ‘all viable accounts of corrective justice’ in torts must account for correlativity.¹² He adds that while ‘correlativity’ is an ‘unhappy phrase’, at minimum it designates a

⁹ E.g. Robert Stevens, ‘The Conflict of Rights’ in Andrew Robertson and Hang Wu Tang (ed), *The Goals of Private Law* (Hart Pub 2009) 141.

¹⁰ See e.g. Weinrib on contract law and restitution; Weinrib, *The Idea of Private Law* (n 3) 136–142.

¹¹ On ‘relational conceptions’ of tort see Jules L Coleman, *Risks and Wrongs* (Oxford University Press 1992) 314. For a summary of the invocation of relational duties in tort law see also Stephen Perry, ‘Torts, Rights and Risk’ in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 40–44.

¹² Jules Coleman, ‘The Practice of Corrective Justice’ in Owen, David (ed), *The Philosophical Foundations of Tort Law* (Oxford University Press 1997) 66.

‘normatively important relationship’ between the parties.¹³ But (as Coleman himself acknowledges) there are a variety of different forms that this normatively significant relationship could be said to take. Some of these forms will be more or less suitable for different partisan accounts of private law doctrine.

Many divergent theoretical accounts share a commitment to viewing the law of torts in relational terms, even where they otherwise diverge on the explanation of its various doctrines. These accounts often cite judicial reasoning in order to justify this commitment. In the much discussed decision in *Palsgraf v Long Island Railroad Co*, employees of the Railroad Company pushed a passenger boarding a train, in order to assist him.¹⁴ The passenger dropped a package onto the tracks, which, unknown to the Railroad Company employees, contained fireworks. The fireworks exploded and injured another passenger, Mrs Palsgraf. In rejecting Mrs Palsgraf’s claim in negligence, Judge Cardozo argued that the Company’s duties only extended to guarding others from foreseeable risks. Cardozo’s judgment is framed in relational terms—‘the conduct of the defendant’s guard, if a wrong in relation to the holder of the package, was not a

¹³ *ibid* 66–67.

¹⁴ *Palsgraf v Long Island Railroad Co* 248 NY 339 (1928). See also *Macpherson v Buick Motor Co* 217 N.Y. 392 (1916); *Bourhill v Young* [1943] AC 92 (HL).

wrong *in relation* to the plaintiff, standing far away'.¹⁵ Mrs Palsgraf did not stand in the right sort of relation to the employees to have been wronged by their conduct.¹⁶ The duty was not owed to Mrs Palsgraf as a matter of pre-existing relationship between her and the Railway Company.

The relational conception of negligence is not confined to American jurisprudence. The English case law has, at various times, also stressed the relationality of the duty of care that constitutes negligence. It is evident, for instance, in Atkin LJ's insistence that neighbourhood is the general form of 'relations giving rise to a duty of care',¹⁷ and in Oliver LJ's insistence in *Caparo Industries v Dickman* on the existence of a 'sufficient relationship of proximity or neighbourhood'.¹⁸

Weinrib treats Cardozo's judgment in *Palsgraf* as a litmus test for his own theory of tort law. The judgment 'presents and integrates several expressions of correlativity, in the meaning of wrongfulness for tort law (as contrasted with the

¹⁵ *ibid*; emphasis added.

¹⁶ I will not discuss at any length whether or not Cardozo's judgment was correct, but it seems to me that it was at least contestable. Jane Stapleton notes that Cardozo's judgment appears cruel, when viewed from a certain perspective, rather than principled; Jane Stapleton, 'Evaluating Goldberg and Zipursky's Civil Recourse Theory' (2006) 75 *Fordham Law Review* 1529, 1550.

¹⁷ *Donoghue v Stevenson* [1932] AC 562 (HL), 580.

¹⁸ *Caparo Industries v Dickman* [1990] 2 AC 605 (HL), 632-633.

criminal law); in the correlativity of the defendant's duty and the plaintiff's rights; and in the elucidation of risk as a relational concept'.¹⁹ Zipursky and Perry appropriate Cardozo's judgment in a similar fashion.²⁰ Theories of tort law, it is supposed, must at minimum account for the 'relational' character of the duties owed to the plaintiff, as well as the resultant wrong arising from the breach of such a duty.

6.2 Relationship Sensitivity

Private law undeniably evinces a kind of doctrinal sensitivity to the shape of the pre-existing relationship between plaintiff and defendant. In their early work on torts, Goldberg and Zipursky argued that 'relationship sensitivity' was a theoretically underexplored aspect of our duties of care in tort law.²¹ They observed that in the law of torts, 'the existence and content of the duties of care

¹⁹ Weinrib, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (n 4) 24.

²⁰ Benjamin C Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 *Vanderbilt Law Review* 1; Perry (n 11) 40.

²¹ John Goldberg and Benjamin Zipursky, 'The Moral of Macpherson' (1998) 146 *University of Pennsylvania Law Review* 1734; Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (n 20); Benjamin Zipursky, 'Legal Malpractice and the Structure of Negligence Law' (1998) 67 *Fordham Law Review* 649.

one person owes to another are dependent, in part, on the nature of the relationship between those persons'.²²

I agree with Goldberg and Zipursky that relationship sensitivity is an underappreciated feature of tort law, and would add that I think it is an under-recognised feature of the private law more broadly. Relationship sensitivity in private law extends beyond the law of tort. Many equitable wrongs are centrally defined by their relationship sensitivity. Breaches of fiduciary duty and breaches of confidence occur only where there is a particular relationship between the plaintiff and the defendant (a relationship defined by circumstances giving rise to 'trust and confidence', between the parties).²³ In determining whether or not such relationships exist, courts in equity often have regard to different categories of relationship between the parties and their constituent norms.

Relationship sensitivity is significant to the theoretical explanation of the private law. The rights and duties that define private law are not simply rights and duties that we possess against and towards one another simply in virtue of our status as moral agents. Tort law is not just concerned with duties of care that each of us owe to each other; it is concerned with the particular duties of care

²² Goldberg and Zipursky (n 21) 1829.

²³ *Bristol & West Banking Society v Mothew* [1996] 4 All ER 698 (CA) 711-712, per Millet LJ.

that define the relationship between parent and child,²⁴ between client and advisor,²⁵ or between immediate neighbours.²⁶ The law shows a noteworthy readiness to incorporate or have reference to pre-existing relationships and their constitutive norms. (It is noteworthy because of the law's general reluctance to uphold relational norms).²⁷ It has been argued that it reflects this readiness in its willingness to frame our duties of care in relational terms.²⁸

Theoretical explanations of the law that focus solely on the rights and duties that we possess towards or against the world at large will lack an explanation of the relationship sensitivity of private law—unless they are augmented with an account of the way in which these individual rights and duties are reflected in our various interpersonal relationships. The duties of care that I owe towards students in my class are distinct from the duties I owe the world at large. They are shaped by the history of interactions between us and the

²⁴ cf *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) 588 per Hutton LJ.

²⁵ *Hilton v Barker Booth Eastwood* [2005] UKHL 8; [2005] 1 All ER 651.

²⁶ *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18; [1987] AC 241.

²⁷ See Chapter 5. The law is generally reluctant to intervene in our personal affairs in this way, for reasons discussed in that Chapter.

²⁸ cf Ripstein on the 'incorporation thesis'; Arthur Ripstein, 'Civil Recourse and Separation of Wrongs and Remedies' (2011) 39 Florida State University Law Review 163, 182–192. Goldberg suggests that the view of tort law as the incorporation of socially accepted primary duties influenced Cardozo's judgment in *Palsgraf*; Goldberg and Zipursky (n 21) fn. 43.

particular distinctive duties that I have assumed towards my students. But many accounts of the right-duty relationship in private law place surprisingly little emphasis on this kind of relationship sensitivity. Weinrib and Ripstein both offer explanations of the private law that focus on duties of Kantian right.²⁹ The norms that they identify as of primary explanatory importance are impartial and reciprocal—they are the norms that might constitute what Christine Korsgaard describes as ‘citizenship in the Kingdom of Ends’.³⁰ At least some of the norms of private law are norms that are sensitive to narrower relationships between persons—they reflect the law’s endorsement of certain kinds of partiality.

It is, of course, a possibility that we possess these relational rights and duties indirectly, in virtue of our more fundamental rights and duties. Perhaps my rights to accurate advice from my lawyer or to care from my employer are derived from a more basic right—a right to honesty or a right to ‘fair terms of social interaction’—that I possess regardless of whether or not I have ever been

²⁹ Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press 2001); Arthur Ripstein, ‘Philosophy of Tort Law’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002); Ripstein, ‘Civil Recourse and Separation of Wrongs and Remedies’ (n 28); Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice’ (n 4); Weinrib, *The Idea of Private Law* (n 3) 4. Discussed further below.

³⁰ Christine M Korsgaard, *The Sources of Normativity* (Cambridge University Press 1996) 127. They are impartial as between persons, at least. They obviously admit a certain kind of partiality towards persons over other non-human animals.

to see a lawyer or whether or not I have ever been employed.³¹ The same could be said for the duties that physical neighbours owe to one another in nuisance law, or that guardians owe to those under their guardianship. According to those who favour this kind of explanation, the fundamental duties of fairness that I owe others give rise to particular special duties within certain relationships as a matter of application.³² A proviso is sometimes added that those relationships must themselves be justified on impartial grounds.³³ This might be described as a kind of ‘two level’ view of our relational obligations: ‘from an impartial perspective, one can see good reasons for principles which enjoin partiality’.³⁴ Though I have my doubts about this sort of approach to relational norms, I will not quibble with it here. The key point to be made here is that even these explanations do not ignore our relationships. The relationships themselves must still feature in the justification of the rights and duties in question.

³¹ See e.g. Ripstein, *Equality, Responsibility, and the Law* (n 29) 48–93.

³² E.g. Immanuel Kant, *The Metaphysics of Morals* (Gregor, Mary J. ed, Cambridge University Press 1996) section 45.

³³ Versions of such an account are offered in Jonathan E Adler, ‘Particularity, Gilligan, and the Two-Levels View: A Reply’ (1989) 100 *Ethics* 149; Marcia Baron, ‘Impartiality and Friendship’ (1991) 101 *Ethics* 836.

³⁴ Baron (n 33) 842. This two-level approach is not limited to Kantians; for a rule-utilitarian defence see Brad Hooker, ‘When Is Impartiality Morally Appropriate?’ in Brian Feltham and John Cottingham (eds), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010); John Gardner and Timothy Macklem, ‘Reasons’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press 2002) 457–459.

In spite of the private law's obvious readiness to incorporate and protect a variety of relational norms, there are norms in the private law that do not display any familiar kind of relationship sensitivity. We might describe these norms as *impersonal* relational norms, in order to distinguish them from those norms that are constitutive of intimate personal relationships. Some of the duties with which tort law is concerned are duties owed towards the world at large, or at least to classes of persons at large. Goldberg and Zipursky themselves acknowledge that there are norms in tort law that are not constitutive of any pre-existing relationship between the parties. They identify the relationships constituted by duties of care in negligence cases as 'stranger-stranger' relationships, which are not dependent on any prior history of interaction between the plaintiff and the defendant.³⁵ Their appeal to the nature of the 'stranger-stranger' relationship is reminiscent of Atkin LJ's appeal to the relationship of neighbourhood in *Donoghue v Stevenson*, which I discussed in Chapter 3. According to Atkin L, the relationship of neighbourhood at law is defined by a certain kind of closeness or proximity—a vulnerability to being harmed by one's actions. This formulation stretches our intuitive idea of a relationship of practical significance close to breaking point. Rather than being personal relationships, the relationships of

³⁵ Goldberg and Zipursky (n 21) 1830.

negligence law are what might be called *de dicto* relationships—they connect individuals in virtue of descriptive characteristics that they share (railway employees and passengers, manufacturers and consumers, doer and sufferer of harm), and they may do so in spite of the lack of any previous history of interaction between the parties.³⁶

I will argue that the distinction between the personal and the impersonal is false or at least misleading. Some philosophers use language that suggests that there is a relationship of fellowship or humanity that is directly analogous to other categories of relationship (like friendship or love).³⁷ In fact, it has become popular in more recent times to argue that morality itself might have some especially relational character—that our moral duties are essentially duties that are constitutive of our relationship to one another.³⁸ Different arguments to this effect, which place great weight on the ‘bipolar’ or ‘second-personal’ structure of

³⁶ For one invocation of *de dicto* wrongings see Caspar Hare, ‘Voices From Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?’ (2007) 117 *Ethics* 498. There are great difficulties in invoking *de dicto* moral relationships, which were noted by Derek Parfit in his original presentation of the non-identity problem; Derek Parfit, *Reasons and Persons* (Oxford University Press 1984) 359–360.

³⁷ According to Marcia Baron, the distinction between personal and impersonal relationships is an ‘important source of the disagreement between partialists and impartialists’; Baron (n 33) 845.

³⁸ I say that it is recent, though a general appeal to relationality is evident in much of Scanlon’s early contractualist work and in Nagel’s early work; see Thomas Nagel, ‘War and Massacre’ (1972) 1 *Philosophy and Public Affairs* 123; TM Scanlon, *What We Owe to Each Other* (Harvard University Press 1998).

morality, have been advanced by Wallace, Scanlon, Darwall and Thompson.³⁹ As attractive as these appeals to a general moral relationship might be, I think there are good reasons for doubting their prospects. There are a number of crucial points of distinction between personal relationships and the impersonal relationships that are claimed as a basis for moral theory.⁴⁰

The most basic distinction is in terms of their value (or disvalue). In personal relationships, like friendship, the duties that define friendship are indispensable to the realisation of the value of the relationship. Many of the impersonal relationships that define tort law have no discernible value—they may be accidental or unavoidable, but they are not desirable. Consider Atkin LJ's formulation of the relationship of neighbourhood in *Donoghue v Stevenson*.

³⁹ Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press 2006); Stephen Darwall, 'Bipolar Obligation' in R Shafer-Landau (ed), *Oxford Studies in Metaethics*, vol 7 (Oxford University Press 2012); Thomas Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press 2008) ch 4; Michael Thompson, 'What Is It to Wrong Someone? A Puzzle About Justice', *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Clarendon Press 2004); R Jay Wallace, 'Reasons, Relations and Commands: Reflections on Darwall' (2007) 118 *Ethics* 24; R Jay Wallace, 'The Deontic Structure of Morality' in David Bakhurst, Margaret Olivia Little and Brad Hooker (eds), *Thinking About Reasons: Themes From the Philosophy of Jonathan Dancy* (Oxford University Press 2013); R Jay Wallace, 'Duties of Love' (2012) 86 *Aristotelian Society Supplementary Volume* 175.

⁴⁰ For expressions of doubt along similar lines to those offered here, see Samuel Scheffler, 'Morality and Reasonable Partiality' in Brian Feltham and John Cottingham (eds), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010) 125–128. I have also been influenced by discussions I have had with John Gardner about his unpublished work.

As John Gardner has observed, there is no distinct value in belonging to the class of persons who might be harmed by another's conduct.⁴¹ This class of person is one that most of us would wish to avoid. It has, if anything, a distinct disvalue. Other categories of impersonal relationship raise similar concerns.

Another point of distinction is that in the impersonal relationships that are said to define private law there need be no shared history of interaction, or commitment to a future history of interaction, of the sort that defines intimate personal relationships. In emphasising the importance of shared history, I do not mean to exaggerate its importance. Many valuable relationships are formed on very slight kinds of interaction, or even a shared commitment to interacting minimally.⁴² Contractual relationships are often defined by a commitment to very slight interaction, for example. But it strikes me as significant that many of the relationships that are said to define tort law work best when there is no interaction between the parties whatsoever. The relationship between me, as the duty-bearer, and the potential victims of my breach, is most desirable when we do not interact, when my duty is not breached and when my actions inflict no harm. (Perhaps this is just another indication that the relationship in question has

⁴¹ In conversation and in currently unpublished work.

⁴² I am grateful to John Gardner for making this point.

no particular value. A shared history is constitutive of most relationships of value—but when a relationship has no value, it gives us no reason to desire any kind of shared history between the parties.)

A related point is that impersonal relationships similarly fail to demonstrate the same constitutive role for uniqueness in the personal value of the relationship. (One of the ways of securing this uniqueness is through the building of a shared history). As Raz observes in his discussion of St Exbury's *The Little Prince*, the Prince's rose has value, in part, because it is his rose, because he has tamed it by developing a shared history of interaction. The rose 'is not perceptually unique, but unique she is, made unique by the history of their love'.⁴³ Part of the personal value of my friendships is their uniqueness—their value arises in part because they are not simply replaceable with another friendship. They are *my* friends—and they have a special value to me because of their role in my life. But there is nothing that distinguishes my relationship with actual road users from another relationship with other possible road users that I could just as easily have formed. The relationship has no uniqueness, and therefore no personal value. The problems with modelling impersonal relationships as relationships that have personal value are nicely brought out in

⁴³ Joseph Raz, *Value, Respect, and Attachment* (Cambridge University Press 2001) 22.

an example given by Derek Parfit. If all that mattered for a military general was being on the ‘winning side’, in an impersonal sense, then he could guarantee this by switching sides when the result of the battle became clear.⁴⁴ The side of battle that the general is on matters to him because it is *his* side—because it has played a role in his life that is not simply replaceable by joining another side.

These points of distinction lead me to doubt that many of the relationships that are said to define the private law are really relational in the sense in which I am interested. But I do not need to raise these doubts to make my point. If Goldman and Zipursky are right that our duties of care are exhaustively relationship sensitive, then they mean that they constitute distinct relationships nested within our universal moral relationships. According to Goldberg and Zipursky, the relationality of duties of care in negligence law explains why breaches of these duties of care are not wrongs against the world at large—the interests of some individuals are given priority in the moral calculus of negligence law.⁴⁵ The nature of these relationships of care (as with other personal relationships) can only be specified through reference to the rights and duties

⁴⁴ Parfit (n 36) 360.

⁴⁵ Goldberg and Zipursky (n 21) 1828–1832. cf Ripstein, *Equality, Responsibility, and the Law* (n 29) 106–107.

that define them.⁴⁶ In other words, the relationality of the norms of tort law is crucial to the theoretical explanation of why some parties have standing to complain for tortious breach while other affected parties do not. The primary duties of tort law are owed to individuals by the duty-bearers—they relate the breach of a duty to a specific individual who is wronged by the breach, and thus explain the nexus of the relationship between plaintiff and defendant.⁴⁷

However much the appeal to relationships between classes of persons succeeds as a way of describing aspects of our duties at private law, it is implausible as an account of the private law as a whole. At least some duties that define the law of torts are general duties not to injure others in a wrongful way. The duty not to defame another, for instance, is a duty owed to the world at large, for breach of which any injured party has standing to complain.⁴⁸ The duties of defamation law are not relationship sensitive in this way. They are simple duties not to defame others. Similarly, there is no reason to view some of

⁴⁶ Goldberg and Zipursky (n 21) 1832 fn. 379; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) 41.

⁴⁷ The importance of a theoretical explanation of standing is emphasised in Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (n 20) 10; Benjamin Zipursky, 'Civil Recourse, Not Corrective Justice' (2002) 91 *Georgetown Law Journal* 695; Benjamin Zipursky, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 *Florida State University Law Review* 299, 301–307.

⁴⁸ For an argument to this effect (also relying on the example of defamation), see Stapleton (n 16) 1551.

the duties that define negligence law as evincing any particular kind of relationship sensitivity. Some duties of care are not sensitive to any kind of features of the relationship between the parties. My duty to take care when I am behind the wheel of my car is a duty to the world at large, not just to fellow drivers or to nearby pedestrians.⁴⁹ The reason that I take care, and the reason that others can impugn me for my failure to take care, is that driving negligently is inherently dangerous to any number of different classes of persons.

Relational characterisations of our most basic duties of care therefore display an objectionable parochialism. The basic duty of negligence law is best characterised as a duty not to bring about harms to certain categories of persons by breaching an impersonal duty of care.⁵⁰ The duty of care may be owed to others than those who are harmed, but the law invokes separate norms (some of which may be relationship sensitive) in order to determine the question of

⁴⁹ As Gardner puts it (albeit in the criminal context), 'surely one should not be thinking of the roads as a place of fellowship. One should be thinking of them as a place of great danger, to be approached with great care, even-handedly extended to all actual and potential users'; John Gardner, 'Relations of Responsibility' in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford University Press 2011) 99.

⁵⁰ Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011) 262.

standing.⁵¹ It seems implausible to characterise duties of care in the private law as exhaustively relationship sensitive for this reason.

I have argued that some of the norms of private law are not pre-existing relational norms incorporated into law. More significantly, even if the norms of private law are relational in some significant sense, there is no way of characterising the correlativity of their rights and duties that is both philosophically informative and self-evident. In the following section, I consider three attempts at characterising the correlativity of plaintiff and defendant at private law in terms of the content and justification of the norms that define them. None of these approaches offers a self-evidently correct theoretical explanation of private law relationships.

6.3 Correlativity in Private Law

6.3.1 Hohfeldian Analysis

The most general invocation of correlativity to describe the private law belongs to the tradition of Hohfeldian analysis of legal positions. Hohfeld famously declared that there were four 'strictly fundamental legal relations': the relations

⁵¹ See Stapleton (n 16) 1544.

between right-bearer and duty-bearer, between the bearer of a privilege and bearer of a no-right, between the possessor of a power and the possessor of a liability, and between the possessor of a disability and the possessor of an immunity.⁵² Hohfeld envisaged his account of the law in terms of these four relations to be exhaustive by stipulation—he wrote that these four legal relations were *sui generis* and incapable of further philosophical explication.⁵³ Hohfeld’s ‘correlativity thesis’ provides the basis for this system of legal relations. In formulating the correlativity thesis Hohfeld quotes, with approval, dicta from *Lake Shore & M.S.R. Co v Kurtz*: ‘when a right is invaded, a duty is violated’.⁵⁴ This loose formulation of the correlativity thesis is consistent with a variety of alternative accounts of the relationship between rights and duties—it is not necessarily the relationship of logical equivalence that Hohfeld posits.⁵⁵ Hohfeld then clarifies matters by saying that ‘if X has a right against Y that he shall stay

⁵² Hohfeld (n 5).

⁵³ Hohfeld referred to his pairings as ‘the basic conceptions of law—the legal elements that enter into all types of jural interests’; *ibid* 27.

⁵⁴ *Lake Shore & M.S.R. Co v Kurtz* (1894) Ind. App., 60. Quoted in *ibid* 38.

⁵⁵ Note that logical equivalence is distinct from identity. That John is Fred’s nephew is logically equivalent to Fred being John’s uncle, but John’s uncle and Fred’s nephew are clearly not identical.

off the former's land, the correlative (and *equivalent*) is that Y is under a duty toward X to stay off the place'.⁵⁶

It is common to elide this version of the correlativity thesis with more substantive conceptions of correlativity in law, like the bipolar correlativity invoked by theorists of corrective justice (discussed below).⁵⁷ But, interpreted as many proponents of the Hohfeldian analysis of law suggest it should be interpreted, the correlativity thesis is just an axiom for the purposes of describing the law within a given logical schema.⁵⁸ In Hohfeld's schema, an obligation owed to S by T correlates with a claim right held by T against S of the same content, but his logic is silent on what, if anything, distinguishes an obligation owed to a claimant from an obligation *simpliciter*. At the very least, his logic is consistent with a variety of different accounts of what 'directs' a particular obligation to a right-holder.⁵⁹ In this respect, Hohfeldian correlativity should not yield any

⁵⁶ Hohfeld (n 5) 38.

⁵⁷ Some of these confusions are highlighted in Cane's critique of 'rights fundamentalism' in private law theory; Peter Cane, 'Rights in Private Law' in Donal Nolan and Andrew Robertson (ed), *Rights and Private Law* (Hart Pub 2012).

⁵⁸ Hence Kramer's now famous claim that Hohfeld's analysis belongs to a 'framework of deontic logic', and that it is not 'susceptible to moral objections or empirical refutation'; Kramer (n 5) 22.

⁵⁹ Some theorists have argued that, as a matter of exegesis, Hohfeld subscribed to what is known as the 'will' or 'choice' theory of rights; John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 202; cf. Kramer (n 5) 61 fn. 23. The treatment of 'directed duties' in rights analysis was addressed in Chapter 1.

particular theoretical explanation of private law. It is simply meant to provide a framework through which philosophical discussion of legal positions can be precisified or disambiguated.

The language of rights is often thought to function as an impediment to clear understanding of our moral and legal requirements. Hohfeld himself worried that the word 'right' is a 'chameleon-hued word' that is a 'peril both to clear thought and to lucid expression'.⁶⁰ This concern is shared by many (but obviously not all) philosophers and lawyers who adopt his approach. Amongst contemporary legal philosophers, John Finnis gives clear expression to this concern when he writes that 'most claims of right in the modern Western debate are, as they stand, indefensible stumbling blocks in the path of clear discussion between men of good-will'.⁶¹ The Hohfeldian approach is accordingly sometimes treated as a tool for precisifying the description of rights in law. Rights-talk is said to offer a way of reporting duties from the point of view of the person affected by them.⁶² Scholars who endorse Hohfeld's approach for this reason are

⁶⁰ Hohfeld (n 5) 35.

⁶¹ John Finnis, 'Some Professorial Fallacies About Rights' (1971) 4 *Adelaide Law Review* 377, 386.

⁶² John Finnis describes rights talk as a 'many faceted instrument for reporting and asserting the requirements or other implications of a relationship of justice...from the point of view of the person(s) who benefit(s) from that relationship'; Finnis *Natural Law and Natural Rights* (n 59) 210.

sceptical about the role of rights in practical reason. They treat rights as having a verdictive or conclusory role—rights are not seen as action-guiding in any relevant sense. They will accordingly reject attributing any normative significance to the fact that the law can be described in terms of right-duty pairings.⁶³

Even without embracing this sort of scepticism about rights, the putative neutrality of the logic means that Hohfeldian correlativity is compatible with a large variety of theoretical accounts of private law. The strength of Hohfeld's logical schema is the recognition that rights, universally, correspond to duties. It follows that rights can always be precisified in terms of the content of the duties to which they correspond. Analysis of the private law as constituted by pairs of Hohfeldian relations is consistent with a variety of different theories about the function and content of those relations.⁶⁴ It is, for instance, consistent with the thesis, often associated with civil recourse theory, that relationships that define tort law comprise primary rights and obligations coupled with the possession of

⁶³ ibid 218–221; John Oberdiek, 'Specifying Rights Out of Necessity' (2008) 28 *Oxford Journal of Legal Studies* 127. These concerns are explored in a constitutional law setting by Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2012).

⁶⁴ According to Kramer, 'The Correlativity axiom in itself leaves open the substance and distribution of various duties and rights'; 'Legal and Moral Obligation' in Martin P Golding and William A Edmundson (ed), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Pub 2005) 189.

a legal power to impose remedial duties upon infringement of those primary rights.⁶⁵ It is also consistent with the decidedly instrumental thesis that the private law exists to promote or protect the interests of right-bearers.⁶⁶

Hohfeldian analysis of the law only posits that it is relational in the very weak sense that relational predicates like ‘...owes a duty to...’ and ‘...has a right against...’ can be applied to the description in law. The analytical framework is capable of being used to describe a variety of legal positions that might otherwise not be regarded as being constituted by normatively significant relations of the sort that define private law. Hohfeld’s schema has been applied to public duties,⁶⁷ for instance, and to the various duties that are sometimes taken to define the criminal law.⁶⁸ The account therefore does little to resolve substantive debates about the nature of the private law relationship. It simply asks us to take the relationality of private law for granted, and offers a more precise way of parsing these significant legal relationships. It is possible to augment Hohfeldian analysis

⁶⁵ See e.g. Zipursky, ‘Rights, Wrongs, and Recourse in the Law of Torts’ (n 20).

⁶⁶ For further discussion of some of these ambiguities in the rights-based analysis of private law see Cane, ‘Rights in Private Law’ (n 57).

⁶⁷ E.g. Kramer (n 5) 58–60. Kramer argues that the distinction between duties in public law and the duties in private law is that public duties are owed to collectives, not individuals. But surely there are cases when this distinction breaks down (e.g. contracts involving collectives).

⁶⁸ E.g. Leif Wenar, ‘The Nature of Claim Rights’ (2013) 123 *Ethics* 202, 203.

of the private law with a variety of different substantive premises linking the plaintiff and the defendant. But none of these premises will be in and of themselves uncontroversial.

6.3.2 Bipolar Correlativity

A different invocation of correlativity can be found in the work of private law theorists who emphasise the form of private law norms as norms of corrective justice. Correlativity is said to reflect the ‘conclusion that the defendant and the plaintiff have respectively done and suffered the same injustice’.⁶⁹ I will describe this as the ‘bipolar correlativity’ thesis, since this notion of correlativity is aptly captured by Weinrib’s famous insistence that correlativity embodies what he calls ‘the bipolar character of the private law relationship’.⁷⁰ The norms that are constitutive of the private law relationship are exhaustively norms of corrective justice. Corrective justice, as Weinrib characterises it, is ‘latent in the bipolar relationship of plaintiff to defendant’.⁷¹

⁶⁹ Weinrib, *Corrective Justice* (n 6) 10.

⁷⁰ Weinrib, *The Idea of Private Law* (n 3) 133. cf Darwall’s use of ‘bipolar’ to describe any norms that are relational (he actually endorses a variant of the civil recourse theory of private law); Darwall, ‘Bipolar Obligation’ (n 39); Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (n 39) 177–178, 179–198.

⁷¹ Weinrib, *The Idea of Private Law* (n 3) 19.

For Weinrib, bipolar correlativity entails a relationship in which ‘one party’s normative gain is the other’s normative loss’.⁷² His account invokes Aristotle’s ‘arithmetic’ conception of justice—in which the judge’s role, as intermediary, is to restore transactional equality between the parties.⁷³ According to the bipolar correlativity thesis, if T suffers normatively to a degree against S, then S gains normatively to the same degree Γ against T. A normative gain or loss is distinct from a factual gain or loss. The ‘normative’ gain and loss in question arise out of the breach of a primary duty owed by the defendant to the plaintiff, which correlates with a right held by the plaintiff against the defendant. The defendant’s gain lies in their injustice towards the plaintiff, which is a breach of a primary duty. The plaintiff’s correlative loss lies in the injustice they suffer from the same breach. The remedy corrects their loss by undoing the injustice suffered and correcting the defendant’s wrongful gains.

The bipolar correlativity thesis is not the Hohfeldian correlativity thesis. It is possible to accept that the private law can be appropriately described in terms of various relational Hohfeldian positions without accepting the stronger claim that what unifies private law is *bipolar* correlativity. On the other hand, there is

⁷² *ibid* 120.

⁷³ Aristotle (n 2) V, ch 4. For exposition see John Gardner, ‘What Is Tort Law For? Part 1. The Place of Corrective Justice’ (2011) 30 *Law and Philosophy* 1, 9–10.

nothing in the corrective justice framework that commits its adherents to rejecting Hohfeldian correlativity. In fact, the Hohfeldian notion of correlativity can assist in the precise exposition of bipolar correlativity. According to proponents of bipolar correlativity, it defines a relationship between individuals who are, respectively, both the doer and sufferer of the same wrong. The wrong in question can itself be described in terms of the breach of a duty and the infringement of a correlative claim right. The relevant 'normative loss' is suffered by the holder of the claim right when the bearer of the correlative duty falls into breach, the relevant 'normative gain' is enjoyed by the duty-bearer upon failure to perform their duty.⁷⁴

But the bipolar correlativity that Weinrib and others locate in the private law is not exhausted by this kind of Hohfeldian analysis. There is more to bipolar correlativity than the correlativity of right and duty. Bipolar correlativity requires not just that the normative loss and normative gain be derived from breach of the same claim right or duty, but that they be *equal*—the defendant's

⁷⁴ For an elucidation of the view that private law wrongs are breaches of Hohfeldian claim-rights, see especially Robert Stevens, *Torts and Rights* (Oxford University Press 2007); Robert Stevens, 'Rights and Other Things' in Donal Nolan and Andrew Robertson (ed), *Rights and Private Law* (Hart Pub 2012). Curiously, Weinrib himself rejects the Hohfeldian view of right and duty as 'analytic reflexes of each other', on the ground that this view is 'inconsistent with the party's transactional equality'; Weinrib, *The Idea of Private Law* (n 3) 124.

remedy corrects their earlier wrong. Bipolar correlativity also relies on the tacit assumption that there is a wrong committed in private law that is the violation or infringement of the plaintiff's right. This view has also been contested. Some theorists concede, for instance, that the secondary duties in private law are duties owed to the plaintiff, but argue that the primary wrong committed by the defendant need not have been a wrong *against* the plaintiff.⁷⁵

A distinctive feature of many corrective justice accounts is the claim that the norms of corrective justice exhaust the content of the relationship between plaintiff and defendant in private law.⁷⁶ The normative relationship that exists between the plaintiff and the defendant is defined *exclusively* by the primary rights and duties that connect the two. Reference to external considerations that might ground these rights or duties, like individual interests or collective welfare, is not permitted. This has particular implications for the account of rights offered by some corrective justice theorists. Weinrib notes, for instance, that on his view, the plaintiff's rights cannot be understood 'simply as bundles of

⁷⁵ See especially Coleman (n 11) 314–318, 330–332; Nicolas Cornell, 'Wrongs, Rights, and Third Parties' (2015) 43 *Philosophy and Public Affairs* 109.

⁷⁶ cf Gardner on 'completeness'; 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (n 72) 4–6.

welfare'.⁷⁷ Rights must be understood (according to Weinrib) on distinctly Kantian terms—they are to be understood in terms of Kantian relations of right.⁷⁸ This view of rights is incompatible with 'interest' and 'will' theories of rights of the sort favoured by many contemporary philosophers. Ripstein observes that these alternative accounts rely on the view that rights are 'institutional instruments that constrain the conduct of others in order to protect things that matter apart from them'.⁷⁹

The invocation of bipolar correlativity is supposed to offer a theoretical explanation of what is apparent from the very form of liability in private law. Yet it is hard to see how the mere form of the relationship that connects the plaintiff and defendant is incompatible with rival views. There are other views of the right-duty relationship in private law that appear just as consistent with its formal structure.

⁷⁷ Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *The University of Toronto Law Journal* 349, 353.

⁷⁸ *ibid* 353–354.

⁷⁹ Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009) 34.

6.3.3 Justificatory Correlativity

It is possible to see the relational rights and duties of private law as grounded in more abstract individual rights possessed by the plaintiff. Accounts of rights in private law often focus on rights held by the plaintiff *against* the defendant, specified in terms of the content of the defendant's duty to the plaintiff. Rights can also be regarded as general individual entitlements that are capable, other things being equal, of justifying more specific duties owed to the right-bearer. Rather than being described in terms of three-placed predicates that relate a right to a duty-bearer, a right-bearer and an action, rights can instead be described in terms of a relationship between an individual and an object, proposition or state of affairs.⁸⁰ This function of rights is most common when rights are invoked in what Zimmerman calls the 'manifesto sense'—as they are in the language of fundamental human rights, for instance.⁸¹ Rights in the 'manifesto sense' are by no means anathema to the private law. Cave J's judgment in *Allen v Flood*, for instance, appealed to those 'personal rights with which we are most familiar', including 'rights of reputation', 'rights of bodily safety and freedom', and 'rights

⁸⁰ Finnis *Natural Law and Natural Rights* (n 59) 200.

⁸¹ Michael J Zimmerman, *Ignorance and Moral Obligation* (Oxford University Press 2014) 121–122.

of property'.⁸² Rights invoked in this way can then correlate with a variety of more specific duties directed towards the right-holder.⁸³ I will describe the correlation between abstract rights of this sort and the more specific duties owed to the rights holder as 'justificatory correlativity'.

Raz notes that many such rights may justify duties that 'fall short of securing their object'.⁸⁴ The justificatory correlativity allows for a gap to emerge between the content of our entitlements and the content of the duties that they justify. In common law, for instance, the 'rights of bodily safety' cited by *Cave J* are protected only in a variety of modified ways by the torts of personal injury. The importance of individual bodily safety does not make any accident or injury to that person wrongful. To be wrongful, conduct must in some way breach a more specific duty (such as the duty not to assault another) that correlates with the abstract right.

The treatment of rights as abstract entitlements that justify more specific duties owed to the right-holder does not threaten Hohfeldian analysis. As

⁸² *Allen v Flood* [1898] AC 1 (HL) 29.

⁸³ The possibility that private law relationships might protect individual goods is briefly, but intriguingly, conceded by Zipursky; 'Substantive Standing, Civil Recourse, and Corrective Justice' (n 47) 329.

⁸⁴ Raz, *The Morality of Freedom* (n 7) 170–171.

Kramer observes, this particular view of rights can be accommodated within the Hohfeldian schema by treating abstract rights as ‘inchoate entitlements’ which can be stated in terms of the more specific Hohfeldian pairings that they justify.⁸⁵ Many of those who initially offered justificatory accounts of rights took them to be in direct opposition to the Hohfeldian approach.⁸⁶ It is probably better to see the two as complementary.⁸⁷

Just as justificatory correlativity is not necessarily incompatible with Hohfeldian accounts of the private law, justificatory correlativity is not necessarily incompatible with accounts of private law that emphasise bipolar correlativity. Indeed, corrective justice theorists often take bipolar correlativity to be a kind of justificatory correlativity—the plaintiff’s primary right, properly specified, justifies an identical primary duty, because the specification of the

⁸⁵ Kramer (n 5) 45–49.

⁸⁶ See especially MacCormick, ‘Rights in Legislation’ (n 7); Campbell (n 7); Raz, *The Morality of Freedom* (n 7) 7.

⁸⁷ As Finnis says, the view of rights as abstract entitlements gives ‘an intelligible unity to a temporal series of many and varying *sets of Hohfeldian rights*’; (n 59) 201.

right must refer to precise content of the primary duty. Moreover, the right exhausts the possible justifications of the defendant's duty.⁸⁸

There are, however, ways of invoking justificatory correlativity that do impugn bipolar correlativity. To begin with, some theorists have relied on a variant of justificatory correlativity in order to explain strict liability in the private law. Feinberg's much discussed log cabin case, in which a hiker stumbles across an unoccupied cabin in the woods, and breaks into the cabin in order to guarantee his survival, is a useful point of entry into the debate. This problem as Feinberg envisaged it can be represented by the following trilemma.⁸⁹

- (1) The hiker has acted permissibly.
- (2) The hiker owes the cabin owner compensation.
- (3) If the hiker owes the cabin owner compensation, then the hiker has violated a right of the cabin owner.

⁸⁸ According to Weinrib, 'the plaintiff's right must be the ground of the defendant's duty, and the scope of the duty must include the kind of right-infringement that the plaintiff suffered'; Weinrib, *The Idea of Private Law* (n 3) 125.

⁸⁹ I am relying on Andrew Botterell's presentation of the problem; Andrew Botterell, 'In Defence of Infringement' (2008) 27 *Law and Philosophy* 269.

The common law has occasionally recognised liability to compensate in analogous situations, suggesting that the same trilemma also arises in the philosophical analysis of the private law.⁹⁰ The various ways out of the problem inevitably involve rejecting one of the three premises. The first is to deny that the hiker has acted permissibly—the hiker has instead violated a duty not to violate the property of the cabin owner, albeit justifiably.⁹¹ The second is to deny that the hiker owes the cabin owner compensation—they have acted permissibly, and therefore owe no compensation.⁹² The third involves denying the conditional premise in (3), above. It is argued that compensation can be owed to the cabin holder without the hiker having violated the cabin owner’s rights. In technical parlance, the hiker has ‘infringed’ the rights of the cabin owner, without ‘violating’ them.⁹³

⁹⁰ The most discussed case is *Vincent v Lake Erie Transportation* 124 NW 221 (1910); see also *Rylands v Fletcher* (1868) UKHL 1; (1868) LR 3 HL 330. A structurally similar problem has emerged in the philosophical discussion of the ‘right not to be harmed’ and the imposition of risk; see especially Zimmerman (n 81) 5.

⁹¹ John Gardner, ‘Wrongs and Faults’ in Andrew Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005).

⁹² John Oberdiek, ‘Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights’ (2004) 23 *Law and Philosophy* 325.

⁹³ This is the resolution of the trilemma that is favoured by Judith Thomson and Jules Coleman; Judith Jarvis Thomson, *Rights, Restitution, and Risk: Essays, in Moral Theory* (Harvard University Press 1986) 33–48; Coleman (n 11) 299–302.

This third way of resolving the trilemma tacitly relies on a kind of justificatory view of rights—the rights in question are conceived of in a more general, abstract form. The general right not to be harmed or have one’s property harmed cannot justify holding the hiker to be under a duty not to break into the cabin, but it does justify holding the same hiker to be under a duty to compensate them for infringement of their rights. The infringement/violation distinction invokes what John Oberdiek refers to as the ‘moral space’ view of rights—the view that the content of rights is determined solely by facts about the person (their status, property, interests), and not facts about the contexts in which the right is applied.⁹⁴ The ‘moral space’ view has been extensively criticised in the literature, and I will not respond to these criticisms in any length here.⁹⁵ My argument is just that it offers a sufficiently intelligible account of strict liability cases to make it a candidate explanation. If it is a correct account of the right-duty relationship, it is incompatible with bipolar correlativity. It allows for duties of repair to arise in situations in which there is no equivalent ‘normative gain’ in the form of an injustice on the defendant’s behalf. Their relationship to

⁹⁴ Oberdiek, ‘Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights’ (n 92) 326.

⁹⁵ See especially Oberdiek, ‘Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights’ (n 92); John Oberdiek, ‘What’s Wrong with Infringements (Insofar as Infringements Are Not Wrong): A Reply’ (2008) 27 *Law and Philosophy* 293; Oberdiek, ‘Specifying Rights Out of Necessity’ (n 63).

the plaintiff is an *ex post* relationship of repair for harms that were not wrongfully caused.

Abstract individual rights can be balanced against one another in order to determine the precise duties that should be imposed on defendants. The possibility of this sort of abstract reasoning threatens the view that private law is defined exclusively by immanently intelligible relationships of corrective justice. In other words, it threatens the view that corrective justice exhausts the normative content of the private law. It suggests that private law is occasionally called to evaluate the significance of general, or abstract rights that are predicated of individuals, and to determine the precise relationships of responsibility that these rights act as a reason for upholding. And there is evidence that this kind of thinking does impede on the private law, whether it ought to or not. Over the past decade, English judges have grappled with balancing ‘right to privacy’ against ‘freedom of expression’ in breach of confidence claims, for instance.⁹⁶ Contract lawyers frequently invoke the abstract right to ‘freedom of contract’, and weigh such freedom against broader considerations of public interest.⁹⁷ It is precisely this kind of teleological

⁹⁶ As in e.g. *Campbell v MGN Limited* [2004] UKHL 22; [2004] 2 AC 457 (HL).

⁹⁷ See e.g. *Prime Sight Ltd v Lavarello* [2013] UKPC 22; [2014] AC 436, [47] per Lord Toulson.

reasoning that is said by some to be anathema to the conception of law as corrective justice.⁹⁸

The justificatory view of rights also allows that legal rights may provide the ground for the development of legal doctrine, and for the imposition or recognition of novel relational norms.⁹⁹ There is no closed list of legal relationships that are grounded in an individual right.¹⁰⁰ Most notably, courts have recognised existing legal rights as the grounds for expanding the category of relational duties that are recognised by the law. In *White v Jones*, the House of Lords considered a claim by a plaintiff who had stood to benefit under a negligently drafted will.¹⁰¹ In spite of the fact that the case law had previously held that solicitors owed duties of care only to their client, given the existing relationship between the two, the court held that the solicitor should be liable to the third party for their negligence. Lord Goff based his decision in part on the importance of the ‘right of citizens to leave their assets to whom they please’, and

⁹⁸ Weinrib, *The Idea of Private Law* (n 3) 3–6. On the role of teleological reasoning in the common law, see John Harty, ‘Constraint and Freedom in the Common Law’ (2015) 15 *Philosophers’ Imprint*.

⁹⁹ On rights as justifications in legal reasoning see Joseph Raz, ‘Legal Rights’ (1984) 4 *Oxford Journal of Legal Studies* 1.

¹⁰⁰ I am paraphrasing Raz, here; *The Morality of Freedom* (n 7) 170. cf MacMillon LJ’s comment in *Donoghue v Stevenson* that the ‘categories of negligence are never closed’; (1932) AC 562, 619.

¹⁰¹ *White v Jones* [1995] 2 AC 207 (HL).

the recognition that this right meant that ‘legacies can be of great importance to individual citizens’.¹⁰² Lord Goff’s decision can be characterised as invoking a set of more general legal rights as the grounds for legal change.¹⁰³ The recognition of a legal right of testamentary freedom provided the ground for imposing a duty of care owed by the solicitor to the intended beneficiary.

This invocation of justificatory correlativity therefore challenges the purported exhaustiveness of corrective justice accounts of private law in another way. Because legal rights are treated as grounds for the imposition of novel duties of care, their recognition can have distributive effects—the existing legal rights provide justifications for the distribution of new legal rights and duties. When duties are distributed in this way, courts will inevitably have regard to considerations that are broader than the relationship between the parties. The question of whether or not to hold solicitors responsible towards third party beneficiaries is, in part, a distributive one.¹⁰⁴ It is an allocation of powers and

¹⁰² *ibid* 260.

¹⁰³ At least this is a plausible characterization of these decisions—I do not mean to claim that everyone will agree with this characterization. On legal rights as grounds for legal change see further Raz, ‘Legal Rights’ (n 99) 12–15.

¹⁰⁴ See especially John Gardner, ‘What Is Tort Law For? Part 2. The Place of Distributive Justice’, *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 338–346.

liabilities to various classes of parties, and this allocation is capable of being assessed as just or unjust in a distributive sense.

Grounding the relational norms of private law in the abstract rights of the plaintiff is obviously controversial. A common objection is that the justificatory view of rights invites conceptual confusions—that it confuses rights with the interests that ground them, for instance,¹⁰⁵ or that it robs rights of their importance by depriving them of a verdictive or conclusory character.¹⁰⁶ Another common objection is that allowing judges to reason in this way is normatively undesirable—that it allows for judges to engage in reasoning that threatens the coherence of legal doctrine. There is no more reason to expect consensus about justificatory correlativity than there is about any other aspect of the private law relationship. The possibility of justificatory correlativity—and its different interpretations—demonstrates that there are a variety of divergent philosophical accounts of the relationship between plaintiff and defendant in private law.

¹⁰⁵ See e.g. Kramer (n 5) 44; NE Simmonds, 'Rights at the Cutting Edge', *A Debate Over Rights* (Oxford University Press 1998) 114.

¹⁰⁶ See e.g. Finnis (n 59) 218–221; Oberdiek, 'Specifying Rights Out of Necessity' (n 63).

6.4 Legal Relations and Theoretical Explanation of Law

In my discussion in the preceding section I identified three possible characterisations of the relationship of correlativity that is said to exist between plaintiff and defendant in private law. I did not mean my discussion to be exhaustive—I am sure there are other ways of construing the right-duty relationship between plaintiff and defendant in private law. Rather I meant to demonstrate the need for accounts of the private law to do more than simply appeal to the apparent correlativity of the plaintiff's rights and the defendant's duties. The relationship between plaintiff as right-bearer and the defendant as bearer of a correlative duty can be understood in a variety of divergent ways, with a variety of different implications for how such a normatively significant relationship should be understood. It is also consistent with a diversity of views about the practical function of rights and their particular justificatory relationship to duties.

Explanation of the law involves engaging with the various normative claims made by the law. It therefore involves engaging with the various normative relationships that are incorporated into or created by legal doctrine. My own impression is that underlying the different invocations of correlativity in law is a desire for some self-evident datum that will constrain the philosophical

discussion of legal doctrine. If we could at least agree on the structure and content of the relationships that define private law, then this might allow us to coalesce around the explanation that best accounted for the contents of such relationships. But the explanation of legal doctrine inevitably involves engaging with its normative content, and it is futile to hope for ‘non-normative explanations of normative doctrine’.¹⁰⁷ In order to fully explain the law we need to describe the processes of justification in which the law purports to engage, and evaluate their soundness.¹⁰⁸ One’s views on the content and justification of the various norms that define the private law will depend, in part, on one’s other philosophical commitments (and *vice versa*). The view that the private law is *exhaustively* as opposed to partly concerned with corrective justice, for instance, rules out certain otherwise plausible views about the function of rights in practical reason.

It is true that the private law is particularly apt for description in terms of Hohfeldian correlates. Hohfeld’s own exposition of his schema relied almost exclusively on a variety of aspects of private law doctrine for its illustrations—his

¹⁰⁷ Raz, *From Normativity to Responsibility* (n 49) 258.

¹⁰⁸ Gardner, ‘What Is Tort Law For? Part 1. The Place of Corrective Justice’ (n 73) 2–3.

schema is particularly apt for the analysis of civil disputes.¹⁰⁹ But this datum alone tells us very little about the nature of the relationships that might be said to define private law. It merely provides a logical schema within which these relationships may be considered. The logic is also, as we have seen, consistent with a variety of different theories about the particular justificatory relationship that exists between rights and duties within private law.

I do not mean to claim that the relationality of private law is completely uninformative. All relational conceptions of private law (even those simply describing the law in terms of Hohfeldian rights and their correlatives) are agreed on one substantive point. At minimum, proponents of relational conceptions all agree that the private law partly comprises certain deontic states of affairs that connect the plaintiff to the defendant in a normatively significant relationship. This is enough to rule out the possibility that the private law is a simple economy of benefits and burdens distributed for optimal social efficiency. Relational conceptions of the private law are at least opposed to some of the crudest varieties of scepticism about legal rights and duties. So there is at least one theoretical purpose to invoking the relationality of the private law. Doing so demonstrates the implausibility of various forms of legal realism and economic

¹⁰⁹ A point noted by Simmonds (n 105) in his exposition of Hohfeld's 'formalism'.

analysis that ignore or treat as artifice the nature of the duties, powers and liabilities that connect the plaintiff and defendant.¹¹⁰ But it would be a mistake to take a shared acceptance that the private law comprises ‘normatively significant relationships’ as indicating a broader consensus about the normative structure of the private law. Proponents of relational conceptions of the private law agree that it is to be partly understood in terms of rights and duties shared between plaintiff and defendant. No broader consensus appears to exist between them.

6.5 Conclusion

Weinrib argues that correlativity is not ‘substantive’, but merely a ‘structural principle’—it refers to a ‘pattern of argument to which content (whatever it is) of private law should conform’.¹¹¹ Elsewhere Weinrib refers to correlativity as determining the ‘obvious fact’ that the plaintiff’s liability and the defendant’s liability are one and the same.¹¹² That private law ought to accord with this structure is treated as self-evident—if it did not adhere to this particular structure, the law would be unintelligible. Goldberg and Zipursky likewise

¹¹⁰ For instance, both Weinrib and Goldberg and Zipursky contrast relational conceptions of the private law with economic and realist analysis; Weinrib, *The Idea of Private Law* (n 3) 5–6; Goldberg and Zipursky (n 21).

¹¹¹ Weinrib, *Corrective Justice* (n 6) 10.

¹¹² Weinrib, ‘Correlativity, Personality, and the Emerging Consensus on Corrective Justice’ (n 4) 116.

frame their own project as one that better explains the ‘form, content, and pattern of reasons given within [private law] duty doctrine’.¹¹³ These authors show how tempting it is to frame theoretical arguments in terms of certain obvious ‘formal’ or ‘structural’ features of private law. This temptation should be resisted. There are few formal or structural features of the private law relationship that are uncontroversial.

This Chapter has considered a variety of attempts to describe the normatively significant relationships that at least partly define private law. It seems likely that the private law does consist in normatively significant relationships, of some sort or other, between persons. But there is no reason to expect consensus on either the justifications or constitutive features of these relationships. Simple appeals to the ‘relational’ or ‘correlative’ character of private law do very little to resolve debate about the normative foundations of private law doctrine. The apparent relationality of private law is consistent with a variety of different theoretical accounts of those legal relations.

In the next Chapter, I discuss the philosophical connection that exists between legal rights and the performance of various responsibilities within

¹¹³ Goldberg and Zipursky (n 21) 1827.

shared relationships. My argument in the next Chapter demonstrates the relevance of my argument in this Chapter in another way. I argue that, when identifying the grounds and content of rights within certain legal relationships, we need to engage in substantive moral inquiry about the nature of the relationships in question and their purported contribution to our interests. Appeals to the simple juridical form of these relationships are for this reason insufficient. There is a need to look beyond the structure or form of the relational norms in question to the interests that ground them.

CHAPTER 7: LEGAL RIGHTS, RELATIONSHIPS AND WELLBEING

In the previous two Chapters, I examined the incorporation of relational norms as legal norms, and the significance of relational norms to the theoretical explanation of legal doctrine—particularly private law doctrine. Both Chapters considered the role of the law in upholding and supporting relational norms. In this Chapter I continue to consider how parties' interests in their relationships are supported by the law. In particular, I discuss our rights to certain kinds of support from others in fulfilling responsibilities within a relationship. I take as my test case the rights of parents to support in fulfilling their parental responsibilities. The rights that concern me have a certain structure: they are rights that one party A has against another party B, so that B has some duty to assist with or abstain from interfering in A's relationship-based responsibilities towards C. In the case of parents, for example, these are rights to assistance or non-intrusion from third parties (such as the state) with respect to performance of duties towards their children.

This Chapter argues that our rights against third parties to perform a role and its associated duties and permissions are grounded in our interests in performing that role. The principal argument proceeds in two stages. In the first

section, I argue that many of our valuable roles are partly constituted by duties or obligations. In the second section, I argue that our valuable roles—even apparently burdensome roles—contribute to our interests. It follows that any rights that support us in performing a role that occurs within a valuable relationship also contribute to our interests in a special way. Once chosen, the role is no longer just a role. It is a role that has special value for its bearer. In the final section of the Chapter, I discuss the possibility of ‘detached’ or ‘non-committed’ rights attributions. Role-based rights may also be attributed to others in a detached or non-committed way in situations where it is mistakenly believed that the relationships in question sufficiently promote their interests.

7.1 Rights, Interests and *The Children Act*

The Children Act stipulates that ‘parental responsibilities’ include all those ‘rights’ which ‘by law a parent of a child has in relation to the child and his property’.¹ Here we have, in the language of the Act itself, an implicit equivalence between the rights of parents and the responsibilities and burdens that we place on them to act in their child’s best interests. Parental rights are defined as amongst the legal responsibilities of parents. Many of the decisions that parents have a right

¹ The Children Act 1989 (UK), s 3(1).

to make, and many of the actions that they have a right to undertake, are not to their apparent benefit. Parents have the right to decide how to school their children, to make decisions about their religious upbringing, and to make decisions about their child's medical treatment. Many of these rights must also be exercised with the child's interest in mind, not in the interests of the parents, and exercising these rights may even be quite burdensome for parents.² This is problematic because rights are supposed to be grounded in the interests of the parents.

We can distinguish between at least three distinct categories of parental rights against third parties:

- i. Rights that primarily serve the interests of the parent but which might contribute to the interests of children indirectly, for instance the right to tax credits designed to encourage single parents to re-enter the workforce.

² The Children Act 1989 (UK), s 1.

- ii. Rights against third parties that parents exercise vicariously on behalf of their children, for instance the right to buy pharmaceuticals on their children's behalf.³

- iii. Rights against third parties to assistance in the performance of certain parental responsibilities, the performance of which should benefit the child, for instance the right to child-benefit payments, which the parent is then duty-bound to spend on the child's behalf.⁴

There are important distinctions between these categories of parental rights. For my purposes here, not all parental rights are equally problematic. The parental rights identified in (i) are easily explained. Parents of course have many rights that stand to benefit children indirectly, but they pose no theoretical difficulty if the rights are grounded in the interests of their bearers. Rights in category (ii) are interesting but not problematic. They generally occur where there is an obvious match between the child's interests and the parents. The primary right to pharmaceuticals belongs to the child, but a secondary right to exercise that right

³ Brighouse and Swift characterise these rights as 'purely fiduciary'; Harry Brighouse and Adam Swift, 'Parents' Rights and the Value of the Family' (2006) 117 *Ethics* 80, 82.

⁴ Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) 50.

on the child's behalf is given to the parent, and it is not hard to see why it would be in parents' interests to exercise that secondary right. The rights that are the subject of my discussion here fall primarily within category (iii), though some parental rights can be hard to categorise, and may sit awkwardly between these different categories. The challenge that these rights present is that at least some of them appear to be rights to perform duties that are burdensome. It appears to be difficult to ground these rights in the interests of parents.

This is the crux of the challenge. I will argue that rights promote the interests of their bearers. Wherever there are rights, there are interests—not just any interests, but interests that are in themselves sufficient to justify holding others to be under a duty.⁵ But the rights of parents under *The Children Act* appear to offer a very direct counterexample to this philosophical position. How can it always be in a parent's interests to act on their child's behalf? Surely, parenting at least occasionally involves burdens and self-sacrifice. Furthermore,

⁵ As will become clear, I have in mind Joseph Raz's definition of a right; *The Morality of Freedom* (Oxford University Press 1988) 166. Another closely related account of rights holds that rights are just duties that benefit or are in the interest of the rights-holder. This is the account of rights commonly attributed to Bentham; see HLA Hart, 'Bentham on Legal Rights' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1973); Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights* (Oxford University Press 1998). I will not concern myself with defending this alternative version of the interest theory, though similar arguments are broached by Kramer and Steiner in their defence of one alternative (presumably Kramer's own); Matthew H Kramer and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 *Oxford Journal of Legal Studies* 281, 288–294.

any relevant interests belong to the child, and not to the parent. The parent has a right to act in their child's interest, but in no way does it serve their own interests to have this right.⁶

The problem presented by parental rights to so-called 'interest theories' of rights is really just a variant of a more general problem, which has been noted by a number of prominent critics.⁷ Many of our roles, both within our special relationships and within social or institutional structures, appear to exist because they serve the interests of others, rather than the interests of the role-bearer. A promisor has the right to keep their promise, even though they might have promised to do something that is unambiguously harmful to their own apparent

⁶ Historically, it is not the interest theory, but its principal rival—the so-called 'will' or 'choice' theory of rights—that is thought to have a problem with children's rights; Neil MacCormick, 'Children's Rights: A Test Case for Theories of Rights' (1976) 62 ARSP: Archiv für Rechts-und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy 305; cf. Onora O'Neill, 'Children's Rights and Children's Lives' (1988) 98 Ethics 445. I am not sure how many theorists have noted that the rights of parents with respect to their children present problems for naïve versions of the interest theory. Raz notes that the problem arises with respect to parents' rights to child benefit payments; Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (n 4) 50. Brighouse and Swift discuss the problem in some depth in their (n 3). In any case the general problem as it arises with respect to the rights of role-bearers is well discussed.

⁷ See especially Frances Kamm, *Intricate Ethics* (Oxford University Press 2007) 244–248; Gopal Sreenivasan, 'A Hybrid Theory of Claim Rights' (2005) 25 Oxford Journal of Legal Studies 257, 265–266; Leif Wenar, 'The Analysis of Rights' in Matthew H Kramer (ed), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (Oxford University Press 2008) 241–242; Leif Wenar, 'The Nature of Claim Rights' (2013) 123 Ethics 202, 204–207.

interest.⁸ A journalist has the right not to disclose their sources, even when that right does very little to protect the journalist's own interests, and may even damage them.⁹ Authorities and officials have rights to perform responsibilities that do not appear to be to their benefit. Legitimate authorities ought to act in the interests of the governed, rather than in their own interests. It is therefore hard to imagine how, on the interest theory, any of these role-bearers could accrue any rights properly associated with their responsibilities. Problems like this can be created for just about any purportedly burdensome role—especially those roles (like the roles of parent or police officer) that require us to make decisions or exercise powers on behalf of others.

Here I take up the challenge of explaining how it is that these rights to undertake burdens are grounded in the interests of their bearers. I defend the interest theory as an account of rights within certain relationships. When we attribute rights to a role-bearer within a certain relationship, it is either because an interest of the role-bearer is sufficient for holding another person to be under a duty, or because we are citing the existence of such a purported interest within a system of norms in a non-committal way.

⁸ Wenar, 'The Nature of Claim Rights' (n 7) 204.

⁹ Kamm (n 7) 244–248.

In section 7.2, I outline the theory of rights that I am defending. I then discuss the various ways in which the possibility of role-bearers' rights is supposed to be problematic for this theory. In section 7.3, I offer my response to the problem. First, I reflect upon the various ways in which many roles are defined in terms of their constituent duties. I then argue that our chosen roles form part of our valuable goals or achievements, and thus promote our interests. It follows that burdens and duties that are themselves constitutive of worthwhile roles or relationships also promote our interests.

In section 7.4, I consider a further issue that arises with respect to the discussion of role-bearer's rights in legal systems—the possibility of 'detached' or 'non-committed' rights attributions. Once the possibility of detached rights attributions is acknowledged, the force of many role-based counterexamples to the interest theory is diminished.

My aim in this chapter is not only to defend a particular account of rights in moral and legal philosophy, but also to reflect at greater length on the contribution that roles and relationships make to our wellbeing. It is wrong to draw an atomistic distinction between the interests of one individual and the interests of another. It is frequently in our own interests to serve the interests of

others. A similar problem affects theories of rights—while rights are individualistic in a trivial sense, many rights are also inextricably socially dependent. Our interests depend on our ability to serve and cooperate with others. The example provided by the definition of parental responsibilities in *The Children Act* ought to make this clear, in its own way. We might be reluctant to claim that it is always in our interests to be our parent, but we are also equally reluctant to make the converse claim—that it is always against our interests to be a parent. Parenting can be difficult; it requires us to alter our lifestyles and constrains our choices; it can even present us with tragic decisions that we would not have faced but for our decision to become parents.¹⁰ The same could equally be said of our decision to occupy a variety of other socially defined roles that involve apparent self-sacrifice in the pursuit of others' benefits. But occupying these roles still serves our interests in a fundamental way.

Before beginning, I need to make one quick terminological detour. It is tempting to claim that the rights of parents under the *Children Act*, and other similar role-based rights, are not rights, strictly speaking, but powers.¹¹ As we all

¹⁰ Think, for example, of the decision faced by the parents in *Re: A (Conjoined Twins)* [2001] 2 WLR 480 (CA).

¹¹ The so-called 'right to rule' is sometimes said to really be a misnomer—it is simply a normative power, on behalf of the ruler, to change the normative position of the ruled; for this characterisation see Joseph Raz, *The Authority of Law: Essays on Law and Morality*

know, Hohfeld suggested that ordinary rights-talk was ambiguous between rights, in the strict sense, and other normative positions. Often, Hohfeld argued, when we say that someone has ‘a right’, we mean that she has a power—an ability to change someone else’s normative position.¹² It is possible that the ‘rights’ of parents under the *Children Act* are really just powers to confer duties on others to perform. Even granting some ambiguity in the way that the word ‘right’ is used in ordinary language, I think it is likely that at least some role-based rights are what Hohfeld would have called claim rights or rights ‘in the strict sense’—rights that correspond to duties on behalf of others.¹³ In many cases, these rights are necessary to protect parents’ powers. They make parents’ powers under the act meaningful. For instance, parents’ rights to make decisions about the health of their children impose certain duties on doctors to inform

(2nd edn, Oxford University Press 2009) 16–20; Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 24. A variety of differing interpretations of the right to rule are discussed by Stephen Perry in his ‘Political Authority and Political Obligation’, *Oxford Studies in Philosophy of Law: Volume 2* (Oxford University Press 2013). I offer my own brief discussion of the issue in Chapter 7.

¹² Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1919).

¹³ I am uncomfortable with attributing this kind of ambiguity to natural language expressions involving ‘right’. Following Grice, I tend to think it is methodologically unsound to posit multiple senses where one will suffice; HP Grice, *Studies in the Way of Words* (Harvard University Press 1989) 47–48. But I do not need to rely on this methodological point in order to make my argument here.

them about the nature of their child's illness.¹⁴ Without such rights, the power to consent to examination or treatment would be vulnerable to failures on a doctor's behalf to explain the child's condition.

More fundamentally, even if parents' rights under the *Children Act* were interpreted as powers to impose duties on behalf of others, it is still the case that these powers would themselves need justification.¹⁵ To some extent, the analysis that follows might be seen as an attempt to account equally for both the rights and powers of role-bearers. It is in many respects just as hard to conceive of a power that does not serve the interests of its bearer as it is to conceive of a right that does not do so. In fact, one standard justification of many (if not all) normative powers is that they serve our autonomy—they give us some sort of control and ability to impose a chosen pattern on our own lives. The power to

¹⁴ The General Medical Council interprets parental responsibility under *The Children Act* to include a right to be so informed; see General Medical Council, 'Protecting Children and Young People: The Responsibilities of All Doctors' (General Guidance 2012) 18–22. Though on doctors' duties to parents at common law see *JD v East Berkshire Community Health Trust & Ors* [2005] UKHL 23.

¹⁵ Justification of a power is what distinguishes it from a mere causal ability to change someone's deontic position. Some attempts at analysis of the deontic concept of a *power* can be found in Joseph Raz and Neil MacCormick, 'Voluntary Obligations and Normative Powers' (1972) 46 *Proceedings of the Aristotelian Society*, Supplementary Volume 59; HLA Hart, *Essays on Bentham* (Oxford University Press 1982) ch 8; Andrew Halpin, 'The Concept of a Legal Power' (1996) 16 *Oxford Journal of Legal Studies* 129. Kramer and Steiner argue that the interest theory is a theory about all Hohfeldian incidents, and not just claim rights; Kramer and Steiner (n 5).

impose duties on ourselves is a constitutive aspect of our wellbeing.¹⁶ The explanation of the way in which these powers might serve our wellbeing, and the explanation of the rights which enable or protect these powers, are closely related, if not identical, projects.

7.2 The Interest Theory and the Problem of Role-Bearers' Rights

7.2.1 Interests and the Interest Theory

The interest theory of rights is a theory about the characteristic function of rights. According to interest theorists, rights promote *personal* value—value that belongs to the bearer in some way. Usually it is said that they promote their bearer's interests or wellbeing.¹⁷ More specifically, rights are grounded in an aspect of individual wellbeing that is sufficient to justify holding others under a duty or duties that promote those interests. The version of the interest theory that I wish to defend, which is more or less Raz's widely cited formulation of the interest theory, is as follows:

¹⁶ I am thinking in particular of Raz's justification of the power to make promises in Raz and MacCormick (n 15).

¹⁷ As Cruft observes, analogous problems to those that arise for the interest theory can be created for *any* account of rights that relies on a person's individual features; Rowan Cruft, 'Why Is It Disrespectful to Violate Rights?' (2013) 113 Proceedings of the Aristotelian Society 201.

Interest Theory of Rights: An individual has a right if and only if that individual has an interest that is, other things being equal, sufficient to justify holding some other person to be under a duty.¹⁸

I have removed Raz's stipulation that the individual must be the kind of thing capable of having rights, since the issue of what is capable of having rights does not concern me here. By 'holding' someone to be under a duty, I mean something like *accepting* or *internalising* the fact that there is a duty, though I will not fully specify the attitudes in terms of which this internalisation is to be defined.¹⁹

¹⁸ Raz, *The Morality of Freedom* (n 11) 166. Note that this is not an analysis of rights in terms of necessary and sufficient conditions for possession of a right—rather it is attribution of a necessary function to rights; cf. MH Kramer, 'Refining the Interest Theory of Rights' (2010) 55 *American Journal of Jurisprudence* 31, 32.

¹⁹ This account of rights draws a direct connection between the correct theory of rights and the formulation of rules in terms of 'acceptance value' that has been developed by rule-utilitarians like Brandt and Hooker; see Bradley Hooker, *Ideal Code, Real World* (Oxford University Press 2000) 75–80; Richard B Brandt, 'Toward a Credible Form of Utilitarianism' [1963] *Morality and the Language of Conduct* 107. Rights appear to play a special role in moral epistemology, in that they may become known before it is known what duties they justify; see further Raz, *The Morality of Freedom* (n 11) 181–182. Cruft suggests an alternative conception of 'holding', on which it is just a reference to the particular grounds of the duty; Cruft, 'Why Is It Disrespectful to Violate Rights?' (n 17) 205. It would be interesting to consider the ways in which accounts based on these differing interpretations of what it is to hold someone under a duty diverge, but that task does not concern me presently. For an attempt to characterise the internalisation of social rules see A Perry, 'The Internal Aspect of Social Rules' (2015) 35 *Oxford Journal of Legal Studies* 283.

I will assume that an interest is a value that is relativised to its bearer, and will assume no more than this for the purposes of my discussion here. In other words, an interest is the kind of good we have in mind when we say that something is ‘good for’ another person.²⁰ Many accounts of interests treat them as equivalent to an individual’s wellbeing.²¹ But it is possible to envisage substantive theories about what is in a person’s interest that do not have wellbeing in mind, at least as wellbeing is commonly understood.²² It is also possible to imagine that different interest theories of rights might invoke a variety of different theories about what constitutes an individual’s wellbeing. My arguments do rely on the assumption that our individual roles contribute to our

²⁰ Moore famously thought we could do without the concept *good for*. But I will assume that even the most devout contemporary Moorean will wish to make use of some kind of relativisation that will suffice for the purposes of analysing rights—perhaps just empirical relativisation like ‘good in the life of’ or ‘good belonging to’. Rosati, for example, argues that ‘good for’ specifies a valuable relation between a person and a particular fitting valuable goal or end; see Connie S Rosati, ‘Objectivism and Relational Good’ (2008) 25 *Social Philosophy and Policy* 314; cf. GE Moore, *Principia Ethica* (Cambridge University Press 1903) section 59; Thomas Hurka, ‘‘Good’ and ‘Good For’’ (1987) 96 *Mind* 71; Donald H Regan, ‘How to Be a Moorean’ (2003) 113 *Ethics* 651; Donald Regan, ‘Why Am I My Brother’s Keeper?’ in R Jay Wallace, Samuel Scheffler and Michael Smith (eds), *Reason and Value: Themes from the Philosophy of Joseph Raz* (Clarendon Press 2004). Those who take the resolute Moorean line will have to give up on rights-talk altogether—or else come up with a different theory of rights.

²¹ As in Raz’s own theory of rights.

²² See e.g. Timothy Macklem and John Gardner, ‘Value, Interest, and Well-Being’ (2006) 18 *Utilitas* 362. Other related terms include ‘self-interest’, ‘welfare’, and ‘personal good’. Sometimes philosophers use these terms interchangeably. At other times they are stipulated to have distinct meanings. In order to avoid these debates, I will mostly use the phrases ‘interest’, as I take it to be the most ecumenical.

interests in a manner analogous to other projects and attachments. Some philosophers argue that the contribution of projects and attachments to our wellbeing makes some theories of individual wellbeing less plausible. But I think that my arguments are largely neutral between competing theories of what is in someone's interests.²³

An important aspect of the version of the interest theory that I wish to defend is its focus on the *sufficiency* of the individual's interest. The interest must be, in and of itself, sufficient to justify holding the counterparty to be under the relevant duty. Many supposed counterexamples to the interest theory focus on the alleged insufficiency of the individual interest in question, as we shall see. There are a number of ways in which the sufficiency requirement might be interpreted.²⁴ For my purposes here, I have decided to treat the sufficiency requirement as counterfactual. The interest must be one such that it *would be* sufficient to justify holding someone under the duty in question. I think that my

²³ It might be thought, for example, that my treatment is better suited to various objective theories of wellbeing; but even desire-based or hedonic theories of wellbeing generally want to make accommodations that allow for the role that achievement of socially-dependent goals plays in enhancing wellbeing. Consider possible hedonistic responses to Nozick's 'experience machine' counterexample; as canvassed in Roger Crisp, *Reasons and the Good* (Oxford University Press 2006) 117–125.

²⁴ See discussion in Cruft, 'Why Is It Disrespectful to Violate Rights?' (n 17) 205.

arguments here may well be adaptable to other interpretations of the sufficiency requirement.

7.2.2 Role-Based Counterexamples

Problems for the interest theory are created by what John Rawls referred to as 'enabling rights': 'rights we have so that we can fulfil certain duties that are prior in the order of grounds'.²⁵ Enabling rights are predominantly associated with relationships and social roles. The rights of parents under *The Children Act* are one example of enabling rights: the rights under the Act arise for parents with respect to the performance of their duties towards their children. Just about any role-based right will be associated with a set of enabling rights. Police officers, for example, have exceptional rights that are meant to enable them to fulfil their statutory duties.

Rights to perform relational or role-based duties are problematic for the interest theory in two principal ways. First, they appear to show that rights are not to the benefit of the role-bearer—that they do not serve their interests at all (in fact, they may even damage their interests). Second, they appear to show that

²⁵ John Rawls, *Lectures on the History of Political Philosophy* (Belknap Press of Harvard University Press 2007) 144.

even where rights are to the benefit of the right-holder, the right-holder's interest is not individually sufficient to justify holding anyone to be under the corresponding duty. The right-holder's interest is dependent on the interests of others, and therefore not individually sufficient to justify any duty.

The first set of counterexamples supposedly show that the promotion of interests is not even a *necessary* feature of rights. Philosophers point to legal rights that are thought to demonstrate that interests are not even a necessary feature of the right (or that they do not play any necessary role in the justification of the right). Other counterexamples concede *arguendo* the association of rights with interests, and focus solely on the sufficiency of the interest—they do not intend to deny that the role-bearer has some interest that is protected by the right, but they do deny that the role-bearer's interest would, on its own, be sufficient to justify a duty.²⁶ Parents have a right to receive a child benefits payment, for example, but that right exists because it serves the child's interest. We can also think of the rights of police officers, or journalists, or the rights of other legal officials, which seem to be entirely justified by the interests of those whom they serve. The journalist may have an interest in not disclosing her sources, but the individual interest is not sufficient to justify holding others to be

²⁶ See especially Wenar, 'The Nature of Claim Rights' (n 7) 204–205; Kamm (n 7) 244–248.

under a duty to support that right. Only the combination of the journalist's interests with the interests of others who are served by the socially valuable role of journalist could result in the journalist having such a right. The journalist does have such a right, so it must follow that the interest theory of rights cannot be correct. According to Kamm, 'if the satisfaction of the interests of others is the reason the journalist gets a right to have his interest protected, his interest is not sufficient to ground the duty of non-interference with his speech'.²⁷

The latter set of counterexamples is the one that creates the most difficulty for the interest theory. The sufficiency requirement is an important aspect of the interest theory of rights—it rescues the theory from trivial counterexamples involving beneficiaries of duties who are not right-bearers. Hart offers the example of the third-party beneficiary to a contract: interest theories without a sufficiency requirement allow us to derive a right, on behalf of the third-party beneficiary, that the contract be performed. But not all jurisdictions recognise such a right.²⁸ In the context of rights within roles or relationships that are socially dependent, however, the sufficiency requirement is problematic. The interests of the journalist only justify holding others to be under the requisite

²⁷ Kamm (n 7) 246.

²⁸ Hart, *Essays on Bentham* (n 15) 187–188.

duties because the role in question serves other interests. It appears as though the role-bearers' interests are not sufficient to justify the duties—since their own interests depend on the role serving the interests of others.

I will make two preliminary observations in response to these objections. First, the supposed insufficiency of interests to justify further duties can be avoided if we appropriately distinguish the grounds of the interest from the grounds of the right itself. I will argue that the fact that the role itself has value (in that it serves the interests of others) is sufficient to ground the role's contribution to the interests of the individual role-bearer. The strength of the role-bearer's interests in performing the role thus reflects the strength of the interests that justify the role in the first place. The role-bearer's interests, once acknowledged, are then sufficient to ground the existence of a right. The interests of others served by the role are not, in themselves, sufficient to ground the individual role-bearer's *particular* rights. They ground the role's contribution to the interests of the individual role-bearer, which in turn is sufficient to ground the right in question. I elaborate on this point below.

Second, whether a given interest is sufficient to justify holding another person under a duty is in a significant way indeterminate. It is easy to conceive

of borderline cases in which we do not want to assert either that an individual's interest is sufficient or that it is not sufficient to justify holding others to be under a duty to protect or promote it. All I can do in my discussion here is attempt to demonstrate that these counterexamples are not as persuasive as they are often believed to be. My response aims to demonstrate that supposed counterexamples do not provide *clear* instances of rights that do not serve the interests of the bearers.

7.3 Other Responses

Before offering my own response to these putative counterexamples, it is worth briefly outlining two responses that can be found to these arguments in the existing literature—one offered by Raz and another offered by Matthew Kramer and Hillel Steiner. Both responses observe, I think correctly, that there is a good deal of congruence between our performance of role-based duties and the promotion of our interests. They differ from my own account in a variety of ways, however, and it is worth noting these divergences.

7.3.1 Raz's Response

Raz responds to these role-based counterexamples by making a series of observations designed to bolster the association of rights with the interests of the

rights-bearer.²⁹ These observations are useful, as they help to clarify what is at stake in the debate between defenders of the justificatory version of the interest theory and the theory's critics. Moreover, Raz's responses take us a long way towards a satisfactory answer to the putative counterexamples.

First, Raz argues that in many circumstances, the rights of the individual and the interests of the public that are served by the right are 'doubly harmonious'.³⁰ Others benefit from the presence of the right, and the individual benefits from the fact that the right serves the interests of others. This is an important point, one that I develop below. Any role that has personal value to us has that value because it serves the interests of others.

Second, Raz notes that though 'rights are to benefits, the justifying benefit need not be the benefit one has a right to'.³¹ Many individual rights are derived from more general rights that are grounded in more general interests. For instance, my interest in my old band t-shirts is negligible—certainly not strong enough to justify any of the duties that others owe me not to deprive me of my enjoyment of them. But it is my interest in a general system of property, in

²⁹ Raz, *The Morality of Freedom* (n 11) 179–183; Joseph Raz, 'Rights and Individual Well-Being', *Ethics in the Public Domain* (Oxford University Press 1995).

³⁰ Raz, 'Rights and Individual Well-Being' (n 29).

³¹ *ibid* 49.

having control over my possessions, that grounds the general right to property from which this particular right is derived.³²

Third, Raz argues that sometimes ‘part of the justifying reason for the right is its contribution to the common good’.³³ The right, in other words, has instrumental value.³⁴ It is this final aspect of Raz’s argument that I find most problematic. The problem with this aspect of Raz’s approach is that it appears to be an abandonment of his own requirement that the interests that ground rights be sufficient to justify the relevant duties. If the interests of the rights bearer are only instrumentally valuable, then how is it that the person’s interests are *sufficient* to ground the duty in question?³⁵ This is the puzzling aspect of Raz’s account that I attempt to remedy below, by offering a more detailed picture of the justificatory nexus that exists between individual interests that ground rights, and the duties that they would be sufficient to justify. On the view I defend, the

³² *ibid* 48–49. cf Rowan Cruft, ‘Against Individualistic Justifications of Property Rights’ (2006) 18 *Utilitas* 154.

³³ Raz, ‘Rights and Individual Well-Being’ (n 29) 55.

³⁴ Raz, *The Morality of Freedom* (n 11) 180.

³⁵ Kamm (n 7) 245. Note that it is not possible to remedy Raz’s account by reformulating the theory so that rights are grounded in interests that are necessary but not sufficient for the justification of the relevant duties. The objection could just be restated: in many circumstances the interests of the right-bearer appear not to be necessary for justification of the relevant duty. Consider the example of my interests in property—the relevant duties that protect them could equally be justified by the interests of the broader community in having established rules with respect to property and ownership.

instrumental value of performing a role grounds the individual's interest in performing the role, but the individual's interest, once grounded, is then sufficient to ground the right.

7.3.2 Kramer and Steiner's Response

Kramer and Steiner argue that role-based counterexamples fail in two ways. First, the counterexamples rely on the assumption that interest theories of rights construe rights in terms of the purpose or justification of the duties in question. This, they argue, is a mistake.³⁶ Second, they argue that rights that enable the performance of role-based duties do in fact promote the interests of their bearer. Kramer and Steiner maintain that the role-based counterexamples neglect the fact that 'people generally have vital interests in being able to pursue their occupations adroitly'.³⁷

Like Raz's response, Kramer and Steiner's response has the virtue of identifying the direct benefit that usually accrues to rights-holders from rights that enable them to fulfil their social and occupational roles. The problem, for my purposes here, is that they invoke a different theory of the relationship

³⁶ Kramer and Steiner (n 5) 289–290.

³⁷ *ibid* 291.

between rights and interests than the one I am concerned to defend. Rights, according to Kramer's version of the interest theory, are not to be understood in terms of the justification or purpose of some set of duties, but instead in terms of the regular or usual effects of those duties.³⁸ I disagree with this abandonment of the justificatory view, for reasons that I outline elsewhere in this thesis.³⁹ Moreover, Kramer and Steiner discuss a version of the interest theory according to which rights will not always promote the interests of their bearer. It is not necessary that rights promote the interests of their bearer; rights must only 'usually' be beneficial.⁴⁰ It is unclear why this concession is necessary.

Elsewhere, Kramer and Steiner acknowledge that there are 'generally beneficial effects that are intrinsic to the fulfilment' of role-based duties.⁴¹ This suggests that they think that the effects on the interests of the role-bearer are necessary, but that the effects on the overall interests of the role bearer are more ambiguous. If this is the case, then the formulation suggests a failure to distinguish between promoting an interest and serving someone's greatest

³⁸ Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights* (Oxford University Press 1998) 85–88; Kramer and Steiner (n 5) 289.

³⁹ I discuss the issue further in Chapter 4.

⁴⁰ Kramer and Steiner (n 5) 290; see also Kramer, 'Refining the Interest Theory of Rights' (n 18) 32; Kramer, 'Rights Without Trimmings' (n 38) 93–96.

⁴¹ Kramer and Steiner (n 5) 298.

interest. Something may promote my interests in one way while also harming my greater interests.⁴² It is of course obvious that it will not always be in one's greatest interest to perform one's role obligations, whatever that role may be. It is easy to think of situations where the balance of our interests will be served by departing from these obligations. The mere fact that an interest is defeated, however, does not indicate that it ceases to be an interest. Perhaps it is not always in our greatest interest to be parents—perhaps our lives would have gone slightly better if we had never chosen to be parents. It does not follow that it is not in our interests *at all* to be parents. A choice does not need to be optimific in order to contribute to our interests.

I do not think that the relationship between rights and interests needs to be weakened in this way. It is possible to argue that rights necessarily either promote the interest of their bearers, or putatively promote interests within the given institution or practice in which the right is found. Both Raz's response and Kramer and Steiner's, rest on the observation that individuals necessarily have an interest in the performance of role-based duties. Below I make this argument

⁴² cf Raz's claim that these 'rights serve their [the role bearer's] interests as persons with those characteristics, but they may be against their interests overall'; Raz, *The Morality of Freedom* (n 11) 180.

in greater detail, and then demonstrate the way in which these interests are sufficient to justify further duties on behalf of others towards the role-bearer.

Raz's arguments and Kramer and Steiner's are offered in the abstract, against a diverse array of role-based objections, so it is unclear how they would respond to the particular set of rights that I am considering in this Chapter. Perhaps they would agree with me that these rights serve the interests

7.4 The Response

As we have seen, the gist of the response to the role-based counterexamples lies in the observation that our projects and attachments make an indispensable contribution to the shape of our lives, and accordingly are vital to our interests. Roles and relationships are amongst our valuable projects and attachments. Since the duties and responsibilities associated with our roles are *constitutive* of those roles, it follows that they are constitutive of our interests in a more fundamental way than is commonly supposed. Where our interest in performing these roles is sufficient to justify holding others to be under duties, it is capable of grounding a right on behalf of the role-bearer. The major premise of the argument is that duties are constitutive of valuable roles and relationships. The minor premise is that roles and relationships, where they are valuable, contribute to the interests

of their bearers. From both premises we thus conclude that the duties and responsibilities that are constitutive of valuable roles and relationships serve their bearer's interests. Below I will defend each premise in turn. I then discuss the relationship between the considerations that justify the role, which are often only weakly related to the interests of the individual, and the individual's interests in performing the role. This last point is important—it allows us to distinguish the manner in which the individual interests are sufficient to justify the duties in question.

7.4.1 Duties and Roles

Duties are constitutive of all roles—at least when roles are understood in the thicker sense that is favoured by most philosophers and many sociologists. Some writers working in a broadly sociological tradition have tried to argue that it is possible to identify social roles without referring to those roles' constituent deontic features. According to this kind of sociologist,⁴³ it is possible to define roles without reference to constituent deontic properties. These explanations of roles are inadequate precisely because they fail to describe exactly what distinguishes these roles for internal participants. Other sociological accounts

⁴³ For critical sociological engagement with this thinner notion of role, see Dorothy Emmet, *Rules, Roles and Relations* (Macmillan 1966) 17–32; RS Downie, *Roles and Values* (Methuen & Co 1971) 121–127.

have never sought to deny what we might describe, paraphrasing Hart,⁴⁴ as the ‘internal aspect’ of roles—it is impossible to describe role-bearer’s behaviour without referring to their belief in the existence of certain role-based reasons for action.⁴⁵ Jerry Cohen notes that statements like ‘John is a Barrister, but he does not have the right to plead in court’ or ‘Sir William is Chancellor of the Exchequer, but he does not have the duty to prepare a budget’ have a paradoxical ring to them.⁴⁶ Deontic features like rights, duties and permissions are inextricable from the proper description of these roles. A sociologist who sought to describe roles without reference to these features would be failing to understand the role as the role-bearer themselves understand it. This issue was considered at greater length, with respect to our valuable relationships, in Chapters 1 and 2 of this thesis. In those chapters I noted that many relationships are defined in part by their constituent duties and permissions. There is an apparent circularity here that is in fact benign. The duties are partly constitutive

⁴⁴ HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 88–91.

⁴⁵ In fact, sociologists, rather than philosophers, may have been the first to draw our attention to these attitudes. Lacey notes, for example, that Hart’s ideas in *Concept of Law* were influenced by Weber’s work. Weber explained certain behaviour by attributing attitudes of acceptance of ‘maxims’ within a legal system; Nicola Lacey, ‘Analytic Jurisprudence and Descriptive Sociology Revisited’ (2006) 84 *Texas Law Review* 944, 951–952.

⁴⁶ GA Cohen, ‘Beliefs and Roles’ (1966) 67 *Proceedings of the Aristotelian Society* 17, 21.

of the good; and the value of the role itself at least justifies holding the role-bearers to be under the constitutive duties.

7.4.2 Roles and Interests

The roles and relationships we choose to fulfil and pursue are an important source of our projects and attachments. Performing voluntary roles and assuming responsibilities within relationships contributes directly and indispensably to role-bearers' interests. The contribution that roles and relationships make to our interests is well discussed in the philosophical literature. There is a broad philosophical consensus that, where roles and relationships have value, they contribute to our interests.⁴⁷

This consensus is typically associated with what Derek Parfit memorably referred to as 'objective list' theories of individual wellbeing—theories that stipulate that 'certain things are good or bad for us, whether or not we want to have the good things, or avoid the bad things.'⁴⁸ Many objective-list theories of wellbeing stipulate that our relationships and social roles are amongst those

⁴⁷ See Brighouse and Swift (n 3); John Cottingham, 'Ethics and Impartiality' (1983) 43 *Philosophical Studies* 83; David Miller, 'Reasonable Partiality Towards Compatriots' (2005) 8 *Ethical Theory and Moral Practice* 63; Joseph Raz, 'Liberating Duties', *Ethics in the Public Domain* (Oxford University Press 1995); Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press 2002) 59, 93.

⁴⁸ Derek Parfit, *Reasons and Persons* (Oxford University Press 1984) 493.

things that are good for us.⁴⁹ Yet we need not be objective list theorists in order to acknowledge the importance of our goals and achievements to the promotion of our interests. We might simply concede that there is some objective component to our interests—that the contribution of our choices, desires or preferences to the promotion of our interest depends, perhaps only in part, on some objective property that is possessed by the object that is chosen, desired or preferred.⁵⁰ Even thoroughgoing hedonists might concede that engaging in valuable role-based projects is part of a successful optimific strategy—that we are likely to be happier, all things considered, if we shape our lives around certain role-based projects.⁵¹

It is instructive to note the different ways in which our fundamental individual interests are themselves socially dependent. Many of our goals depend in various ways on the forms that are given to them by different social attitudes and practices. This kind of inextricable dependence of our interests on

⁴⁹ John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 88; James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* (Clarendon Press 1986) 67; Thomas Hurka, *Perfectionism* (Oxford University Press 1993) ch 10; Richard Kraut, *What Is Good and Why: The Ethics of Well-Being* (Harvard University Press 2007) ch 3.

⁵⁰ See Parfit (n 48) 501–502.

⁵¹ See e.g. Roger Crisp, 'Utilitarianism and Accomplishment' (2000) 60 *Analysis* 264.

the social forms has been explored by Raz in his *Morality of Freedom*.⁵² If I choose it and the role is otherwise worthwhile, it is in my interests to perform the role of dogcatcher. But the precise responsibilities and rights associated with the role of dogcatcher may depend on either or both social practices or legal instruments that define the role and its constitutive duties. In many circumstances, legal or social rules will determine the specific content of our moral rights. Our specific moral rights may depend upon how our roles are socially defined.⁵³ What is in my interests as a parent or friend depends in part on how the particular role is socially defined. This puts paid to the idea that because they serve individual interests, rights cannot be socially dependent.

The association between roles and interests also provides a counterweight to the observation that our interests conflict with the interests of others. It is true that in some circumstances promotion of my interests necessarily precludes promoting the interests of others. Sometimes these conflicts of interest arise because resources are scarce. More frequently these conflicts arise because we are required to allow one party's choice about what is in their interests to prevail

⁵² Raz, *The Morality of Freedom* (n 11) especially chapters 12 and 13. .

⁵³ For discussion see AM Honoré, 'The Dependence of Morality on Law' (1993) 13 *Oxford Journal of Legal Studies* 1; Joseph Raz, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1.

over another. Laws that give minors the right to determine when they should obtain an abortion conflict with laws that endow the minor's parents with similar rights.⁵⁴ More fundamentally, the interests of children in having a secure and comfortable upbringing do restrict capacity for parents to make the sorts of autonomous choices that they otherwise would. The sacrifices that parents and carers make are real, and it is important not to diminish them. In the context of parental rights, this is what leads Brian Bix to conclude in his discussion of family law that recognising the legal rights of children 'necessarily limits the rights or prerogatives of adults'.⁵⁵ At various points in their discussion of parents' rights, Brighthouse and Swift seem to lend their support to this view. They refer to the conflict between parents' rights and children's rights as embodying an 'underlying tension' in liberalism between the promotion of children's autonomy and toleration of parental choices.⁵⁶

Yet focussing on these conflicts can be misleading, because they conceal the ways in which the interests of role-bearers can converge with the interests of

⁵⁴ The example is from Brian Bix, *Family Law* (Oxford University Press 2013) 117. For further discussion in the context of US law see Carol Sanger, 'Regulating Teenage Abortion in the United States: Politics and Policy' (2004) 18 *International Journal of Law, Policy and the Family* 305.

⁵⁵ *ibid* 117.

⁵⁶ Brighthouse and Swift (n 3) 81–84.

those for whom the role is being performed. The real conflict concerns who should be able to exercise authoritative control over those interests. For instance, many of the conflicts that characterise relationships between parents and their children revolve around shared interests. Both parent and child agree that it is in their collective interests that the child obtains the correct medical treatment. They simply disagree as to who should have the power to determine the correct course of treatment. These conflicts have a higher-order quality; they arise with respect to who has most interest in deciding how those interests are best pursued. These conflicts are pressing ones for liberal societies, as Swift and Brighthouse demonstrate. But they should not be allowed to conceal deeper convergences between the interests of parents and children. In English law these convergences were noted by Lord Nicholls in his judgment in *JD v East Berkshire Community Health NHS Trust*, that ‘the best interests of a child and his parent normally march hand-in-hand’.⁵⁷ In that judgment the House of Lords held that doctors owed no particular duty to consider parental wishes in reaching decisions about children’s care. The parents’ interests were grounded in the best interests of the child, which were protected by the doctor’s duties towards their patient.

⁵⁷ *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [56].

7.4.3 General Justifications and Special Interests

Recall that in Rawls's definition of 'enabling rights', he defines them as rights that are dependent on prior duties that justify or ground them. The possibility of enabling rights thus provides an important counterweight to some prominent distortions of the role of rights in practical reasoning, including the view that rights are by their very nature conceptually prior to duties. Rights certainly have priority over those duties that the rights themselves justify. But it is also evident that rights may be dependent upon the existence of certain valuable duties—the duties, by way of the role or practice that they constitute, may contribute to an individual interest, and that individual interest may itself be sufficient to justify holding others to be under further duties that enable the performance of the role.

A distinction needs to be made between having an interest in the general practice or institution within which the role occurs, and having an interest in the *particular* role that one occupies. The role-based rights and responsibilities of journalists offer one example of the importance of this distinction. Roles like 'journalist' are often said to have a non-individualistic justification.⁵⁸ Many of the role-based duties associated with journalism are justified, not by the interests of

⁵⁸ For a nice elaboration of the problems presented by non-individualistic accounts of fundamental rights see Cruft, 'Why Is It Disrespectful to Violate Rights?' (n 17).

the journalist, but by the way in which journalists serve the interests of others. It appears to follow that any rights associated with the role of journalist must also be justified by consideration of the general interest, and that therefore the interests of the individual are not sufficient to ground any duties.

This puzzle draws attention to an important distinction between what Hart called ‘special’ rights and ‘general’ rights.⁵⁹ Special rights are those rights that arise out of special transactions or relationships between people, where general rights are those rights held by everyone that are not ‘peculiar to those who have them’.⁶⁰ (Hart goes further than this in drawing the distinction, but I do not think his particular explanation of the distinction is needed). Role-based rights are *special* rights—they are held by particular individuals who occupy particular roles within relationships or social institutions. And the social institutions within which these roles occur frequently are justified by a diversity of considerations apart from the interests of the role-bearers.⁶¹

⁵⁹ HLA Hart, ‘Are There Any Natural Rights?’ (1955) 64 *The Philosophical Review* 175, 183–188.

⁶⁰ *ibid* 188.

⁶¹ In pointing out that of our role-based rights are special rights, I do not mean to diminish the importance of another category of rights that has recently featured prominently in Kimberley Brownlee’s work on social deprivation. In addition to have rights that arise with respect to the relationships we have already formed, we might have certain general, fundamental rights *to form* relationships with others; see Kimberley Brownlee, ‘Ethical

Role-based rights qualify as special rights in two ways—they depend on the responsibilities of the role, but they are also particular to the individuals who occupy the role. The individual's interest is promoted by fulfilling the role, in part, because it is their role, because, like other projects and attachments, it enables them to shape their lives around a pattern of responsibilities. It is not simply the journalist's right that they not disclose their sources that justifies holding others to be under respective duties. It is the fact that the particular individual has chosen the role of journalist that gives their interest its particular weight, and which makes it sufficient to justify holding others to be under the relevant duties. The same can be said, *mutatis mutandis*, with respect to the rights of parents under *The Children Act*. The role of parent is at least partly justified by the needs of the child. But once a person decides to become a mother or a father, they gain a significant interest in serving their child's interest. They have rights under *The Children Act* because it is their child, and because the particular child that they have has particular needs and interests to which they are committed. It is true that the role that they have occupied is a fiduciary one—that it is centred mainly on the promotion of the child's interests. But this does not preclude

Dilemmas of Sociability' (2015) 28 *Utilitas* 1; Kimberley Brownlee, 'A Human Right Against Social Deprivation' (2013) 63 *Philosophical Quarterly* 199. These rights might ultimately serve the same interest.

parents from having what Brighouse and Swift call a ‘non-fiduciary interest in playing this fiduciary role’.⁶²

If I am right, then role-based rights are also tied to the uniqueness of the role to the role-bearer. My rights as a parent are not just the rights I possess *qua* parent, they are rights I possess as a particular parent of a particular child—rights shaped by a history of interaction and attachment to that child.⁶³ A journalist’s rights are not just rights *qua* journalist, they are rights possessed by the individual who has chosen the role, and who has imposed a particular pattern of responsibilities on their life. Their rights enable them to continue to fulfil the role that has meaning to them.

The interests of the particular individual in occupying the role that they have chosen (or, in the kinds of extraordinary cases already discussed, the role that has been designated to them) thus possess greater gravity than is imagined by philosophers who have critiqued the interest theory. When we consider role-

⁶² Brighouse and Swift (n 3) 95.

⁶³ On the role played by histories of interaction in constituting valuable projects and attachments see Niko Kolodny, ‘Which Relationships Justify Partiality? The Case of Parents and Children’ (2010) 38 *Philosophy and Public Affairs* 37; Niko Kolodny, ‘Which Relationships Justify Partiality? General Considerations and Problem Cases’, *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010); Joseph Raz, *Value, Respect, and Attachment* (Cambridge University Press 2001) ch 1; R Jay Wallace, *The View From Here: On Affirmation, Attachment, and the Limits of Regret* (Oxford University Press 2013) ch 2.

bearers *de dicto*, their interest in fulfilling their responsibilities can be hard to envisage. Once we consider role-bearers *de re*, however, we get a greater sense of the significance that their role might have to them. Some writers have suggested, I think quite plausibly, that our relationships and projects give our life meaning.⁶⁴ To the extent that the roles that we perform are part of imposing a meaningful pattern of responsibilities on our own lives, they make an indispensable contribution to our wellbeing.

It might still be objected that, the gravity of role-bearer's interests notwithstanding, their interests are still not sufficient to justify the imposition of duties, because these interests are dependent on the value of the role, and the role itself is justified by external considerations. If the role itself is dependent on external justification, then how could the individual's interest in that role be sufficient to ground the relevant duties?

To begin with, a more precise interpretation of the sufficiency requirement is needed.⁶⁵ Consider the following counterfactual interpretation: once it is

⁶⁴ See e.g. Berit Brogaard and Barry Smith, 'On Luck, Responsibility and the Meaning of Life' (2005) 34 *Philosophical Papers* 443; Susan Wolf, *Meaning in Life and Why It Matters* (Princeton University Press 2010).

⁶⁵ For a different attempt to formulate a test for sufficiency that vindicates his own version of the interest theory see Kramer, 'Refining the Interest Theory of Rights' (n 18).

acknowledged, the individual's interest *would be* sufficient to ground duties of the right sort. It need not matter that the duties are justified by other considerations—the interest itself would, in other circumstances, be sufficient to justify holding others to be under the relevant duties.⁶⁶

Nor does it matter that the interest itself is dependent on the value of the role, which serves other interests. That the role serves the role-bearer's interest would, in and of itself be sufficient to justify concluding that others are under the relevant duties. The truth of the sufficiency claim is certainly grounded in certain further facts about the other interests that the role serves. But there is nothing contradictory or paradoxical about this. The role-bearer's special interest in serving their role emerges from the value of the role—it is dependent on the interests of others but not morally identical to them. In other words, there are two distinct sufficiency relationships, not one. First, the social-value of the role is sufficient to justify the conclusion that an individual has an interest in performing that role. Second, the individual's interest in performing that role is sufficient to justify holding another person to be under a duty towards them with respect to that role. The social value of the role and the individual's interest

⁶⁶ In other words, one problem seems to arise because in situations involving the right-bearer's interests the justification of the correlative duties is overdetermined. Either the interests served by the role or the interests of the role-bearer would have been sufficient to justify the duties in question.

in the role do not make a joint contribution to justification of the duty. Rather, the social value grounds the interest, which in turn grounds the duty.

7.5 Detached Rights Attributions

I have argued that duties, even apparently burdensome duties, are constitutive of many valuable relationships and roles, and that these valuable relationships and roles promote the interests of those who share in them. It ought to follow, then, that all rights associated with roles are in the interests of their holders, and this ought to be enough to dispense with any concerns that we might have about role or relationship based rights. However, there is a further complication for the interest theory, which arises because many roles as they are socially practised may not have the value that they are believed to have, and that, as a result, they might not actually contribute to the interests of the individual. It appears we can felicitously cite a Kamikaze pilot's 'right' to fuel, or parents' 'rights' to arrange marriage on behalf of their children, even when we are certain that roles or relationships that are constituted in this way are lacking in value, and thus do not actually believe that the rights promote their bearers' interests.

When discussing the rights of role-bearers, it is important to recognise the possibility that some of our rights-attributions will be detached, or non-

committal. This is an important (and I think often overlooked) component of our interpretation of rights in law and within social roles more generally.

It is not an objection to the interest theory to note that in some legal systems, there are legal rights that do not in fact serve their bearer's interests. Nor is it an objection to note that some rights typically acknowledged within social roles fail to serve their role-bearer's interests. It may be true, for instance, that children's rights to access certain medical procedures without their parents' consent do not actually serve their interests. It does not follow that attributing a legal right to children to obtain the procedure is infelicitous. Any normative or deontic language may be used in what legal philosophers usefully describe as a 'detached' manner. This kind of detachment is equally evident in the case of legal duties. It would apply equally if, rather than speaking in terms of the child's legal rights to a medical procedure, I was to speak of the doctor's legal duties to provide the procedure. In either case, I would have cited the norm as a norm, without endorsing it as a guide to action.

Though there are dissenting voices,⁶⁷ the possibility of detached or non-committed use of deontic language is well known and has been discussed at length elsewhere in a variety of philosophical contexts.⁶⁸ It is a crucial feature of normative language and thought that is often overlooked or unduly resisted in discussions of legal rights.⁶⁹ In many circumstances, asserting that a parent has a right to arrange his child's marriage, or that a victim's family has a right to attend the execution, is merely to say elliptically, without necessarily endorsing such a right, that the existence of such a right is accepted by others. In the case of

⁶⁷ E.g. Luis Duarte D'Almeida, 'Legal Statements and Normative Language' (2011) 30 *Law and Philosophy* 167.

⁶⁸ For an account of detached use of normative language in law see Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999); Raz, *The Authority of Law: Essays on Law and Morality* (n 11) 153–157. Raz attributes the distinction between detached and committed statements to a difference in truth-conditions between the two. I do not think that this kind of semantic account is sustainable--the detachment is better treated as a matter of implicature. Raz's account of detached legal statements is better reconceived as an account, not of the semantics of legal statements, but the attitudes of the speakers. Compare with Shapiro's notion of 'perspectival legal claims'; Scott Shapiro, *Legality* (Harvard University Press 2011) 184–186. For some examples of discussion of the possibility of descriptive usage of deontic language elsewhere in the philosophy of language see RM Hare, *The Language of Morals* (Oxford Clarendon Press 1952) 159–160 (on 'descriptive' usage); Peter Laserson, 'Context Dependence, Disagreement, and Predicates of Personal Taste' (2005) 28 *Linguistics and Philosophy* 643, 672 (on 'exocentric' usage); John Lyons, *Semantics*, vol 2 (Cambridge University Press 1977) 792–793 (on 'objective' usage).

⁶⁹ Simmonds worries that basing a theory of rights on the moral beliefs of legal officials is an 'abandonment of positivism'; NE Simmonds, 'Rights at the Cutting Edge' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds) *A Debate Over Rights* (Oxford University Press 1998) 202. Wenar says that 'what legal rights there are cannot depend on what makes a human life go well', and that 'we cannot make the analysis of the former depend on the truth about the latter'; Wenar, 'The Nature of Claim Rights' (n 7). Cruft worries that the theory makes 'what qualifies as a right overly dependent on lawmakers' judgments about people's interests'; Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 *Law and Philosophy* 347, 375.

law, the assertion that there are certain legal rights by law-applying officials has been said to result in a claim or representation, made by the legal officials at the time of application, that such rights are valid moral rights.⁷⁰

In these cases, the individuals' rights within the role must ultimately be explained in terms of mistaken beliefs in the value of the role, and thus in the contribution that the role makes to the interests of its bearer. Social norms become norms in virtue of being accepted or practised by a given social group. Choosing a role indicates a belief in its value to the bearer—the belief that it is, other things being equal, a meaningful and worthwhile pattern of responsibilities and burdens to impose on one's life.

It might be argued that invoking the possibility of detached legal statements to buttress any theory of rights risks trivialising the identification of rights in legal systems—since almost anything could be claimed as a right by legal officials, depending on their beliefs, and thus almost anything could be claimed to be in the interests of their subjects. Because legal systems create or acknowledge purported rights and obligations, there is no limit to the kinds of

⁷⁰ For some attempts to make sense of the idea that law makes a moral claim, see John Gardner, 'How Law Claims, What Law Claims', *Law as a Leap of Faith* (Oxford University Press 2012); Raz, *The Authority of Law: Essays on Law and Morality* (n 11) ch 2. Plunkett similarly claims that the law *represents* itself as moral; David Plunkett, 'Legal Positivism and the Moral Aim Thesis' (2013) 33 *Oxford Journal of Legal Studies* 563, 592–603.

purported rights and obligations they can be said to create or acknowledge, and thus to the kinds of moral claims that legal officials might wish to make. We are, however, still constrained by the plausibility of attributing these false beliefs to legal officials. Usually it is possible to imagine why certain law-applying officials might believe that a certain duty serves the interests of the right-holder. It may well actually run against a parent's interest to have the right to determine whether or not their child receives a blood transfusion, but it is easy to see why some law-applying officials might believe that it was in their interest to have such a right. It is not the case, in my opinion, that it serves anyone's interests to allow parents to arrange marriage on behalf of their children, but it seems plausible to attribute the belief that it does serve people's interests to allow them to do so.

7.6 Conclusion

The rights of parents under *The Children Act* serve their interests if and only if they serve the interests of the child. This is because it is good for individuals to impose patterns of responsibility for the welfare of their children upon themselves. There is nothing philosophically problematic about the Act's equivalence between the rights of parents and their responsibilities towards their children. The word 'interest' certainly creates philosophical ambiguities, and

many very different theories of rights could be described as interest theories. Still, once an appropriately detailed philosophical account of the way in which various social connections serve our interests is offered, many of the apparent difficulties with the interest theory disappear.

I have also addressed another oversight that is common in much of the rights literature and which obscures the discussion of legal and social rights.⁷¹ Many rights assertions are *detached* rights assertions—they are assertions about rights that are not actually of sufficient benefit of their bearers, but which are claimed to be sufficient by those who create or apply the norms in question. Many opponents of the interest theory cite, as counterexamples, the possibility of rights in law that do not sufficiently serve the interests of the bearer. But this is not sufficient for the counterexamples to the interest theory to succeed. What critics of the interest theory need to show is that there are some legal rights that are not *claimed* to be in the interests of their bearers by the officials that apply the law.

⁷¹ cf Kramer, 'Rights Without Trimmings' (n 38); Kramer, 'Refining the Interest Theory of Rights' (n 18); Matthew H Kramer, 'Some Doubts About Alternatives to the Interest Theory of Rights' (2013) 123 *Ethics* 245. Kramer regards his version of the interest theory as a theory of legal rights, and accordingly holds that legal rights serve the actual (not merely claimed) interests of their bearers. Note, however, that Kramer's own version of the interest theory is in some important ways different from the version of the interest theory that I have been discussing here.

I have concluded that role-based counterexamples to the interest theory of rights fail, once the way in which those roles serve the particular interests of the individuals who occupy them is understood. The purported counterexamples demonstrate the perils of trying to adopt a theory of rights purely on the basis of conceptual or linguistic analysis. There is no use in attempting to rely on any colloquial notion of 'interest' when we are accounting for the function of rights. Ultimately interest theorists need to invoke a substantive theory of personal value, and to connect it with a plausible account of the various ways in which various kinds of right-bearing activities serve the interests of particular individuals.

I argued in Chapter 4 that we should be wary of accounts that equate rights with enforcement or sanction. The argument in this Chapter reiterates this concern from a different perspective. As I argued in Chapter 4, the law is not solely concerned with sanction or enforcement. It is also concerned with what Hart once referred to as the 'guiding' and 'goading' of conduct.⁷² Without an appropriate understanding of the justification of the legal duties that define, for example, the responsibilities of parenthood at law, our understanding of the

⁷² As in his famous claim that we should not 'regard the law as simply a selection of stimuli goading the individual'; HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008) 44.

law's motive and methods of guidance risks being incomplete. It is relevant to our understanding of law that the law takes the performance of parental responsibilities to be in parents' own interests, and thus to be the ground of rights in the parents themselves. For the most part the law assumes that parents will act in conformity with their own interests, and thus promote the rights of their children. The best kind of guidance that the law can provide is in the simple acknowledgment of this fact. It is only in very sad circumstances that the law's interventions need to depart from this presumption.

This Chapter has also demonstrated the significance of my discussion, in Chapter 4, on the nature and limits of the law's incorporation of relational norms. Many relational norms in law are not the creations of law itself. They are norms that the law has decided to uphold in a distinctly legal manner. The norms that govern familial roles, and other social roles, are only intelligible in the context of their broader contribution to our practical lives. The norms that govern parenthood are intelligible at least in part because of the contribution that they make to their bearer's wellbeing. Accounts of the legal rights of role-bearers cannot ignore the fact that these rights protect activities that have their value apart from law. The value that role-bearers' legal rights protect is not dependent on the law for its promotion. Moreover, as the example of parents' rights under

The Children Act shows us, the law's involvement inevitably creates difficulties concerning the weighing and distribution of rights and duties that do not necessarily arise outside the law.

PART III

CHAPTER 8: INSTRUMENTAL RELATIONSHIPS

Our relationships are a significant part of our lives. Some seem so significant that it is hard to imagine living a life of value without them. In a world without family or friendship, nothing else would come to much good.¹ They make a fundamental and irreplaceable contribution to our wellbeing. This fact sits uneasily with the idea that we can have what may be called instrumental relationships—relationships that derive their value, in whole or in part, from some other end that they help us achieve. Samuel Scheffler even suggests that it would be ‘pathological’ to ‘attach nothing but instrumental value to any of one’s personal relationships’.²

In this Chapter I argue that we have relationships that are wholly or largely instrumentally valuable. Aristotle seems to have had some of these relationships in mind when he spoke of friendships of utility—friendships formed for mutual benefit.³ We have relationships with others supported by their advice, or for the service that they give us; we cooperate with others to achieve

¹ cf Aristotle, *Nicomachean Ethics* (Roger Crisp ed & tr, Cambridge University Press 2000) 1155a: ‘No one would choose to live without friends, even if he had all the other goods’.

² Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press 2002) 121.

³ Aristotle (n 1) 1157a.

certain ends. In the *argot* of contemporary private law, we form certain ‘commercial relationships’ with others, for mutual benefit.⁴ Though these relationships are sometimes unstable, insecure, and contingent on their continuing instrumental value, they are still relationships. They are still defined by constitutive norms that set them apart from other kinds of interpersonal interaction.

In Chapters 2 and 3 I offered a view of normative relationships according to which these relationships are rationally intelligible, and defined by their constituent deontic properties. In this Chapter I develop this account to argue at greater length for the possibility of instrumental relationships—relationships justified, in whole or in part, by their instrumental value. The possibility of instrumental relationships was raised but not fully defended in Chapter 2. Here I offer two examples of relationships that are justified by their instrumental value—teamwork and authority.

⁴ I do not mean to suggest that all of our commercial interactions are relational, but it seems likely that at least some of them are. For further discussion see the collected essays in Ian MacNeil, *The Relational Theory of Contract: Selected Works of Ian MacNeil* (David Campbell ed, Sweet & Maxwell 2001). cf. Dori Kimel, ‘The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model’ (2007) 27 *Oxford Journal of Legal Studies* 233.

My argument proceeds in three stages. I begin with the example of teamwork as a relationship that has instrumental value. I introduce a view of teamwork that defines it in part by its ability to help us pursue valuable ends. In the second part of the Chapter, I respond to two prominent objections to instrumental accounts of normative relationships. I note that the additional value present in instrumental relationships helps us avoid the conclusion that counting teamwork itself as a reason for action is a form of 'double counting'. In the final section of the Chapter, I contrast the teamwork case with another prominent instrumental relationship—authority. Although some have thought it problematic, the instrumental understanding of authority is continuous with our understanding of a range of instrumental social relations, including teamwork.

I am not claiming that all relationships are instrumentally valuable. I take it for granted that there may be some relationships that do have intrinsic value. Relationships of love and friendship, as well as familial relationships, are frequently said to be intrinsically valuable, and I do not want to dispute that

possibility here.⁵ My purpose in this Chapter is simply to defend the possibility of a variety of relationships that have or are dependent upon instrumental value.

8.1 Instrumental Relationships

Aristotle's discussion of friendships of 'utility' in Books VIII and IX of the *Nicomachean Ethics* indicates some of the difficulties that attend the analysis of instrumental relationships. Aristotle clearly thought that in the paradigmatic form of friendship, friendships were 'disinterested', based on appraisal of the other's virtues, with each wishing the best for the other's sake.⁶ In his 'wine example', for instance, Aristotle compares true friendship with wine. It would be 'absurd to wish good to one's wine', because at best we hope that the wine will last for our own sake (so that we can drink it).⁷ True friendship, in contrast, is defined by this kind of well-wishing or goodwill.⁸

⁵ For a dissenting view see Simon Keller, *Partiality* (Princeton University Press 2013) ch 3. Keller argues that it is the individuals within the relationship, and not the relationship itself, that possess intrinsic value. I think my arguments do show that instrumental accounts of e.g. friendship are more plausible than is sometimes supposed, but I do not explore these implications here.

⁶ See Aristotle (n 1) 146–147; 1156b.1156b9–11.

⁷ *ibid* 145; 1155b.

⁸ Chapter 3.

On the other hand, Aristotle expressly concedes the possibility of friendships of utility or pleasure—friendships in which friends ‘love the other not in himself, but only in so far as they will obtain some good for themselves from him’.⁹ Aristotle disparaged friendships of utility in various ways, but he did not refrain from referring to them as friendships. The tension between this disparagement and Aristotle’s willingness to countenance friendships of utility as a particular ‘species’ of friendship has long been a source of debate among his interpreters.¹⁰ Cooper argues that friendships of utility are friendships in which there is well-wishing of the requisite sort, but the well-wishing is largely incidental, arising out of ‘unself-interested well-wishing within the confines of a relationship primarily motivated by self-seeking’.¹¹ Others have countered that this interpretation is incorrect—that the relationships are not defined by well-wishing of any sort—and that they are friendships in virtue of their resemblance

⁹ Aristotle (n 1) 145–146; 1156a.

¹⁰ See, *inter alia*, Kenneth D Alpern, ‘Aristotle on the Friendships of Utility and Pleasure’ (1983) 21 *Journal of the History of Philosophy* 303; Julia Annas, ‘Plato and Aristotle on Friendship and Altruism’ (1977) 86 *Mind* 532; John M Cooper, ‘Aristotle on the Forms of Friendship’ (1977) 30 *Review of Metaphysics* 619; Charles H Kahn, ‘Aristotle and Altruism’ (1981) 90 *Mind* 20; ADM Walker, ‘Aristotle’s Account of Friendship in the “Nicomachean Ethics”’ (1979) 24 *Phronesis* 180.

¹¹ Cooper (n 10) 641.

to friendships in other ways (because they are cooperative or trusting, for instance).¹²

My purpose in this Chapter is not to engage with the exegetical challenge that Cooper raises, but I do think it gives insight into the philosophical problem that anyone defending the possibility of instrumental relationships needs to face. On the one hand, some of our most cherished relationships are those in which we expect the person to act in a way that reflects the value of the relationship (or more fundamentally, the value of the other person within that relationship). But certain kinds of relationships are distinguished by their particular instrumental status—relationships in which we coordinate to secure some desired end, say, or relationships involving the exchange of valued goods.

An instrumental relationship, as I define it, is a relationship that is justified in whole or in part by its relation to some other good. Instrumental relationships are either dependent upon, or partly constituted by, their extrinsic value.¹³ Such extrinsic value is a necessary (though not sufficient) condition for

¹² See e.g. Walker (n 10); Alpern (n 10); John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 141.

¹³ I will proceed on the assumption that the most basic distinction in discussions of value is between intrinsic and extrinsic value. Some have thought that rather than intrinsic value, *final* value is what is significant; e.g. Christine M Korsgaard, 'Two Distinctions in Goodness' (1983) 92 *Philosophical Review* 169; Wlodek Rabinowicz and Toni Rønnow-

the existence of an instrumental relationship. The most common kind of instrumental justification invokes the means-end relation, but this is not the only kind of instrumental justification. A relationship may be valuable just because it *prevents* a particular harmful state of affairs,¹⁴ or because it *signifies* something of value.¹⁵ I will also argue below that instrumental relationships need not have only extrinsic value—they must be partly justified by their extrinsic value, but once so justified, they can acquire additional value.

Instrumental accounts of legal relationships are often accused of failing to cohere with their actual relational features. Instrumental accounts are associated with the rigidities of economic analysis of private law, which is alleged not to be capable of illuminating the relationships between plaintiff and defendant. As Goldberg and Zipursky conclude, ‘the sense of a duty to another is a sense of being bound to another, recognising an intense, often unquestioned, normative

Rasmussen, ‘A Distinction in Value: Intrinsic and for Its Own Sake’ (2000) 100 *Proceedings of the Aristotelian Society* 33. I think that final value is reducible to intrinsic value, and so I will ignore the distinction between the two. What others refer to as ‘final value’ can be analysed as a kind of additional intrinsic value possessed by some instruments.

¹⁴ Though cf. Ben Bradley, ‘Extrinsic Value’ (1998) 91 *Philosophical Studies* 109. The prevention cases undeniably raise certain analytical difficulties that are not present in other instances of extrinsic value.

¹⁵ For instance, marital relationships might be valuable because they *signify* a voluntary, loving commitment. This signatory value might be all that distinguishes marital relationships from *de facto* partnerships.

pressure to act or refrain from acting'.¹⁶ As Weinrib explains, this critique of instrumentalism is supposed to reflect 'the truism that the liability of a particular defendant is always a liability to a particular plaintiff' by taking 'the relationship between the parties to be the central and pervasive feature of liability'.¹⁷ A similar concern has motivated some to criticise instrumental accounts of legal authority.¹⁸ In moral philosophy, the significance of certain relationships is sometimes thought to challenge impartial normative theories.¹⁹ Rather than responding to any particular argument against the possibility of instrumental relationships, my work in this Chapter is meant to demonstrate the general plausibility of relationships that serve an extrinsic purpose. The deontic and phenomenological features we associate with relationships are not incompatible with arguments that they possess instrumental value.

¹⁶ John Goldberg and Benjamin Zipursky, 'The Moral of Macpherson' (1998) 146 *University of Pennsylvania Law Review* 1734, 1844.

¹⁷ See also, Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001) 13–24. This Chapter is a partial and indirect response to this challenge. The possibility of instrumental relationships shows that the apparent relationality of the private law is not enough to discredit the view that these relations are in some way instrumentally justified. I have already argued, in Chapter 6, that the relationality of the private law is compatible with a variety of otherwise divergent theories about the justification and content of private law norms. My arguments here are intended to complement those earlier observations.

¹⁸ See, in particular, Scott Hershovitz, 'The Role of Authority' (2011) 11 *Philosopher's Imprint* 1.

¹⁹ Some of these challenges were discussed in the previous Chapter.

It can help to think of a variety of our personal relationships that are dependent on their instrumental value. Think of the sorts of relationships that arise between work colleagues, business associates, or sporting friends. We do have relationships with other people that are dependent on some kind of instrumental value (such as the pleasure they provide us). For this reason they are, as Aristotle noted, contingent and impermanent. When their instrumental value dissipates, so too do the commensurate obligations associated with the relationship. So long as my tennis-partner and I continue to play good tennis with each other, we have certain obligations to one another (obligations of punctuality and fair play, for instance).²⁰ If we cease to enjoy or be able to participate in tennis, though, then the obligations that we have against one another will dissipate.

It is of course possible that many of these interactions will evolve into more meaningful kinds of relationship. In the process of meeting someone regularly for a game of tennis, we might develop a mutual fondness towards each other that blossoms into an intimate friendship.²¹ Yet it seems obvious that

²⁰ So *pace* Keller, I assume that these ‘undemanding’ relationships do involve duties or obligations; cf. Keller (n 5) 50–52.

²¹ cf Raz on the evolution of friendship and ‘expressive obligations’; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 253–258.

not all relationships need to develop in this way. We value some of our relationships precisely because they are instrumental and impermanent. Our lives would become oppressive in a very peculiar way if we were forced to be friends with everyone whose company we enjoy or whose character we admire.

Most of these instrumental relationships share a common feature: they are relationships that are coordinated around pursuit of a certain kind of value. I will describe them as kinds of teamwork. In the next section of this Chapter, I offer an account of relationships of teamwork, which tries to elucidate their common structure. I argue that teamwork relationships are relationships that are conditional on their fulfilling some instrumental value, but which nonetheless have some kind of additional value to their participants.

Before discussing teamwork it is important that I make two clarifications to my argument. First, many writers associate attribution of instrumental value to something with the diminution of its value or importance. I think this misapprehension is often what motivates criticism of various kinds of instrumentalism, including instrumentalism about relationships.²² Relationships

²² For instance, it is one reason given for scepticism about law's instrumental value; cf. Leslie Green, 'Law as a Means' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Oxford University Press 2010).

that possess only instrumental value might still be irreplaceable and deeply significant. For instance, the relationship between a trusted family doctor and their patient can be deeply significant, even when they have cause to see each other outside of clinical hours. We should not confuse instrumentality with insignificance.²³ It is important to bear this in mind throughout the following discussion. We have weighty reasons to preserve and promote instrumental value.

Second, it is important not to confuse instrumental relationships with self-interested relationships. One interpretation of Aristotle's definition of 'friendships of utility', for instance, makes them out to be entirely self-interested, but in many cases this seems to be a mischaracterisation.²⁴ A relationship can be valuable as an instrument for some other good without either party being self-interested in any fashion. Even in the case of tennis partners, both may value the relationship for reasons that do not relate to their enjoyment of the partnership. I suspect that many critics of the possibility of instrumental relationships are actually critics of self-interested relationships. When Scheffler dismisses valuing

²³ See further Keller (n 5) 54–56.

²⁴ A point noted by Cooper in his argument for an alternative interpretation. The well-wishing may be dependent on some other self-interest, but as long as there is some sort of well-wishing then the relationship as a whole is not *entirely* self-interested; Cooper (n 10) 633–4.

relationships instrumentally as 'pathological', he probably has in mind situations in which one party regards relationships as valuable entirely because of the way in which it promotes their own interests. There *would* be something pathological about this kind of disregard of others' interests, and the pathology would be no less evident in the case of instrumental relationships. For instance, someone who values teamwork solely for the pleasure it brings them, and not for the good it achieves, has not fully appreciated the value of teamwork. In defending instrumental relationships, I do not mean to defend pathological self-interest.

8.2 Teamwork

There are familiar cases where things will go better than they otherwise would if we work together, scenarios that involve reasons for teamwork. Some scenarios are commonplace. When all of us place our oars in the water at the same time and let them exit the water at the same time, the boat moves more quickly through the water than it otherwise would. Other reasons for teamwork are more significant. There are ten of us in a rescue party trying to save ten individuals stuck down ten separate mineshafts. The mine will soon collapse. It only takes one person to rescue an individual miner. Unless each of us agrees on which rescuer will rescue which miner, we might all try to rescue the same man. We have good reason to work together in order to save the miners' lives.

Regardless of their level of importance, all of these cases—I will designate them as *teamwork* cases—have underlying structural similarities.²⁵ We have reasons for entering into the team in the first place (the value of winning the boat race, the value of rescuing ten miners), which I designate as *justifying* reasons. But, once justified, the teamwork itself also provides us with a further reason for action. The reason for action that the teamwork itself provides I refer to as a *constitutive* reason. The justifying reasons are needed to explain teamwork as a source of independent reasons for action. If teamwork had no instrumental value, then there would be no reason to be team-members in the first place. Two requirements explain teamwork's constitutive reasons. The first requirement is one of other-connectedness—members of a team must take each other's actions to be in themselves a reason to act, rather than simply taking themselves to be acting directly on the justifying reason.²⁶ The second requirement is that the

²⁵ Useful discussions of coordination cases (which include teamwork cases) can be found in Michael E Bratman, 'Shared Cooperative Activity' (1992) 101 *Philosophical Review* 327; Michael E Bratman, *Shared Agency: A Planning Theory of Acting Together* (Oxford University Press 2014), especially ch 4; John Gardner, 'Reasons for Teamwork' (2002) 8 *Legal Theory* 495; Margaret Gilbert, *Joint Commitment: How We Make the Social World* (Oxford University Press 2013); Christopher Kutz, 'The Collective Work of Citizenship' (2002) 8 *Legal Theory* 471; Michael J Zimmerman, 'Cooperation and Doing the Best One Can' (1992) 65 *Philosophical Studies* 283.

²⁶ Kutz suggests that the problem of other-connectedness can be further divided into two separate problems: a problem of relationality and a problem of coordination; Kutz (n 25) 475–476. The distinction is helpful, but I am not sure it is necessary. As we shall see relationality solves the problem of coordination—each takes the other to be in the right kind of relationship to provide coordinative reasons for action.

teamwork overcomes the problem of intransigence—teamwork must guarantee that each member is willing to cooperate, and this can only occur if each team-member takes their membership itself as a reason for action.

With these requirements in mind, I propose the following definition of teamwork in terms of its justifying and constitutive reasons. The definition is preliminary and probably incomplete, but it will suffice for the purposes of discussion.

Teamwork for a set of agents A , a set of actions ϕ and a set of reasons Δ exists if (i) everyone in A takes themselves to have a reason to ϕ if and only if the remainder of A ϕ ; and (ii) everyone in A takes themselves to have a reason not to act on reasons not to ϕ if the remainder of A ϕ ; and (iii) the conditions specified in (i) and (ii) ensure that A better conforms with Δ than they otherwise would.

The criteria in (i) and (ii) state the constitutive reasons for simple teamwork. The combined effect of both criteria is to explain teamwork's other-connectedness and its ability to overcome individual intransigence. In the simplest cases, criteria (i) and (ii) will be sufficient to describe teamwork. There are variations on this basic case of teamwork. Teamwork could also involve delegation and division of work, or the appointment of decision-makers. Still, these variations on the simple case will take a similar structure. It will still be vital that everyone in A takes themselves to have a reason to ϕ if the remainder of A act in some way, though

we might be required to carve out special exemptions for different delegations, or stipulate that one or more agent's actions are privileged. In the leadership case, for example, everyone in A will take themselves to have a reason to ϕ if and only if some privileged member of the group, L , takes herself to have a reason to ϕ .²⁷

The requirement in (iii) identifies the typical justifying reasons for teamwork. In stating the requirement in (iii) I have left open the possibility that 'betterness' can come in many forms, and even in degrees. For instance, I am leaving open the possibility that teamwork can be justified when it only increases the likelihood of conforming with Δ (because it provides a more stable solution, say, with less likelihood of unravelling due to free-rider problems). I am also trying to leave open the possibility that teamwork only makes things better *in one way* (as it might when it makes a team collectively better-off at the same time as it makes things worse in one other way for an individual or sub-group).²⁸

There are certain kinds of motivations for action or other attitudes that define membership of the team, and which are explained by this account. As Kutz

²⁷ Gardner (n 25) 499.

²⁸ As in Parfit's Each-We dilemmas; Derek Parfit, *On What Matters*, vol 1 (Oxford University Press 2011) 438.

observes, teamwork is associated with a number of phenomenological features that relate its members.²⁹ Each takes their membership of the team as a special kind of reason for action, to the extent that they resent others who fail to act on their teamwork reasons, or those who act on reasons that are inimical to their teamwork reasons. A relationship provides particular motivating reasons for its members if certain reasons for action are excluded by the relationship—the relationship makes it inappropriate to act on what might otherwise have been valid reasons.³⁰ Intimate relationships like love offer a paradigmatic example of this sort of motivational concern. Each loves the other for their own sake, and not for the sake of some other good that they bring with them. A man who buys his child a generous present to impress his wife, and not because he wants to please the child, is not acting as he should. The father is not demonstrating the requisite kind of motivation that we would expect within a loving relationship. The presence of these sorts of motivational concerns in more intimate relationships does not preclude their existence in relationships of a less intimate form.

²⁹ Kutz (n 25) 466–8.

³⁰ Rather than exclusion, the motivational features of both relationships might be explained in terms of modifying reasons (what Dancy refers to as attenuators and intensifiers), but I have chosen not to complicate matters by considering this possibility; Jonathan Dancy, *Ethics Without Principles* (Oxford University Press 2004); For helpful discussion see John Horty, 'Reasons as Defaults' (2007) 7 *Philosophers' Imprint* 1.

The advantage of certain motivational requirements within instrumental relationships is clear in the teamwork case. Criterion (ii) in our definition of teamwork guarantees that members of their team take their membership to be a reason for action. This is meant to ensure better conformity with the reasons that justify the teamwork. In rare cases, the team-members' initial reasons for joining the team may even be blocked or obscured by the relationship of teamwork. The rescuer who is allocated shaft five is prevented from acting on the reasons that they have to rescue the remaining nine, even though the prospects of the other trapped miners were a reason for the rescuer to join the team in the first place.

The motivational features of teamwork also help to resolve problems generated by the possibility of intransigence.³¹ The fact that membership is taken as providing a reason for action and a reason not for acting on other reasons is crucial to realising teamwork's value. If each member of the team has in mind their reasons not to act as a team, then there is instability. A boat may travel almost as quickly with seven women rowing together as it did when there were eight women rowing together. If just one woman considers that moving quickly

³¹ Analogously, Zimmerman's account of teamwork imposes a requirement of 'transigence'; Zimmerman (n 25) 297. Bratman similarly requires a commitment to the joint activity, and a commitment to mutual support (when needed); Bratman, 'Shared Cooperative Activity' (n 25) 328–331, 336–339; Bratman, *Shared Agency: A Planning Theory of Acting Together* (n 25) 103.

was her initial reason for teamwork she might be inclined not to bother rowing with them. If every member of the team thinks in the same way, then the teamwork loses its stability. In order to avoid this instability each team member needs to think, not in terms of the preconditions of their teamwork, but in terms of their membership of the team. I noted in the Chapter 3 that this kind of motivational aspect is well explained by the possibility of protected reasons. In the teamwork case, protected reasons are reasons to act as part of the team and reasons not to act for reasons that threaten the stability of the team.

Motivation is also an important source of other-connectedness or relationality in instrumental relationships like teamwork. It explains how each can take the other's actions or intentions to be a reason for action at the exclusion of others. In many cases this leads to a great sense of connectedness and solidarity between team-members. Objections to the possibility of instrumental relationships often focus on the plausibility of their involving this kind of other-connectedness. Recall Goldberg and Zipursky's observation that our duties to others reflect bonds that are 'intense' and 'often unquestioned'.³² But teamwork cases show the fact that the relational bond is intense and unquestioned is perfectly compatible with its being structured around some external aim. In fact,

³² Goldberg and Zipursky (n 17) 1844.

the intense and unquestioned nature of the connection may be indispensable to the realisation of the aim.

Teamwork is not a kind of convention. Though both teamwork and convention involve many-agent scenarios, conventions can arise by accident. They have an arbitrariness that is lacking in teamwork scenarios. There are commonalities. In convention scenarios, as with teamwork, a regularity of behaviour gives everyone what Lewis describes as ‘a good and decisive reason’ to conform.³³ In cases of convention, however, the regularity itself seems to provide the good and decisive reason to conform. The criterion in (iii) stipulates that it is required that the outcome of teamwork be better than it would have been in the absence of teamwork. Convention arises in special circumstances where the regularity of behaviour need not be justified in terms of its outcome’s betterness—because some alternate convention would be counterfactually equally acceptable.³⁴ Neither is teamwork (even teamwork involving leadership) the same as authority, as we shall see. Though there are some teamwork cases that involve authority, there are many cases of authority that do not involve teamwork. In legal philosophy, both of these distinctions matter. Legal

³³ David Lewis, ‘Languages and Language’ in Keith Gunderson (ed), *Minnesota Studies in the Philosophy of Science*, vol 7 (University of Minnesota Press 1975) 5.

³⁴ In Lewis’s account of convention, this is guaranteed by his condition (5); *ibid* 5–6.

philosophers sometimes display a tendency to assimilate all legal norms into teamwork norms—to view law as a set of reasons arising from shared intentional behaviour.³⁵ Law is just as likely to (indeed must) contain norms that are accidental, or not the result of shared intention but authoritative intervention.³⁶

8.3 Objections to the Instrumental Account of Teamwork

I have argued relationships of teamwork are relationships that possess particular constituent deontic features, but which depend in part on their serving a particular instrumental purpose. There are two common objections to this instrumental account, usually offered in the alternative. Both attempt to impugn the rationality of the kind of motivations that I identified as arising in teamwork cases. The first objection is that acting for the sake of our membership of the team, rather than for the sake of the basic reasons that justify teamwork, would be acting for the wrong reason, and that this could not be rational. The second objection is that the account of teamwork requires us to act on the same reason

³⁵ C.f. Shapiro's modelling of legal norms as 'plans'; Scott Shapiro, *Legality* (Harvard University Press 2011). On 'plans' in practical reason see further Michael Bratman, *Intention, Plans, and Practical Reason* (Center for the Study of Language and Information 1987).

³⁶ At least one norm in every legal system must be a customary norm—the ultimate norm of a legal system is a special kind of customary rule amongst legal officials; HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 92–3.

twice—once as a reason for joining the team, and second as a reason for acting as a team.

It is helpful to think of these objections in terms of a dilemma for proponents of instrumental accounts.³⁷ The challenge first assumes that we only have reason to act on fundamental or basic reasons. If this were the case, then our ‘reasons’ for teamwork would just be minor premises in our practical reasoning—specifying the ways in which we comply with our constitutive reasons for action.³⁸ If our teamwork reasons are just minor premises in our practical reasoning, the objection runs, then they are not actually reasons of the sort that we could act upon.³⁹ This is the first horn of the dilemma: the account of

³⁷ For analogous dilemmas presented in the case of authority see Christopher Essert, ‘A Dilemma for Protected Reasons’ (2012) 31 *Law and Philosophy* 49; Stephen Perry, ‘Political Authority and Political Obligation’, *Oxford Studies in Philosophy of Law: Volume 2* (Oxford University Press 2013); Scott Shapiro, ‘Authority’ in and Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press 2002). Similar concerns seem to lie behind Hershovitz’s criticism of the Razian model and Regan’s rejection of it favour of an ‘indicator rule’ view of authority; see Donald Regan, ‘Authority and Value: Reflections on Raz’s “Morality of Freedom”’ (1988) 62 *Southern California Law Review* 995; Hershovitz (n 18).

³⁸ Enoch advocates a view of authority that operates on the assumption that authoritative instructions constitute minor-premises in our practical reasoning; see David Enoch, ‘Reason Giving and the Law’ (2011) 1 *Oxford Studies in the Philosophy of Law* 1; David Enoch, ‘Authority and Reason-Giving’ (2014) 89 *Philosophy and Phenomenological Research* 296. Enoch is echoing an account of the law as an occasional ‘rule-of-thumb’ that was advocated by Donald Regan; ‘Law’s Halo’ (1986) 4 *Social Philosophy and Policy* 15; ‘Authority and Value: Reflections on Raz’s “Morality of Freedom”’ (n 37). According to Regan, authority cannot be totally opaque to the concerns that justify it.

³⁹ In Razian terms, these minor premises are auxiliary reasons. Raz offers the following example of auxiliary reasons: I have an *operative* reason to help my friend. Giving my

teamwork as a minor premise in team-members' practical reasoning would not provide us with the protected reasons that we need in order to explain teamwork as a particular kind of relationship grounding reasons for action. We might have a reason to act *as if* we were in a team, but we will not have a reason to act for or out of teamwork. The second horn of the dilemma follows from the suggestion that if we did have a reason to act for or out of teamwork, then we would really be acting on the same reason twice—first as a reason for joining the team and then again as a reason for the teamwork itself. And this would then seem to license a problematic kind of double counting of reasons.

In response to this supposed dilemma, some critics grasp the first horn, and argue that our reasons for acting in the teamwork cannot arise from teamwork itself. In other words, these critics insist that we have reason, as individuals, to act as a team, but the teamwork itself does not provide any reasons for action beyond the reasons we have as individuals.⁴⁰ Another possibility is to grasp the second horn, and argue that since relationships like

friend \$400 will help my friend. This latter fact is the auxiliary reason. Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999) 34–35.

⁴⁰ Regan's theory of cooperative utilitarianism offers the best example of a theory that takes this approach; Donald Regan, *Utilitarianism and Co-Operation*, vol 33 (Oxford University Press 1980). Regan's cooperative rules are designed to be transparent and accessible for an agent. In this sense there is no relationship of teamwork that gives me reasons for action, just a fully-stated decision-rule that allows me to take into account the actions of others.

teamwork *do* provide us with reasons for action, and since an instrumental account of our reasons for teamwork would license double-counting, it must be the case that our teamwork reasons are not instrumental.

The first horn of the dilemma raises epistemological doubts about the coherence of acting on instrumental reasons—these doubts threaten the coherence of the kind of membership-dependent reasons that I have been relying on in order to explain teamwork. In fact, these doubts are at risk of badly over-generating scepticism about what are perfectly legitimate chains of practical reasoning. If we were always required to act on fundamental or non-derivative reasons, then many of our actual chains of practical reasoning would be deficient. I admit that there is something indirect about acting out of teamwork, but I do not think it is problematic. The force of our operative or constitutive reasons can transmit through to the conclusions of our practical deliberation, and those conclusions themselves can function as operative premises. Once we decide that we have reasons for teamwork, the teamwork itself can provide us with requisite reasons for action. So I am convinced that if the assumptions motivating the first horn of the dilemma were to hold, they would place

implausibly strict demands for transparency on our practical reasoning.⁴¹ But full defence of this position would take me too far away from my present discussion. Fortunately, I think that there is another way to explain the existence of teamwork reasons even if the first horn of the dilemma is insurmountable.

Recall that the second horn of the dilemma was that if teamwork were thought to provide us with its own constituent reasons for action, then this would license a kind of double counting. All that is needed to meet this double-counting objection is an explanation of how teamwork could come to acquire additional value beyond the values to which it provides an end.⁴² This way out of the dilemma can be demonstrated through an analogy with the relationship of friendship. In order for friendship to exist in the first place, I need to take pleasure in my friend's company. Still, if my friend asks me for lunch, there is nothing wrong with meeting them because it will bring me pleasure *and* because I they are my friend. I can act on both reasons for action. If we accept that

⁴¹ Further arguments that instrumental reasons are capable of functioning as reasons independent of the ends to which they relate are provided in Niko Kolodny, 'Instrumental Reasons' in Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (Oxford University Press 2015); Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011) ch eight.

⁴² In the case of authority, Edmundson suggests that the problem is overcome by claiming that the relationship has intrinsic value; but he does not consider the possibility that some relationships have intrinsic value in virtue of their instrumentally valuable parts; William A Edmundson, 'Political Authority, Moral Powers and the Intrinsic Value of Obedience' (2010) 30 *Oxford Journal of Legal Studies* 179.

friendship has value that exceeds its component attitudes, then there is no risk of double counting. We may act on the genuine pleasure that our friend gives, as well as acting on the additional value of the relationship of friendship. The pleasure that our friend gives us is partly constitutive of the relationship of friendship, but our friendship has further value in addition to the pleasure we take in each other's company. The additional value explains why we act for both the justifying reason and the constitutive reason at the same time.⁴³

We have teamwork reasons to the extent that teamwork presents us with some additional value that grounds our reasons to act as team-members, in addition to our initial reasons for regarding ourselves as team members. I will outline a number of possible explanations of this additional value below. I suggest that some of these possibilities seem more plausible than others in the teamwork case. In particular, I claim that relationships like teamwork have *additional* extrinsic value, because they ensure that the outcome from pursuing the relationship is in some way better than if the relationship did not exist.

⁴³ These issues were also discussed in Chapter 3.

8.3.1 Additional Intrinsic Value

Instrumental relationships, like other instruments, may have additional intrinsic value that is conditional on their instrumental purpose. Korsgaard discusses the possibility of mixed cases where an object's value for its own sake is *conditional* on instrumental value. She offers as examples mink coats and fine enamel frying pans.⁴⁴ Green offers the example of Bressan's flute—a fine instrument, but also a particularly 'splendid example of the wood turner's craft'.⁴⁵ So splendid, in fact, that it is now preserved behind glass in the Victoria and Albert Museum. Analogously, instrumental relationships like teamwork may possess intrinsic value that is conditional on their conforming with the particular reasons that justified them. This is the view endorsed by Gardner—'when there are reasons for teamwork, teamwork has intrinsic value'.⁴⁶

If this view is true, then there are valuable aspects of teamwork that give us reason to admire it for its own sake, and which arise when teamwork does

⁴⁴ Korsgaard (n 13) 264. Korsgaard wants these examples to force a distinction between what she describes as 'final value' and intrinsic value, but I think that we can explain them either as cases of conditional intrinsic value, or alternatively (and less plausibly) as instances of organic unities; E Wielenberg, 'Goodness Without Qualification' (1998) 32 *Journal of Value Inquiry* 93.

⁴⁵ Green (n 22).

⁴⁶ Gardner (n 25) 504. Gardner is actually going further, and claiming that teamwork has conditional intrinsic value.

what it was intended to do. If instrumental relationships do have additional intrinsic value, then I think we should analyse their intrinsic value as a kind of conditional intrinsic value.⁴⁷ We can value instrumental relationships for their own sake while still holding that their value is in some way conditional on their ability to serve a particular end. There *is* something admirable about teamwork—we can appreciate the value of teamwork even apart from the end that the teamwork is helping us realise. For instance, one of the enjoyable aspects of competitive sport lies in the appreciation of the finely-honed teamwork and coordination of players, even when their objectives are largely inconsequential. Like the Bressan flute, which we can admire even when it rests unplayed, we can value teamwork even where it is coordinated around some largely valueless end.

8.3.2 Additional Extrinsic Value

The additional value that is possessed by an instrumental relationship need not be solely intrinsic. The relationship in question might also have extrinsic value beyond the particular values to which it provides an end. In particular, it might constitute what Raz has described as a special kind of conditional or facilitative good that has value in addition to the value of the ends to which it provides a

⁴⁷ On the possibility of conditional value see Dancy (n 30) 171–175. Full discussion of this possibility would take me too far away from my current subject.

means—a good that exists because it facilitates or has the potential to facilitate another good, but which has its own additional extrinsic value unconditionally.⁴⁸ For instance, buying an insurance plan has extrinsic value even in circumstances where we will never need to rely on the plan. The value of insurance is partially preventative and extrinsic—in that it prevents loss in the case of harm or accident—but it can still have further potential value that explains why we were justified in keeping it in situations where it was unneeded.

I think this is at least part of explanation of the source of the additional value in the teamwork case and other goal-oriented instrumental relationships. Many of our instrumental relationships do not *just* help us to achieve some end. They help us to achieve it *well* (in less time than we would have otherwise, or with fewer resources). In the teamwork case, the additional extrinsic value is explained by the stability of the outcome. When it is justified, teamwork has additional extrinsic value because it raises the likelihood of success by reducing the probability that one member of the team will doubt the value of their participation and start the unravelling of the whole collective effort. We are all familiar with the types of success that we associate with cooperative efforts like teamwork.

⁴⁸ Raz, *From Normativity to Responsibility* (n 41) 111–113, 143–149.

This kind of additional extrinsic value is also clear in the case of our relationship with justified authorities, to be discussed shortly. Authorities, through their instructions, have a variety of means for helping us to reach some end that we might otherwise have reached with less-efficacy or which we might have been less likely to reach. Authoritative instructions can be clear, stable, and prospective.⁴⁹ Following these directives can be a good deal easier than attempting to use our own judgment.

Does it belittle relationships to insist that their additional value is extrinsic—that they ultimately have no value for their own sake? I do not think so. Some extrinsically valuable things are far more valuable than intrinsically valuable things. Goods like aspirin or antibiotics might only be extrinsically valuable, but their value to us can still exceed the intrinsic value of an instant of basic pleasure. Many instruments are an indispensable part of the life well-lived, and many instrumental relationships are similarly indispensable. We can rely on other resources—like the presence of exclusionary reasons—in order to explain these relationships’ motivational features, as well as their apparent indispensability.

⁴⁹ Lon L Fuller, *The Morality of Law* (Yale University Press 1969).

My arguments in this regard are very tentative and preliminary, and further work is needed on these issues. Still, I do not think we should be troubled by the possibility that some instrumental relationships also possess additional value that makes them an independent source of reasons for action. There are several plausible explanations of this additional value that might demonstrate the reason-giving character of these relationships.

8.4 Authority as an Instrumental Relationship

So far in this Chapter I have focussed on teamwork, and I stressed at the outset that an understanding of teamwork is of limited importance for our understanding of law in general.⁵⁰ In offering an instrumental account of teamwork, however, I have offered the rudiments for an instrumental account of authority, and authority is a far more important feature of legal systems. It is commonly held that law necessarily claims authority, for example.⁵¹

⁵⁰ Teamwork is more useful when it comes to considering the nature of the relationship that exists between or among legal officials—legal officials sometimes expressly conceive of themselves as members of a collective body. It is claimed this is the correct way to interpret the actions of parliamentarians in creating legislation, for example: Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2012). I will not assess the plausibility of these claims here.

⁵¹ More precisely, that legal officials make such claims when they apply the law. John Gardner, 'How Law Claims, What Law Claims', *Law as a Leap of Faith* (Oxford University Press 2012); Raz, *The Authority of Law: Essays on Law and Morality* (n 21) chapter two.

Viewed analogously to teamwork, authority is just an instrumental relationship between two sets of agents that involves both justifying reasons and constituent reasons.⁵² The possibility of this kind of instrumental understanding of authoritative relationships is important, precisely because instrumental accounts of authority are often said to lack an ability to account for its relational features.⁵³ There are many, and varied, versions of this criticism of instrumental account of authority.⁵⁴ Amongst the different points that these critiques emphasise are these:

- (i) According to the instrumentalist, authority is just an intermediary between reasons and persons, rather than a meaningful social relationship. Instrumental accounts do not provide a satisfactory

⁵² Leslie Green, *The Authority of the State* (Clarendon Press 1990) 40–1.

⁵³ Shapiro (n 37); Scott Hershovitz, 'Legitimacy, Democracy, and Razian Authority' (2003) 9 *Legal Theory* 201; Stephen Darwall, 'Authority and Second-Personal Reasons for Acting' in David Sobel and Steven Wall (eds), *Reasons for Action* (Cambridge University Press 2009); Stephen Darwall, 'Authority and Reasons: Exclusionary and Second Personal' (2010) 120 *Ethics* 257; Hershovitz (n 18); Stephen Darwall, 'Authority, Accountability, and Preemption' (2011) 2 *Jurisprudence* 103.

⁵⁴ The most celebrated contemporary account of authority is probably Joseph Raz's service conception of authority. In particular, Raz's normal justification thesis about authority stipulates that the normal way of justifying authority is just to show that the subject will better conform with already existing reasons for action by following the directives of the authority than if they attempted to conform with those reasons directly. See Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 53.

account of authority in terms of reasons shared 'between or among persons'.⁵⁵

- (ii) The instrumental account is unable to explain how it is that authorities are often said to have the *right to rule*, a corresponding duty of obedience owed to the authority, and the standing to demand their subjects' compliance.⁵⁶
- (iii) The instrumental account of authority identifies the wrong kind of reason for a subject to obey. They are a reason to act *as if* another person has authority over the subject, not actual authority.⁵⁷

The possibility of instrumental relationships like teamwork goes a long way to dispelling the concerns raised in (i) and (iii) as they apply to authority. (The concerns raised in (ii) were partly met by the discussion, in Chapter 7, of the rights of role-bearers. I will not revisit them here.) The criticism in (i) has been

⁵⁵ Jules Coleman, quoted in Hershovitz (n 18) 11.

⁵⁶ Darwall, 'Authority and Reasons: Exclusionary and Second Personal' (n 53) 260; Hershovitz (n 18) 6–10. It is usually assumed that the right to rule, the obligation to obey, and the standing to demand compliance are equivalent; see e.g. Darwall, 'Authority and Reasons: Exclusionary and Second Personal' (n 53). Those (like me) who argue that each of these three terms are not interdefinable will be forced to read into (ii) three distinct challenges to the instrumental view. Other are tempted towards a revisionary view that holds that some or all of these requirements are missing; see e.g. Enoch, 'Authority and Reason-Giving' (n 38).

⁵⁷ Darwall, 'Authority and Reasons: Exclusionary and Second Personal' (n 53) 267–268.

addressed by showing that the familiar features of authority are continuous with features of other instrumental relationships. In this Chapter I have focussed on teamwork, but there are other examples of instrumental relationships. Relationships of advice, instruction, custodianship, and service are all continuous with this instrumental appraisal.⁵⁸

The concern raised in (iii) is misguided. As in the teamwork case, the reasons identified as justifying reasons in the instrumental account of authority are not necessarily the reasons that should motivate the subject who acts on the authoritative instruction. The teamwork example shows that instrumental relationships often require this kind of exclusion of reasons. The concern overlooks the necessary motivational aspects of authoritative relationships. In the case of teamwork, the requisite motivations guarantee a certain kind of connectedness that ensures that each team-member is focussed on their responsibilities as a team-member rather than directly on their desired outcomes. In the case of authoritative relationships, the subject is motivated to conform with the actual directives of the authority. The relationship is constituted by

⁵⁸ Advice is a particularly interesting case. It seems to me that part of the difference between authorities and advisors is that the constitutive reasons associated with advisory relationships create non-mandatory rather than mandatory norms. The advisor's advice gives us reason to act if we desire a certain outcome, not reasons to act categorically; see also *ibid* 259–260.

protected reasons that connect the authority and their subjects, and which create the necessary kind of motivational attitudes.⁵⁹

Accounting for authority in terms of its justifying and constitutive reasons is a useful starting point for a working definition, which I will develop analogously to the definition in the teamwork cases. The constitutive reasons associated with authority are the reasons created for the subject simply in virtue of the authority's say-so. Authoritative speech acts confer an obligation on us that is directly related to their content. The justifying reasons associated with authority can be naturally understood in terms of authority's instrumental value in a causal sense. Authority appears to serve certain reasons by guaranteeing better conformity. With these justifying and constitutive reasons in mind, the following account seems plausible.

Authority exists between one set of agents A and another set of agents S and a set of reasons Δ if (i) everyone in S takes a ruling from anyone in A as a reason to comply with that ruling; and (ii) everyone in S takes a ruling from anyone in A as a reason not to act for reasons not to comply with that ruling; and (iii) the conditions stipulated in (i) and (ii) ensure that S better conforms with Δ than they otherwise would.

⁵⁹ Perhaps this overlooks the real thrust of these objections. It might be argued that these objections do not rely on relationality, but instead on the coherence of the kind of motivational factors I have relied upon in order to capture relationality. If that is the case, then their objections will rely on the kinds of epistemological doubts that I examined in section 3.2.

This definition is partially incomplete. In order to complete it I would need to offer an account of the kind of speech act that comprises what I have called a ruling.⁶⁰ For the purposes of discussion here, take a ruling to be whatever speech act is constituent of authority. The definition bears an obvious similarity to existing instrumental accounts of authority, particularly the account offered by Raz in pursuit of his service conception of authority.⁶¹ The conditions specified in (i) and (ii) are just particular codifications or what he describes as his pre-emption thesis—justified authority offers us reasons to follow it, and to exclude or pre-empt reasons not to follow it.⁶² The condition in (iii) is a rather sparse version of what Raz identifies as his normal justification thesis—authority’s need to ensure that the outcome of our compliance is better conformity with some existing reason.⁶³ The three conditions will offer plenty for detractors to quibble about, but they seem to me to be a plausible attempt to define authority in terms of its constituent and justificatory reasons.

⁶⁰ For an attempt see Enoch, ‘Authority and Reason-Giving’ (n 38) 307.

⁶¹ Raz, *The Morality of Freedom* (n 54); Joseph Raz, ‘The Problem of Authority: Revisiting the Service Conception’, *Between Authority and Interpretation* (Oxford University Press 2009). See also Enoch, ‘Authority and Reason-Giving’ (n 38).

⁶² Raz, *The Morality of Freedom* (n 54) 45.

⁶³ *ibid* 53–7. Raz also offers a further thesis, a dependence thesis, but it is not so much a necessary feature of authority as a desirable feature—it guarantees that authorities are not merely helping us to conform with reasons that they have already created for us.

Is authority really just a specific case of teamwork? Both relationships have similarities. Both are instrumental relationships that seem to be justified in terms of their causal contribution. To justify both it is necessary to show that their outcomes are in some way better than if we had not acted as members of a team or subjects of an authority. They differ in their constitutive reasons and thus in their means of securing an outcome. Authority is an indirect method of conforming with reasons for action, where teamwork relies on coordinated intention that is usually directed towards a certain outcome.⁶⁴ Authority also involves speech acts where teamwork need not and often does not. In authority, the reason that justifies the relationship may well be the very same reason that the authority asks the subject to ignore. For instance, in cases involving possible self-defeat, a justified authority can help us to avoid self-defeat by following their instructions. A community of fishermen may avoid overfishing a certain area by following authoritative instructions. They can do so even without agreeing amongst each other as to the best course of action. There is no need for them to coordinate intentionally.⁶⁵

⁶⁴ The indirectness of authority is explored in the following Chapter.

⁶⁵ Though of course teamwork in the form of a cooperative agreement might provide an equally suitable means of preventing overfishing.

A kind of authority could easily arise in teamwork scenarios. Imagine that in the mine rescue scenario described at the beginning of the Chapter, the rescuers agree that one of them, the captain, will decide in which mine shaft each is to attempt rescue. When the captain barks 'Shaft one!' at one of their subjects, his saying-so confers an obligation on the rescuer to go into shaft one. However, authority in this scenario is dependent on the pre-existing agreement and coordinated intentions of the group. Many authoritative relationships are more varied, and they are usually less dependent on coordinated intention. In the next Chapter of this thesis I examine one particular kind of authority that I argue requires a broader account—the authority claimed by legal and political authorities.

8.5 Conclusion

In this Chapter I have sought to defuse several common objections to the possibility of instrumental relationships. Initially I relied on the example of relationships of teamwork, which are frequently justified by our reasons to act for the value of the ends that they realise. I then offered some necessary elaboration on several issues raised by the instrumental account. I focussed on the possibility of instrumental relationships that possess additional value. This additional value allowed my account of instrumental relationships to avoid the

objection that they licensed double counting of their justifying reasons. I then turned towards a discussion of the relationship between authority and subject as another instrumentally justified relationship. I noted that the analogy with teamwork helped to defang several common objections to the instrumental account of authority. In doing so, however, I noted that there are important distinctions between teamwork and authority. While both can be used towards a wide array of shared ends, they differ in the means they offer for serving those ends. Authority is less likely to rely on the concerted intentions of subjects.

I began the Chapter by noting that some relationships are defined by the value we attribute to the other for their own sake—and that this sits uneasily with the notion of an instrumental relationship. But rather than disputing the possibility of relationships having instrumental value, we would be better off considering how and in what ways relationships come to have this instrumental value (do they admit a wide or narrow range of justifying reasons, for instance, and what means do they offer for achieving conformity with these reasons?). In the present Chapter I have introduced several considerations meant to aid this effort. In the next Chapter I consider whether legal authority can be instrumentally justified.

CHAPTER 9: RELATIONSHIPS, COMMUNITY, AND LEGAL AUTHORITY

In the previous Chapter, I defended the possibility of instrumental relationships, and noted the significance of this possibility for our understanding of relationships of authority. In this final Chapter I consider the significance of relational norms for our understanding of legal authority. In the conclusion of their recent philosophical study of the family, Swift and Brighthouse note that the account of 'relationship goods' that they rely on to justify familial partiality could provide the basis for a more careful consideration of civil and political relationships: 'similar questions can be asked about the civic relationships, about the goods made possible by citizens sharing membership of the state'.¹ Here I attempt to follow Swift and Brighthouse's suggestion. I locate the argument of this thesis within a broader debate about the nature of authority and the justification of legal intervention. I consider the extent to which legal authority might be constitutive of a broader relationship between the authority and the community that they purport to govern. I argue that our relationships with legal officials are very often impersonal, and that to the extent that any obligations of obedience relate us to legal officials, those obligations will ordinarily be instrumentally

¹ Harry Brighthouse and Adam Swift, *Family Values: The Ethics of Parent-Child Relationships* (Princeton University Press 2014) 176.

justified. My arguments for these conclusions help to demonstrate some of the broader difficulties with attempts to view morality in relational terms.

My argument proceeds in three stages. First, in section 9.1 I distinguish between authoritative relationships that are justified for their instrumental value and authority that is necessary for the realisation of an intrinsically valuable relationship. Second, in section 9.2 I then outline some previous philosophical attempts to analyse justified legal authority in terms of a broader relationship between the authority and the community that is governed. In the third and final section of the Chapter, I argue that justified legal authority need not be relational, and that, in any case, any existing relationship between authority and community will be insufficient to justify legal authority. I do this in three discrete sections. In section 9.3 I observe that justified legal authority need not be relational. In section 9.4 I then contend that, to the extent that legal authority is justified, it often serves our relationships indirectly. In section 9.5 I argue that in many situations in which legal authorities claim justification, they must show that they are acting on a balance of diverse reasons. Our relationships with legal officials, or our duties as citizens, are seldom independently sufficient to justify our obedience. I conclude in section 9.6 with some reflections on the significance of this Chapter for one of the broader arguments of this thesis.

Before I begin, I should note that I do not mean to claim at any point in this Chapter that legal authority is justified. It may well be that for everything I have argued legal authority is never justified. My arguments below concern the hypothetical justification of authority in communities of the sort in which we live. They are meant to determine what instances of justified authority might look like in these circumstances, and not to offer justification of any legal authority.

9.1 The Value of Authoritative Relationships

The phrase ‘authority’ has often been taken to describe a genus of normative relationship, though it need not be taken this way. (I will argue below that there are forms of legal authority that do not instantiate a relationship in any meaningful sense). In Coleman’s words, authority in this sense is to be understood as a relation ‘between or among people’.² Authoritative relationships of this sort all involve what I describe, following Raz, as normative powers.³ By ‘normative power’, I am referring to the ability that legitimate authorities have to make intentional and valuable changes to the normative positions of their

² Jules Coleman, quoted in Scott Hershovitz, ‘The Role of Authority’ (2011) 11 *Philosopher’s Imprint* 1, 11. For similar comments see Leslie Green, *The Authority of the State* (Clarendon Press 1990) 40–41; Leslie Green, ‘The Duty to Govern’ (2007) 13 *Legal Theory* 165, 184.

³ Joseph Raz, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999) 98–106.

subjects. I will assume that authority consists in the authority having normative power over the subject.⁴ Authority may or may not consist in certain other normative incidents, such as the right to rule and perhaps even the duty to do so, but at the very least legitimate authority consists in normative powers of this sort.

It will be useful to distinguish between two different models of authoritative relationship. On the first model, authorities' normative power over their subjects is constitutive of a relationship of intrinsic value between authority and subject, such that the authority is necessary to the realisation of the relationship. The authority's power is therefore justified by the fact that it is necessary to the realisation of the relationship. On the second, the power-conferring norm is constitutive of a relationship that has only instrumental value—the very value of the relationship depends on some other end or ends

⁴ There seems to be a broad consensus in favour of this view; see e.g. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 46; Raz, *Practical Reason and Norms* (n 3) 98–106; Joseph Raz and Neil MacCormick, 'Voluntary Obligations and Normative Powers' (1972) 46 *Proceedings of the Aristotelian Society, Supplementary Volume* 59; Green, *The Authority of the State* (n 2) 62; Stephen Perry, 'Political Authority and Political Obligation', *Oxford Studies in Philosophy of Law: Volume 2* (Oxford University Press 2013) 25–30. Versions of this requirement for the existence of a normative power are also endorsed by Enoch and Edmundson; William A Edmundson, 'Political Authority, Moral Powers and the Intrinsic Value of Obedience' (2010) 30 *Oxford Journal of Legal Studies* 179; David Enoch, 'Authority and Reason-Giving' (2014) 89 *Philosophy and Phenomenological Research* 296. For a dissenting account see Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights* (Oxford University Press 1998).

that the relationship serves. In this section of the Chapter I will introduce and briefly defend this distinction.

9.1.1 Authority within Relationships of Intrinsic Value

Some norms conferring power on one person over another are constitutive of relationships of intrinsic value; the value of the relationship itself is sufficient to justify the constitutive norm. It is plausibly constitutive of a properly functioning relationship between father and son that, when a father instructs his son to be at the dinner, he confers an obligation on the son to do so, regardless of the value of the edict. It is constitutive of their relationship that the father has this sort of normative power to confer an obligation on his son. Although obeying the parent will often suit the child's interests, the child's interests are not necessary for the justification of their obedience. What matters is their relationship to the parent.

Parental authority is necessary for the realisation of the relationship between parent and child—a relationship that has a distinct intrinsic value apart from its instrumental benefits. The parental relationship makes a contribution to the successful flourishing of both the parent and the child that is not reducible to the instrumental benefit of the child's obeying the parent's commands. The parent's control over their children is indispensable to the realisation of the

relationship and its value. Take, for example, a parent's authority to choose what book they will read their child. Brighthouse and Swift note that without this sort of authority, parents' abilities to forge intimate relationships with their children will be limited, and with it the children's ability to benefit from such a relationship.⁵

The value of such authority lies not only in inculcating children in a relationship of safety and control, but in giving parents a certain amount of control and discretion over their children's lives.⁶ It therefore follows that the value of the relationship itself is sufficient for justification of parental authority. None of this is to deny that parents sometimes illegitimately exercise authority over their children. It seems obvious to me that, notwithstanding the constitutive authority of parents, they do often overstep their bounds and abuse this authority.⁷ Nor is it to deny that many instances of parental authority that fall outside these cases are justified by their instrumental value.⁸ But some scholars seem to want to appeal to instrumental concerns to justify all instances of

⁵ Brighthouse and Swift (n 1) 125.

⁶ As Swift and Brighthouse put it, the exercise of parental authority 'is valuable for parents; having the discretion to decide for oneself certain things about how one's children are raised is a key component of what makes parent-child relationships valuable for those doing the parenting'; *ibid* 12–13.

⁷ A point that Brighthouse and Swift also treat as self-evident; *ibid* 26–27.

⁸ It seems plausible to suggest that as a child gets older, and their interest in autonomy grows, the necessity of parental authority to realisation of the relationship recedes; *ibid* 156.

authority—parental or otherwise. This seems to me to be a mistake, at least so long as we are allowing that certain kinds of relationship have intrinsic value. If anything has intrinsic value, it is the relationship between parents and their children, and parental authority seems to play an important role in realising this relationship.⁹

It is certainly true that circumstances of this sort, in which one's authority over another is constitutive of the relationship, rather than incidental to it, are rare. There are many situations where I can remind my friends and loved ones of their standing obligations towards me, or tell them how best to conform with this obligation, but my doing so does not confer any fresh obligation upon them. As Green puts it, 'social relationships may bring with them very stringent obligations without amounting to an obligation to obey their commands'.¹⁰ But it would be wrong to dismiss the possibility altogether. I think that there are other examples of this sort of authority that help to illustrate its plausibility.

⁹ Of course, a thoroughgoing rule-utilitarian might insist that the value of family is itself instrumental—that it provides an environment for promoting the welfare of parents and children. There is little that can be said against this position here, but I would want to suggest that it is implausible for independent reasons.

¹⁰ Leslie Green, 'Law, Legitimacy, and Consent' (1989) 62 Southern California Law Review 795, 816.

Other clear cases of intrinsically valuable authority arise within contractual or quasi-contractual relationships.¹¹ The authority that one contracting party exerts over another exists only in virtue of the value of relationship between the contracting parties. No one can avoid their liabilities under a contract by showing that performing them would not be instrumentally valuable or that it would no longer suit them on the balance of reasons to carry out their undertakings. (David Owens goes so far as suggesting that the authority that promises confer on promisees is the fundamental value of these relationships.¹²) Contractual relationships have value that is not dependent on their particular instrumental use. This value justifies the constitutive powers that define the relationship between contracting parties.

In a more general setting, individuals may voluntarily undertake and assume general roles with respect to one another, and these voluntary roles may bring with them certain constitutive vulnerabilities to another's authority. The various powers that spouses exercise over one another, for instance, are part of the relationship as they have undertaken it. The nature of these roles, and the interests that they serve, was discussed previously in Chapter 7. But part of the

¹¹ I am not claiming that all contracts instantiate relationships between the parties, but some of them do.

¹² David Owens, *Shaping the Normative Landscape* (Oxford University Press 2012) 146–150.

value in the role may well lie in making oneself liable to another's authority. Husbands and wives value the fact that each exerts a certain amount of control over the other. The value of these relationships tends to track the value of allowing others to impose patterns of burdens and responsibilities on our lives, and of partially forfeiting the control that we normally exercise over our own conduct.

These arguments indicate that even relationships of authority in legal settings might have intrinsic value. In many legal systems the authority that parents exercise over their children is directly recognised by law. In the United Kingdom the law recognises the authority of parents to make decisions about the health, education and property of their children.¹³ This authority is at least plausibly necessary to the realisation of the relationship between parents and their children—a relationship which is merely incorporated and given effect by the law. But examples of intrinsically valuable authority in the law extend beyond the family. They include situations where the legal power of one party over another is thought to reflect the law's interest in protecting certain categories of relationship that have intrinsic value. Contractual relationships,

¹³

See Chapter 6.

particularly those contractual relationships that help to constitute meaningful relationships between those parties, provide one particularly clear instance.¹⁴

9.1.2 Authority as an Instrumental Relationship

Other authoritative relationships are justified by the ends that they help us serve. In these relationships it is still the case that the value of the relationship is sufficient to justify the constitutive authority, but the value of the relationship is itself dependent on some other ends that the relationship serves. Instrumental relationships of this sort were discussed in the previous Chapter. On the view defended, we can have relationships with one another which are justified in whole or in part by the services that we provide to one another, including the service we provide through issuing authoritative directives. The purpose of authority of this sort is to help us to conform with our existing reasons for action more effectively than we would but for the existence of such authority. Both the authority and the subject treat the existence of their relationship as a sufficient

¹⁴ In making this argument I do not mean to deny that many kinds of contractual relationship are valuable precisely because they allow for 'cooperation or mutual reliance between strangers', and that they have an intrinsic value that lies in the facilitation of detachment between parties, rather than intimacy; for further discussion see Dori Kimel, *From Promise to Contract* (Oxford University Press 2003) 65–80. My focus here is on certain restricted situations where the contract does form part of a special relationship.

reason for acting in conformity with the authority's directives, and in doing so they ensure better conformity with their existing reasons for action.

Where an authority is instrumentally justified, the precise powers of the authority reflect the underlying justification. Many of the relationships created and upheld by law or by government purport to have this character. The authority of a parole officer over a parolee is limited to the terms and conditions of their parole; the orders and advice of the parole officer are meant to assist the parolee in complying with the terms of their parole and their aims for rehabilitation (it is of course another question whether they in fact do so). The relationship between lawyers and their clients is regarded in a similar way. (By way of contrast, powers that are justified by the value of a relationship are justified just in case they are necessary for the realisation of that relationship.)

There is a tendency to view the two models of authority that I have introduced as mutually inconsistent. One either accepts that legitimate normative powers are constitutive of a relationship that has intrinsic value, and rejects the possibility of instrumental authority, or vice versa. Edmundson, for instance, argues that justified authority must have intrinsic value, and that merely assisting someone in conforming with an existing reason for action is not

exercising authority.¹⁵ David Enoch takes the opposing viewpoint—and argues that authority can only be instrumentally valuable.¹⁶ It is preferable, in lieu of some argument for regarding the two models as incompatible, to think of there being two distinct but related types of authoritative relationship.¹⁷ Both occur where the value of a relationship between persons is sufficient to justify holding someone to be under a duty. In the case of relationships of instrumental authority, however, the value of the relationship is dependent on the service of some other value.

I think that the spectrum of relationships involving authority is also more complex, and varies along many more dimensions, than the division I have embraced here might suggest. There are intrinsically valuable relationships that have additional instrumental value—as when we have friends who we value for their good advice. And we may well have relationships with others that progress from being simply instrumental and become intimate friendships. Raz argues

¹⁵ Edmundson (n 4) 187.

¹⁶ Enoch (n 4) 325, fn. 47.

¹⁷ A third possibility is suggested by Joseph Raz in ‘The Problem of Authority: Revisiting the Service Conception’, *Between Authority and Interpretation* (Oxford University Press 2009) 153–154. Raz thinks that his own instrumental view can accommodate the fact that certain authoritative relationships and procedures have intrinsic value, see also *The Morality of Freedom* (Oxford University Press 1988) 93–94. Hershovitz disagrees; see Hershovitz (n 2).

that respect for law can permissibly develop from an appreciation of its virtues, and that duties of obedience can arise from this permissible attitude of respect.¹⁸ A similar argument might be sufficient to establish that, where legislators and legal officials serve us well, we are given reasons to respect and admire them, and that these reasons ground further obligations towards them that express our respect and admiration. In this way, we may find ourselves related to a community of legal officials that has served us well. I readily admit that there is something artificial about the simple division between intrinsic and instrumental authority that I have adapted here. But the division is a useful one for the purposes of argument, and I will continue to rely on it throughout the remainder of this Chapter.

In my discussion below I turn towards considering the extent to which the legitimate authority of legal officials is constitutive of a normative relationship between them and their subjects. I argue first, that there might be instances of legitimate legal authority that do not instantiate a relationship with their subjects, in any meaningful sense. I then argue that any such relationship, if it did exist, would need to be instrumentally justified.

¹⁸ Raz, *The Authority of Law: Essays on Law and Morality* (n 4) 250–261.

9.2 Legal Authority, Friendship, and Community

Many discussions of legal or political authority rely on an analogy with relationships of fraternity or friendship. Aristotle insists, in the *Nicomachean Ethics*, that the authority of a King over his subjects is part of a friendship of ‘superior benefit; he [the King] treats his subjects well, since being a good person he cares for them with a view to their well-being’.¹⁹ (On the other hand, Aristotle also compared authority to the relationship between a shepherd and his flock, or a father and his children.²⁰) The authority and their subjects are related by their membership in a valuable political community.

The analogy with friendship has been endorsed, for different purposes, by John Finnis.²¹ Finnis suggests that community, like friendship, is a ‘matter of relationship and interaction’.²² He then claims that authority arises out of the need for coordination within a political community: ‘dedicated members of the group will always be looking out for new and better ways of attaining the

¹⁹ Aristotle, *Nicomachean Ethics* (Roger Crisp ed & tr, Cambridge University Press 2000) 1161a.

²⁰ *ibid.*

²¹ John Finnis, ‘Reason, Authority and Friendship’, *Reason in Action: Collected Essays Volume I* (Oxford University Press 2011); John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 141–148; Raz, *The Authority of Law: Essays on Law and Morality* (n 4) 253–260.

²² Finnis, *Natural Law and Natural Rights* (n 21) 135. See more generally 134–160.

common good, of co-ordinating the action of members, of playing their own role'.²³ The legitimacy of authorities arises out of the need for community members willing to play such a role.

Probably the most conspicuous appeal to the model of friendship is Ronald Dworkin's attempt in *Law's Empire* to invoke friendship in service of his particular model of justice as integrity.²⁴ Dworkin deploys friendship in service of an analogy with law as an interpretive practice. Friendship forms the basis of a 'more abstract interpretation of the yet more general practice of associative obligation'.²⁵ Our relationship with our community is, like friendship, reflective of a history of interaction that gives rise to commensurate duties and responsibilities. Membership of a legal or political community is 'in itself pregnant of obligation'.²⁶

Following Dworkin's terminology, this model of authority is often described as an 'associative' model of legal obligation and authority. The authority of legal officials is derived from a pre-existing power-conferring

²³ Finnis, *Natural Law and Natural Rights* (n 21) 231.

²⁴ Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 197–199.

²⁵ *ibid* 178.

²⁶ *ibid* 206.

relational norm, one that is constitutive of a broader relationship of community.²⁷

Very roughly, the view that emerges on associative models is one in which we find ourselves given certain socially designated roles, which are already endowed with constitutive rights, obligations and liabilities to act, and which we can only avoid in circumstances where the role is badly compromised by its immorality. Otherwise, it is a matter of living up to 'our station and its duties', to purloin F.H. Bradley's memorable phrase.²⁸ The usual justification of these role and relationship-based obligations and liabilities is in terms of the intrinsic value of the role. Since the role itself has this value, and the norms in question are necessary to realise the value of the role, the norms are justified.²⁹

²⁷ For reasons that I will not expand upon in this Chapter, I am suspicious of this label, since it seems to describe a wide-range of viewpoints about the nature and value of our relationships and their significance for political and legal obligation. Examples of viewpoints commonly described as associativist can be found in e.g. John Horton, *Political Obligation* (Humanities Press International 1992); Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press 2002); Jonathan Seglow, *Defending Associative Duties* (Routledge 2013). Soper's view, which I discuss briefly below, is a particularly interesting variant; Philip Soper, *The Ethics of Deference: Learning From Law's Morals* (Cambridge University Press 2002).

²⁸ FH Bradley, *Ethical Studies* (Cambridge University Press 2012) 145–192.

²⁹ Versions of this 'teleological' justification of role-based obligations are offered by John Cottingham, 'Ethics and Impartiality' (1983) 43 *Philosophical Studies* 83; Joseph Raz, 'Liberating Duties', *Ethics in the Public Domain* (Oxford University Press 1995); David Miller, 'Reasonable Partiality Towards Compatriots' (2005) 8 *Ethical Theory and Moral Practice* 63; Seglow (n 27). For some objections see Simon Keller, *Partiality* (Princeton University Press 2013) ch 3; Seth Lazar, 'The Justification of Associative Duties' (2016) 13 *Journal of Moral Philosophy* 28.

In other words, associativists adopt a model of legal authority in which the authority's normative powers are supposedly necessary in order to realise the intrinsic value of community. The authority of legal officials is said to be constitutive of their particular role within the particular community. While associativists typically do not deny the existence of other kinds of obligation-bearing roles within a community, our legal obligations are justified by our obligations as citizens or compatriots. (In Dworkin's words, these relationships are 'less local and familiar' than family or friendship).³⁰

To begin with, I have pretheoretical doubts about the plausibility of this sort of fraternal model of obligations towards legal officials in a community. Green has observed that the traditional parental model is in many respects a more accurate one. Where friendship is reciprocal, and typically governed by non-authoritative speech acts like requests and recommendations, parental relationships involve the type of fealty by the child towards the parent that is indicative of true authority.³¹ Even where our relationship with legal authorities is characterised by a kind of mutuality or reciprocity, these authorities are

³⁰ Dworkin (n 24) 206.

³¹ Green, 'The Duty to Govern' (n 2) 180–181; Leslie Green, 'Legal Obligation and Authority' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2012, 2012) <<http://plato.stanford.edu/archives/win2012/entries/legal-obligation/>>.

intervening in our lives in a manner that is not characteristically fraternal. As will become clear, I agree with Green that the fraternal model is not an appropriate way of characterising our relationship with legal authorities. It does not follow (and Green does not claim that it follows) that we can ignore our obligations towards community altogether.³² Part of any justification for legal authority may well be that obeying the authority helps subjects to conform with obligations that they owe to one another as members of a political community. But this demonstrates that legal authority is seldom simply a matter of our relationship with authorities; it is a matter of how that relationship might serve a diverse variety of ends, including the relationship that defines political community.

We could attempt to rescue the fraternal model from these doubts by suggesting that rather than obligations of obedience owed to authorities we have obligations of deference towards legal authorities that are constitutive of our membership of a political community. Phillip Soper suggests that these obligations of deference are expressive of respect for fellow citizens, and he argues that the model of deference has various advantages over Dworkin's integrity model.³³ There are a variety of difficulties with Soper's claim.³⁴ But even

³² See Green, *The Authority of the State* (n 2) 188–219.

³³ Soper (n 27) chs 7 and 8.

if Soper's claim were to hold, the obligations in question would not belong to any relationship with the authority in question. Moreover, as Brownlee suggests, these obligations of deference are unable to inform us what it is that should relate us to our *particular* legal authorities.³⁵ They are simply generic obligations of deference to a necessary authority.

In the remainder of this Chapter I attempt to elaborate upon these already expressed doubts about the plausibility of justifying legal authority in terms of its role in a relationship of community. First, I suggest that our relationship to legal authority might be *impersonal*. I then concede for the purposes of argument the possibility that there are relationships of community and that these relationships have intrinsic value. I argue that even in these circumstances the realisation of these relationships is not independently sufficient to justify the authority of legal officials.

9.3 Impersonal Legal Authority

The preceding discussion suggests one obvious difficulty for accounts of legal authority that calls for further elaboration. We are used to thinking of authority

³⁴ See Kimberley Brownlee, 'Legal Obligation as a Duty of Deference' (2008) 27 *Law and Philosophy* 583.

³⁵ *ibid* 595–596.

in relational terms, whereas many of our interactions with legal authority are removed and impersonal. To the extent that we do interact with legal authority, most of us interact with authoritative legal texts and codes—signs and directives that, however much they purport to influence our decision-making, do little to relate us to those who install and enforce them. Most of us use the law in the same way that we would use an alarm-clock or a thermometer or a reminder note—we relate to it as an impersonal instrument that might occasionally facilitate our conduct.³⁶ So it is not obvious that authoritatively created legal norms are necessarily relational norms.

In fact, the argument that legal authority need not be relational authority is rather straightforward. Authority, as I have already argued, consists in the use of normative powers—powers to intentionally and valuably alter another's normative status (usually through the imposition of duties and the creation of permissions). It is not necessary that this power be constitutive of any relationship between authority and subject. There is no requirement that the authority and subject take the relationship between them as a reason for acting in

³⁶ Don Regan makes this insight the basis of his 'indicator rule' conception of legal authority; Donald Regan, 'Authority and Value: Reflections on Raz's "Morality of Freedom"' (1988) 62 Southern California Law Review 995, 1003–1013.

conformity with the authoritative directives.³⁷ It follows that there are exercises of normative power that are not relational.

This argument is borne out by a further observation about the value of law in contemporary society. If we do have relationships of legal authority, these relationships most plausibly exist with the legal officials who apply and uphold the law.³⁸ But for many of us our contact with legal officials is blessedly rare and unobtrusive. Law tends to work most effectively and efficiently when we are able to anticipate its effects and plan our lives around it.³⁹ When we use the law well, we can avoid any kind of relationship with the legal officials, and this may very well be part of the very value of having law.⁴⁰ As I argued in Chapter 6, the intervention of law is often inimical to the sorts of intimacy and self-creation that many of our most familiar relationships need to flourish. Law is associated with

³⁷ For arguments to this effect debunking the ‘right to rule’ conception of legal authority, see Enoch (n 4).

³⁸ Joseph Raz, ‘Authority, Law and Morality’ (1985) 68 *The Monist* 295; John Gardner, ‘How Law Claims, What Law Claims’, *Law as a Leap of Faith* (Oxford University Press 2012).

³⁹ Hence the observation that efficacious law possesses a kind of ‘negative virtue’, since when law is at its most efficient we are able to avoid, as far as possible, its intrusion in our lives; Joseph Raz, ‘The Rule of Law and Its Virtue’, *The Authority of Law* (n 4).

⁴⁰ I made this point in another way in Chapter 6 when I discussed the relationality of private law—part of the value of the private law lies in avoiding the kind of relationship that exists between plaintiff and defendant, since this relationship is often signatory of significant harm or detriment, and of the need for legal intervention that is clumsy and heavy-handed. Dori Kimel makes a similar argument with respect to the relationality of contract law in Kimel (n 14); Dori Kimel, ‘The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model’ (2007) 27 *Oxford Journal of Legal Studies* 233.

distinct methods of upholding and enforcing norms that are not conducive to the various virtues (like trust, loyalty or benevolence) that typically define normative relationships.

I therefore do not want to claim that legitimate authoritative norms are necessarily relational norms. Authority may only be relational in the exceedingly thin sense that authority always involves two sets of agents (an authority and a subject). I think it likely that there are some kinds of legitimate legal authority that are not relational at all. There is no relationship between me and the officials who design and enforce the traffic laws. But, when these laws are well-designed and well enforced, I might have a duty to follow them (or at least conform with them). Instead my argument below is conditional: *if* we have a legitimate relationship of authority with the legal officials who create or uphold the law, then that relationship must itself be instrumentally justified, in at least two ways. First, they must help us to conform with other relational reasons (such as the reasons we have as citizens and compatriots) *indirectly*, by providing us with a superior method of conforming with already existing obligations. Second, they must help us to conform with a plurality of distinct reasons for action—legitimate legal authority requires the coordination of a diverse range of interests and concerns.

9.4 Indirectness

If we do have obligations towards our fellow citizens, then we will often do better to conform with them directly than to defer to the authority of legal officials. Suppose, for example, that we are associatively bound to our fellow citizens to act for their good by obeying their requests.⁴¹ This does not yet establish that we have an obligation to the legal officials in question to do as they say. The reasons that our various relationships give us are reasons that we are perfectly capable of conforming with directly and of our own accord. Legal officials, on the other hand, purport to provide us with a particular way of conforming with these obligations. That legal officials do this follows from a widely held view about the nature of authority. Authorities do not simply tell us what we ought to do; they tell us to do something on their say-so. Raz's pre-emption thesis is a particular philosophical interpretation of this aspect of authority. Broadly speaking, authorities attempt to give us reasons for acting that

⁴¹ Variations of this associative obligation are often said to be part of an argument for the intrinsic value of democratic procedure; see e.g. Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2010) 75–130. As I will argue more generally, there is always the further question about whether or not the particular democratic procedure stipulated by legal authorities offers the best way of conforming with these obligations. Even if we have constitutive democratic obligations, more is needed to legitimate the kind of democratic procedure mandated by legal officials.

displace our existing reasoning.⁴² The view has been summed up more ecumenically: authorities, by their nature, purport to make a practical difference.⁴³

The clearest cases in which authority can serve our relations indirectly are those that involve collective self-defeat. The prospect of collective self-defeat, even supposing the existence of associative obligations, is evident in what we might call *citizen's dilemmas*.⁴⁴ An excessive focus on one's obligations as a citizen is likely to lead to the kinds of collective self-defeat that practical authorities may justifiably purport to resolve. One may often do better *qua* citizen by ignoring reasons of citizenship entirely. Consider the case of a small, tightly-knit community where all citizens are worried about a fellow citizen's poverty. If all citizens attempted to act on this concern directly, it would result in the alleviation of the fellow citizen's poverty being overdetermined. The citizens

⁴² Raz, *The Morality of Freedom* (n 17) 57–62.

⁴³ Scott J Shapiro, 'On Hart's Way Out' in Jules Coleman (ed) *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press 2001) 494–497.

⁴⁴ See further Derek Parfit, *Reasons and Persons* (Oxford University Press 1984) 53–65. Parfit shows that relational moral theories are prone to be self-defeating in this way.

could have spent at least some of their money attempting to conform with other reasons for action (like their reasons to alleviate other citizens' poverty).⁴⁵

Alternatively, we can imagine a situation in which the citizens of two different states, acting exclusively on the reasons they have as citizens of Lilliput and citizens of Blefuscu respectively, bring it about that both citizens of Lilliput and citizens of Blefuscu are worse off than they would have been if they had ignored those reasons. Perhaps Lilliput and Blefuscu share a water resource, which each state is overfishing out of collective self-interest. If, as a result of their obedience to a competent authority, each nation had ignored their collective self-interest and preserved fish, they might have done better. These kinds of collective self-defeat are likely when we act in pursuit of relational goods, and authority provides one suitable solution.

A plausible model of legal authority needs to allow for the fact that, even when our authorities only act in pursuit of relational goods, they provide an indirect method of pursuing these goods. With regards to certain areas of law, it is hard to dispute that the law's authority must derive at least in part from its ability to help us conform with certain relational reasons for action. Honoré

⁴⁵ They are making the moral mistake that Parfit describes as the 'share of the total view'; *ibid* 67.

offers the useful example of taxation law.⁴⁶ Members of a community may have, in principle, a moral obligation to contribute to certain public goods. This obligation can only be conformed with once the law gets involved, because otherwise the community would face the chaotic consequence of tax payers trying to settle their contribution directly. Duff's work on criminal responsibility is also illustrative of an indirect model. Duff advances a relational account of criminal responsibility.⁴⁷ According to Duff, certain crimes can be distinguished from other non-criminal wrongs by the fact that they are wrongs *against* the polity. It follows that legal officials responsible for prosecuting criminal wrongs are claiming to act on behalf of the polity in order to make individuals answerable for wrongs committed against the polity. If Duff is right about the justification of the criminal law, then his view is compatible with the argument that our relationship with legal officials offers an indirect method of conforming with these obligations. If my arguments in Chapter 6 are correct, the private law frequently serves a similar purpose. The relationship sensitivity of the private

⁴⁶ AM Honoré, 'The Dependence of Morality on Law' (1993) 13 Oxford Journal of Legal Studies 1, 5.

⁴⁷ I am passing over some further philosophical issues here. Duff's model of responsibility is relational at the conceptual level, as well; see especially RA Duff, *Answering for Crime* (Hart Publishing 2007) 23–30. Still, his particular model of criminal responsibility could be adopted by someone who does not share his conceptual commitments; John Gardner, 'Relations of Responsibility' in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford University Press 2011) 92.

law indicates that one of the concerns of the legal authorities that uphold the law is in protecting and enforcing relational norms.

These arguments are not intended to overstate the significance of the norms that define relationships of community to the explanation of legal doctrine. As should be clear from my earlier discussion of the negligence standard in Chapter 6, this way of viewing our different legal duties often seems to me to be unnecessarily parochial and to blur the line between the truly relational and the impersonal. In fact, as I will now argue, legal authorities seldom have the luxury of only considering one set of relationships and interests. If legal authority is to be justified, it will have to be on the weight of all relevant reasons. But we should at least acknowledge the possibility that the law could be justified as an indirect manner of realising various relational goods.

9.5 Pluralism and the Justification of Authority

Typically, decision making of the sort that concerns coordination of large numbers of people involves a plurality of reasons for action. It is in precisely these sorts of circumstances in which political and legal authorities purport to be justified. If they are to be so justified, it will involve consideration of other reasons than those that already connect the authority and subject. Actions of the

sort proscribed by legal and political authorities require us to consider a broad set of interests and concerns. In these circumstances, even supposing that an authority and their subject share a relationship of independent value, their relationship is unlikely to be independently sufficient to justify the subject's obedience.

Ordinarily, in the circumstances in which these authorities claim to be justified, it is not sufficient for them to simply invoke the intrinsic value of an existing relationship between authority and subject. This is because in the situations in which legal authority typically purports to be justified, a plurality of different reasons applies. Justified authority must assist them in complying with the full weight of those reasons. My argument takes the following form:

- (1) The circumstances in which legal authorities might be justified are those that involve widespread coordination of human affairs to secure certain goods that could not be secured but for such coordination, or to resolve practical dilemmas.
- (2) In all of the circumstances identified in (1), a plurality of reasons applies to the subject.
- (3) When a plurality of reasons applies to the subject, either:

- (i) those reasons fall outside of any constitutive relational reasons for obeying the directives of the authority, such that they are capable of defeating those reasons; or
 - (ii) our constitutive relational reasons to obey must be combined with the weight of those other reasons in order to be sufficient to justify obeying the directives of the authority.
- (4) In neither of the circumstances identified in (3) is the intrinsic value of the relationship between authority and subject independently sufficient to justify obedience. The only way to justify obeying an authoritative directive is to show that by obeying this directive, we better conform with the weight of all reasons.

This argument is vulnerable to a number of possible objections. The first objection may be that the circumstances identified in (1), in which political and legal authority are most likely justified, are not the ordinary circumstances in which legal and political authorities claim authority. The statement in (1) is something close to orthodoxy amongst legal philosophers. Still, it is an

orthodoxy that has its detractors.⁴⁸ So I will endeavour to say a little more in defence of the coordination view of legal authority. Premise (2) relies on assumptions that it will be hard for those who accept associativist models of authority to reject. Premise (3) is the most contentious. Below I elaborate on the ways in which pluralism undermines the sufficiency of existing relationships to justify authority. My argument is not that existing relationships do not matter, or even that they cannot be *decisive*. However, they must be weighed against the plurality of reasons that apply. In circumstances of pluralism, an existing relationship between authority and subject is not independently sufficient to justify obedience.

9.5.1 Coordination

The argument rests on an assumption about the kinds of cases in which legal and political authorities are likely to claim (and possibly receive) justification. These are situations that require the widespread coordination of human activity in order to avoid outcomes in which actions are self-defeating or in which certain common goods fail to obtain. Commonly, writers on the justification of

⁴⁸ See especially Leslie Green, 'Law, Co-Ordination and the Common Good' (1983) 3 Oxford Journal of Legal Studies 299; Green, 'Law, Legitimacy, and Consent' (n 10).

political authority speak of these situations as involving coordination.⁴⁹ Unfortunately, the word coordination invokes the standard economic conceit of the coordination game, which is only very rarely an appropriate model for the kind of common activity that might legitimate *de facto* authority. If legal authority were merely a means of providing solutions to economic coordination games, it would be hard to see how it could justify authority of the kind claimed by *de facto* officials. After all, many coordination games could be resolved simply by providing information or facilitating communication—but this is not what the law does.⁵⁰ Legal officials purport to give us categorical and mandatory reasons for action.⁵¹

⁴⁹ Finnis, *Natural Law and Natural Rights* (n 20) 232–233, 244–249; John Finnis, ‘The Authority of Law in the Predicament of Contemporary Social Theory’ (1984) 1 *Notre Dame Journal of Law, Ethics & Public Policy* 115; John M Finnis, ‘Law as Co-Ordination’ (1989) 2 *Ratio Juris* 97; Raz, *Practical Reason and Norms* (n 3) 159–160; Raz, *The Morality of Freedom* (n 17) 75; Scott Shapiro, *Legality* (Harvard University Press 2011) 132–133.

⁵⁰ The point is made by Les Green in his ‘Law, Co-Ordination and the Common Good’ (1983) 3 *Oxford Journal of Legal Studies* 299. In reply, supporters of the coordination model have argued that economic coordination games are a poor model for the kind of coordination that justifies legal authority; Joseph Raz, ‘Facing Up: A Reply’ (1989) 62 *Southern California Law Review* 1153; Finnis, ‘Law as Co-Ordination’ (n 49); Finnis, ‘The Authority of Law in the Predicament of Contemporary Social Theory’ (n 49). In a similar vein, Parfit observes that the game-theoretic concepts of *prisoner’s dilemma* or *repeated prisoner’s dilemma* are not descriptively suitable for the kinds of practical dilemma that matter for ethical and political philosophy; Parfit (n 44) ch 2.

⁵¹ For a restatement of the argument that obligations are both categorical and mandatory see John Gardner and Timothy Macklem, ‘Reasons’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press 2002) 455–470.

The scenarios that typically justify practical authority of the kind claimed by states and legal officials are those in which, without authoritative intervention, collective action would be either directly self-defeating (in the worst case) or less than ideal. It is in those scenarios that attending to reasons directly, by trying to conform with them, is likely to be self-defeating. Because it involves an indirect method of conforming with reason, authority provides one justified solution to these scenarios (it is not necessarily a unique solution).⁵² Following Derek Parfit, I will describe these scenarios as practical dilemmas. Practical dilemmas may vary wildly in their structure. Some practical dilemmas arise due to excessive prudence—they are resolved when people ignore reasons that they have to act in their own self-interests. Other practical dilemmas arise even where participants are already disposed to act altruistically. Practical dilemmas might arise even in a society of perfectly benevolent and altruistic citizens.⁵³ Importantly for the purposes of my argument here, practical dilemmas

⁵² See Raz, *The Morality of Freedom* (n 17) 75. Raz identifies this as his third ‘common reason’ capable of justifying authority. I would go further and describe it as the central case of a reason that justifies authority.

⁵³ Raz, *Practical Reason and Norms* (n 3) 159–160; Parfit (n 44) 62.

of these sorts typically require subjects to weigh a variety of different reasons for action that appear to have their source in a variety of different values.⁵⁴

This theory of the value of law relates to what Green has called the ‘task-
efficacy’ theory of legal and political authority.⁵⁵ The basic insight of task-
efficacy theories is that potential justifications of legal authority will reflect the particular
strengths of legal systems as means for achieving certain plans and resolving
certain problems. Because law is an instrument for the provision of rulings and
adjudication of disputes, it is well-suited to solving certain kinds of collective
action problems and resolving various interpersonal conflicts. Because of its
particular instrumental value, law provides one possible method of resolving
these conflicts. (Of course, a corollary of this observation is that the law will be
ill-suited to solving other sorts of problems. This is obviously true, and elsewhere
in this thesis I have explored some of these weaknesses. But I will put them to
one side in the present discussion.)

⁵⁴ I am assuming, for the purposes of argument, an account of reasons as grounded in values.

⁵⁵ Green, ‘The Duty to Govern’ (n 2) 173–178. The theory is endorsed in Perry (n 4) 56–57.

9.5.2 Pluralism

The assumption that we face a plurality of conflicting reasons is one that follows naturally from the sort of common-sense morality embraced by those who accept an associativist account of legal or political obligation. In the literature on associative obligations much is made of Scheffler's 'distributivist objection' to associative duties.⁵⁶ We are asked to imagine an initially equal distribution between three people—A, B, and C—all of whom bear the same general duties towards each other. A and B go on to form a special relationship that encompasses special duties towards each other which have priority over their respective duties to C. The distribution of 'normative resources' between A, B, and C has lost its egalitarian balance. Judged by the stringency of the duties protecting them, C's interests have declined in relative importance. Not only this, but A and B are presumably better off due to the fact that they are now engaged in a meaningful relationship. The objection can be sharpened by supposing that A and B have greater wealth, either because that has always been the case, or because the relationship has conferred greater wealth upon them. The special relationship between A and B thus reinforces inequality of resources between them and C.

⁵⁶ Samuel Scheffler, 'Relationships and Responsibilities' (1997) 26 *Philosophy and Public Affairs* 189, 56–59.

It is worth noting that a similar kind of conflict arises with respect to the treatment of various relationships in the private law. Imagine that A and B and C are all legal subjects, and that this time, A and B's special relationship is recognised as the basis of a specific duty of care with a right of legal enforcement. There is now a distributive imbalance between the legal rights conferred on A and B and the rights conferred on C. The decision to uphold certain kinds of relational duties inevitably raises distributional concerns.⁵⁷ It confers a power on members of that class to enforce the secondary duties associated with this breach. From the point of view of the relevant legal authority, it is never simply a matter of doing justice between plaintiff and defendant. Once the decision is made to give the relationship a specific kind of recognition (standing under the law of negligence, for instance) then this is a distribution of a certain pattern of burdens and benefits on members of this class, one that may well have been deprived to other subjects who do not fall within it.⁵⁸

My contention is that Scheffler's objection is just a specific instantiation of a more general problem presented by pluralism in the context of debates about

⁵⁷ Some of these concerns were discussed in Chapter 6 of the thesis.

⁵⁸ I owe this point to John Gardner; John Gardner, 'What Is Tort Law For? Part 2. The Place of Distributive Justice', *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 338–346.

legal and political authority. Suppose that associativists are right, and I do have a duty to give priority to at least some of the interests of my fellow citizens. Once we accept that various relationships—those that involve friendship, family, contract and state—give their members reasons for action, it is hard to deny that these reasons sometimes conflict. In circumstances in which political and legal authorities typically seek obedience, these conflicts are particularly common. In order to justify their authority over us in these circumstances, at pain of self-defeat, authorities need to show that they can secure compliance with the balance of all reasons that apply to us.

In my discussion below I identify two distinct versions of what I describe as the problem of pluralism for existing-relationship views of legal authority. Problems of *external* pluralism arise when constitutive obligations owed to citizens conflict with duties owed towards those who fall outside of the citizenship group. Problems of *internal* pluralism arise when constitutive obligations towards members of the group conflict with other reasons for action arising out of relationships between subgroups.

9.5.3 External Pluralism

Scheffler's distributive objection, introduced above, is a particular kind of challenge from *external* pluralism. For any relationship between A and B, there is some C whose interests provide reasons for action that are not constitutive of that relationship. Those reasons for action may conflict with A and B's constitutive obligations. In those circumstances, if one party directs the other to perform an action, then the only way to justify obedience to these directives is to show that obedience guarantees conformity with the weight of all reasons that apply to C, including the reasons arising from C's interests.

It might help to provide a more pedestrian example. Suppose my father tells me that I really ought to buy my mother a cake tin for her birthday. I know that my mother hates to cook, and that the gift would bring her very little pleasure. My relationship with my father does give me a reason to do as he says, but it is not the only reason I have to consider. I have to weigh other reasons for and against such a decision against the weight of the relational reason to do as my father has told me to do. In this situation, it seems plausible to say that I would not be justified in obeying my father's directive. The situations in which I would have been justified are those in which following my father's directive helps me to conform on the balance of reasons. My father's constitutive authority

over me is not sufficient to justify his directive. I must consider whether following his directive will help me conform with the weight of reasons that includes, not just the reasons that my relationship with my father gives me, but those that my relationship with my mother gives me as well.

The problem can be stated more generally. In situations in which the practical authority is typically justified, the actions recommended by authorities are likely to involve reasons that extend beyond those we have as citizens. Consider, for example, the many variants of the preservation/depletion dilemma faced by modern political communities.⁵⁹ Presently, as citizens, we must choose between depleting certain resources (our marine wildlife, our rainforests, our atmosphere), which will make at least some people in the present slightly better off, and preserving these resources, which will make at least some people in the future much better off.

⁵⁹ Some might object to describing these outward-looking scenarios as dilemmas—they do not involve self-defeat in the way of more familiar prisoner's dilemma type scenarios. But they are dilemmas in a more familiar sense—they point to a potential conflict between the reasons provided by our collective self-interest, and the total weight of our reasons for action.

	Present Citizens Are	Future Persons Are
If We Preserve	Slight Worse Off	Greatly Better Off
If We Deplete	Slightly Better Off	Greatly Worse Off

The preservation/depletion dilemma involves weighing relational and non-relational reasons. (Though some philosophers might want to claim that our reasons to avoid harming future persons are themselves constitutive of a relationship we share with future persons, I will put this possibility to one side.⁶⁰) A justified response will require some weighing of the wellbeing of future persons against the wellbeing of present citizens. It will help us conform better with the weight of such reasons than if we attempted to conform with those reasons directly. It is true that on some views, we have a special relationship with our fellow citizens that justifies prioritising their interests over others, though most would concede it cannot justify ignoring the interests of others

⁶⁰ See Caspar Hare, 'Voices From Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?' (2007) 117 *Ethics* 498.

entirely.⁶¹ I do not mean to deny the possibility of such a view being the correct one. But the essential point is that in order to be justified in the way it resolves a preservation/depletion dilemma, an authority must get the balance between present and future interests right. They must provide us with a method of conforming with the weight of reasons we already have, regardless of the correct balance to be reached. Our obligations as citizens, alone, could not justify this kind of authority.

Dilemmas like preservation/depletion involve the problem of external pluralism, as their justified resolution involves balancing of reasons that arise from the interests of others who are not citizens. It might be claimed that circumstances involving the management of resources and the interests of future persons are rare or deviant cases of justified authority. In most cases, we need only consider what we are obliged to do in our capacity as citizens. This claim is unlikely to succeed. A more mundane category of cases involve what I describe as internal pluralism.

⁶¹ John Broome, *Counting the Cost of Global Warming* (White Horse Press 1992) 107–108; Parfit (n 44) 480–486.

9.5.4 Internal Pluralism

Our relationship with other citizens or members of our polity is not our sole relationship of value. We are also friends, lovers, parents and children. We are members of voluntary associations, make promises to each other and sign contracts with each other. Each of these relationships has value and provides us with reasons for action. If our relationship with authorities did not also help us to pursue these other relationships, its own value would be greatly diminished. Their failure to help us conform with our other reasons would *defeat* our obligations towards our fellow citizens to obey the law. The circumstances in which legal and political authorities typically claim justified authority are those in which they must also help us conform with these other reasons for action in order to be so justified.

The same general considerations that militate against the relational case in the preservation/depletion dilemma can be repeated in less esoteric scenarios, which start to resemble more mundane instances of authoritative intervention. I will describe these scenarios as creating a problem of *internal pluralism*. Suppose that our citizenry divides equally between wealthy and poor citizens. At present, educational choices are left to the family. If poor families are left to rely on private education, and cannot afford it, then their children will not fare well. The

children of wealthy families, on the other hand, tend to fare very well from private education. A better outcome for the poor occurs if the government provides them with public education. A still better outcome for the poor occurs if the government forces wealthy families to use public education. This diverts the resources of wealthy families to the public education system, and builds a sense of community among students.⁶²

Suppose that the authority in question is considering an intervention to make public education compulsory. How would we go about demonstrating that such an intervention was justified? The reasons that we have to be good citizens would only go so far towards legitimating the intervention. We would need to consider the relational reasons we have as parents, the reasons provided by the children's wellbeing, the intrinsic value of education, egalitarian concerns, and the instrumental benefits of respecting parents' autonomous educational decisions.

⁶² Some dilemmas along these lines in the context of the family are considered by Brighouse and Swift (n 1) 127–132.

	Wealthy Families Use Private Education	Wealthy Families Use Public Education
Poor Families Use Private Education	1 st best for wealthy children, least best for poor children	2 nd best for wealthy children, least best for poor children
Poor Families Use Public Education	1 st best for wealthy children, 2 nd best for poor children	2 nd best for wealthy children, 1 st best for poor children.

Many other examples of dilemmas of this sort can easily be provided. How these dilemmas are best resolved is irrelevant to the point that I am trying to make. It is plausible, for instance, that we should assign priority to the interests of poor children, and that their interests should therefore prevail over all other concerns. Alternatively, perhaps we should assign greater priority to the value of parental autonomy in making educational choices. Regardless of the outcome of the reasoning process, resolution of the dilemma requires us to assign the correct weight or priority to all of the relevant reasons for action. It is never sufficient to simply appeal to the interests of the community as a whole.

What the presence of both internal and external citizens' dilemmas indicates is that the reasons that we have as citizens are not independently sufficient to justify authority of the type claimed by *de facto* authorities like political and legal officials in many of the situations in which they claim

authority. Granted, authorities may appeal to these reasons, both when they are present and when they are not. But these reasons seldom do enough work on their own. The reasons we must consider in scenarios of widespread coordination are too diverse, and too significant, to carry the weight that associative accounts of authority want them to carry.

9.6 Relationships and Justification in Moral Theory

The preceding discussion has allowed me to revisit a larger theme of this thesis, this time from the perspective of questions concerning the authority of legal officials and the legitimation of certain kinds of legal intervention. I referred in the Introduction, and again in Chapter 6, to a growing philosophical tendency to view morality in relational terms. This is reflected in the re-emergence of an approach to political or legal authority that treats both largely as a question of relationship or role.⁶³ The arguments in this Chapter demonstrate some of the inherent difficulties in arguing that our practical reasoning is fundamentally a matter of what we owe to one another. Legitimizing obedience to the law, particularly in the context of contemporary states, raises questions concerning the widespread coordination of conduct, about the interests of present and future

⁶³ See e.g. Dworkin (n 24); Margaret Gilbert, *A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society* (Oxford University Press 2006); Seglow (n 27).

persons, and the proper weight to be afforded to the interests of families, communities and nation-states. In these situations, simply appealing to the obligations we owe towards one another as citizens or subjects of the law does little to resolve these questions.

These limits on the justification of legal authority are suggestive of the broader implausibility of attempts to understand morality solely in terms of special relationships. As Samuel Scheffler concedes, 'a morality of inter-personal relations is no longer an adequate morality for our world'.⁶⁴ However plausible an account of morality in terms of our stations and their duties appeared to Green or to Bradley, the simple version of this morality is no longer fit for this kind of use. We have become increasingly aware of the potential for an excessive focus on the interpersonal to lead to a variety of kinds of moral failure—including myopia and self-defeat. If contemporary legal institutions are at all justifiable (and I do not claim that they are) surely it is because they are capable of helping to remedy these defects.

⁶⁴ Samuel Scheffler, 'Morality and Reasonable Partiality' in Brian Feltham and John Cottingham (eds), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010) 127.

Those who identify special relationships as an important source of political or legal obligation often argue that associativist views are widely held—they are assumed to be part of ‘common-sense morality’.⁶⁵ One possible explanation is just that these beliefs are mistaken, and that commitment to the conclusion that a large number of people have mistaken beliefs about legal and political authority is just the cost of rejecting the associativist account of political and legal authority. I think that those of us who defend an instrumentalist view of authority can say more than this. First, instrumentalists allow that there we owe duties in virtue of our membership of a community. They simply observe that these relationships do not produce obligations of deference or obedience to legal authority. Second, instrumentalists can still insist that, when they help us indirectly, authorities form an association with us that has value, and that gives us reason to value the roles that authorities designate for us. They need not deny that authority can be a valuable relationship that binds together two or more parties. Third, it is also worth noting that those who have associativist beliefs may be right about what considerations are doing the justificatory work without

⁶⁵ For discussions that make this assumption see e.g. Henry Sidgwick, *The Methods of Ethics* (Macmillan 1877) bk III; ch 4; Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (n 27) 3; Diane Jeske, ‘Special Relationships and the Problem of Political Obligations’ (2001) 27 *Social Theory and Practice* 19; Diane Jeske, ‘Special Obligations’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2014, 2014) <<http://plato.stanford.edu/archives/spr2014/entries/special-obligations/>>.

being right about authority. It is certainly plausible that, at least in some circumstances, authorities do help us to conform with reasons we have to act on behalf of our fellow citizens. If the criminal law makes us answerable only for wrongs against the polity, as Duff suggests, then if it is valuable, it is as an indirect method of securing our conformity.

The prevalence of associativist beliefs about our obligations towards the law might be explained in part by the historical value of those beliefs. Political and legal authorities, as I have written, often claim justification in situations involving cooperation, to resolve coordination problems, secure public goods, and resolve dilemmas in which individual action would be self-defeating. I would hypothesise, as others have, that, within small communities, in which community members had shared values and priorities and a strong sense of association, associative obligations provided a powerful psychological solution to these problems without the need for authoritative intervention.⁶⁶ In situations involving large numbers of people, frequently in contact with each other, with disparate values and widespread disagreement, their ability to resolve these problems is significantly diminished. In Parfit's terms a *political*, rather than a

⁶⁶ Parfit (n 44) 86; Scheffler, 'Morality and Reasonable Partiality' (n 64) 125–126.

psychological, solution is now needed.⁶⁷ Authority is a kind of political solution, in that it provides an intervening social mechanism for resolving these dilemmas. The popularity of associative attitudes may partially be explained by their ability to resolve less complicated kinds of collective problems and dilemmas. They are prevalent because of their historical value.

By suggesting that these beliefs had historical value I do not mean to offer a debunking argument to the effect that they were false beliefs that had evolutionary benefit for communities.⁶⁸ In addition to being historically valuable, associative beliefs may well be true. It does not follow that they could ever justify political authority of the sort found in modern states with large numbers of people. We do have these associative obligations in many cases, but they are rarely very strong or widespread. In any case, they are incapable of doing the kind of justificatory work that they would need to do in order to legitimate political authority. This is the argument that I have made here. It is compatible with my suggested explanation of the prevalence of associativist views.

⁶⁷ Parfit (n 44) 63–64.

⁶⁸ cf Richard Joyce, *The Myth of Morality* (Cambridge University Press 2001) 135–174.

9.7 Conclusion

As members of families, communities, and nation states, we are subject to a number of important and weighty moral requirements. We undoubtedly have reasons to act on behalf of our family members, friends and neighbours, and we feel the pull of those reasons keenly. Perhaps officials often try to assimilate the obligations that they purport to impose on us into these familiar and attractive categories. It would not be surprising if they did. But such claims are rarely if ever vindicated. Our relationship with the authorities themselves is almost never enough to justify obedience of their directives.

It is possible that legal authorities are justified if they offer us a manner of better conforming with our existing reasons to act on behalf of our fellow citizens. Yet even this purported justification is very often implausible. In the kinds of circumstances in which we are likely to need authority, many divergent reasons apply to us. We have reasons to promote others' welfare, to prioritise the interests of our children, or to protect the interests of non-citizens. Justified authority ought to help us to conform with the weight of those reasons.

My discussion in this Chapter has also attempted to broaden our understanding of how relationships of legal authority acquire their value, if they

have any value to acquire. To the extent that authorities resolve the dilemmas that arise out of our self-interest, our bias towards the present, our pursuit of relationships of value, or our need to coordinate to pursue certain goods, they serve us well. But their ability to do these things is far from guaranteed.

This Chapter is the culmination of my arguments in this thesis. I began, in Part I, with an account of relational norms as norms that are constitutive of a relationship of value. I argued that relational norms needed to be understood in non-legal settings before their presence in law could be properly understood. In Part II I considered the incorporation of relational norms in law. In Chapter 5, I argued that the law's ability to incorporate relational norms was limited by a number of concerns that relate to law's capacities as an instrument of social control. In Chapters 6 and 7 I observed a number of ways in which a proper understanding of relational norms was indispensable to the understanding of legal doctrine. In Part III I located my arguments within a broader debate about the character of law and legal authority. I argued that we can have relationships that are justified by their instrumental value. I also argued that the intrinsic value of our communal relationships was insufficient to justify fealty to legal authority.

Many of my arguments in this thesis have considered how the law, as a particular instrument of guidance, affects our relationships with one another through its intervention. I have argued that relationships are goods that comprise certain constituent norms, that relationships promote our interests, and that the law has a role to play in promoting these interests. Nonetheless, I warned against identifying our normative relationships with the diversity of legal norms that support and protect them. The law does not offer a perfect mirror of our bonds and commitments. I have demonstrated that its role in facilitating our relationships rests on the particular strengths and weaknesses of law as a means of authoritative intervention in our lives.

BIBLIOGRAPHY

- Adler JE, 'Particularity, Gilligan, and the Two-Levels View: A Reply' (1989) 100 *Ethics* 149
- Alchourron CE and Bulygin E, *Normative Systems* (Springer 1971)
- Alpern KD, 'Aristotle on the Friendships of Utility and Pleasure' (1983) 21 *Journal of the History of Philosophy* 303
- Alstott A, *No Exit: What Parents Owe Their Children and What Society Owes Parents* (Oxford University Press 2004)
- Annas J, 'Plato and Aristotle on Friendship and Altruism' (1977) 86 *Mind* 532
- Aristotle, *Nicomachean Ethics* (Roger Crisp ed & tran, Cambridge University Press 2000)
- Atiyah PS, *The Rise and Fall of Freedom of Contract* (Oxford 1979)
- Auden WH, 'The More Loving One', *Homage to Clio* (Random House 1960)
- Austen J and Justice G, *Emma: An Authoritative Text, Contexts, Criticism* (WW Norton & Company 2012)
- Austin JL, *How to Do Things with Words* (Clarendon Press 1975)
- Baron M, 'Impartiality and Friendship' (1991) 101 *Ethics* 836
- Bix B, *Family Law* (Oxford University Press 2013)
- Blome-Tillman M, 'Conversational Implicatures (and How to Spot Them)' (2013) 8 *Philosophy Compass* 170
- Botterell A, 'In Defence of Infringement' (2008) 27 *Law and Philosophy* 269
- Bradley B, 'Extrinsic Value' (1998) 91 *Philosophical Studies* 109
- Bradley FH, *Ethical Studies* (Cambridge University Press 2012)
- Brake E, *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford University Press 2012)

- Brandt RB, 'Toward a Credible Form of Utilitarianism' [1963] *Morality and the Language of Conduct* 107
- Bratman M, *Intention, Plans, and Practical Reason* (Center for the Study of Language and Information 1987)
- , 'Shared Cooperative Activity' (1992) 101 *Philosophical Review* 327
- —, *Shared Agency: A Planning Theory of Acting Together* (Oxford University Press 2014)
- Brighouse H and Swift A, 'Parents' Rights and the Value of the Family' (2006) 117 *Ethics* 80
- —, *Family Values: The Ethics of Parent-Child Relationships* (Princeton University Press 2014)
- Brink D, 'Moral Conflict and Its Structure' (1994) 103 *Philosophical Review* 215
- Brogaard B and Smith B, 'On Luck, Responsibility and the Meaning of Life' (2005) 34 *Philosophical Papers* 443
- Broome J, *Counting the Cost of Global Warming* (White Horse Press 1992)
- —, *Rationality Through Reasoning* (Blackwell 2013)
- —, 'A Linguistic Turn in the Philosophy of Normativity?' (2015) 56 *Analytic Philosophy* 1
- Brownlee K, 'Legal Obligation as a Duty of Deference' (2008) 27 *Law and Philosophy* 583
- —, 'Moral Aspirations and Ideals' (2010) 22 *Utilitas* 241
- —, 'Reasons and Ideals' (2010) 151 *Philosophical Studies* 433
- —, 'A Human Right Against Social Deprivation' (2013) 63 *Philosophical Quarterly* 199
- —, 'Ethical Dilemmas of Sociability' (2015) 28 *Utilitas* 1
- Campbell K, 'The Concept of Rights' (DPhil Thesis, University of Oxford, Faculty of Law 1979)
- —, 'The Variety of Rights', *Challenges to Law and the End of the 20th Century: Rights* (Franz Steiner Verlag 1997)

Campbell TD, 'Humanity before Justice' (1974) 4 *British Journal of Political Science* 1

Cane P, 'Corrective Justice and Correlativity in Private Law' (1996) 16 *Oxford Journal of Legal Studies* 471

— —, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 203

— —, 'Rights in Private Law' in Donal Nolan and Andrew Robertson (ed), *Rights and Private Law* (Hart Publishing 2012)

Card C, 'Against Marriage and Motherhood' (1996) 11 *Hypatia* 1

Chalmers DJ and Jackson F, 'Conceptual Analysis and Reductive Explanation' (2001) 110 *Philosophical Review* 315

Chen-Wishart M, 'Undue Influence: Vindicating Relationships of Influence' (2006) 59 *Current Legal Problems* 30

Chisholm RM, 'Practical Reason and the Logic of Requirement' in Stephan Korner (ed), *Practical Reason* (Oxford University Press 1974)

Christiano T, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2010)

Cohen GA, 'Beliefs and Roles' (1966) 67 *Proceedings of the Aristotelian Society* 17

Coleman J, 'The Practice of Corrective Justice' in Owen, David (ed), *The Philosophical Foundations of Tort Law* (Oxford University Press 1997)

Coleman JL, *Risks and Wrongs* (Oxford University Press 1992)

— —, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001)

Cooper JM, 'Aristotle on the Forms of Friendship' (1977) 30 *Review of Metaphysics* 619

Cooper JM and Hutchinson DS (trs), *Plato: Complete Works* (Hackett Publishing Company 1997)

Cornell N, 'Wrongs, Rights, and Third Parties' (2015) 43 *Philosophy and Public Affairs* 109

- Cottingham J, 'Ethics and Impartiality' (1983) 43 *Philosophical Studies* 83
- Crisp R, 'Utilitarianism and Accomplishment' (2000) 60 *Analysis* 264
- —, *Reasons and the Good* (Oxford University Press 2006)
- Cruft R, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 *Law and Philosophy* 347
- —, 'Against Individualistic Justifications of Property Rights' (2006) 18 *Utilitas* 154
- —, 'Why Is It Disrespectful to Violate Rights?' (2013) 113 *Proceedings of the Aristotelian Society* 201
- D'Almeida LD, 'Legal Statements and Normative Language' (2011) 30 *Law and Philosophy* 167
- Dancy J, *Ethics Without Principles* (Oxford University Press 2004)
- Darwall S, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press 2006)
- —, 'Authority and Second-Personal Reasons for Acting' in David Sobel and Steven Wall (eds), *Reasons for Action* (Cambridge University Press 2009)
- —, 'Authority and Reasons: Exclusionary and Second Personal' (2010) 120 *Ethics* 257
- —, 'Authority, Accountability, and Preemption' (2011) 2 *Jurisprudence* 103
- —, 'Bipolar Obligation' in R Shafer-Landau (ed), *Oxford Studies in Metaethics*, vol 7 (Oxford University Press 2012)
- —, *Morality, Authority, and Law: Essays in Second-Personal Ethics I* (Oxford University Press 2013)
- Downie RS, *Roles and Values* (Methuen & Co 1971)
- Duff RA, *Answering for Crime* (Hart Publishing 2007)
- —, 'Relational Reasons and the Criminal Law' (2012) 2 *Oxford Studies in the Philosophy of Law*
- Duffel SV, 'The Nature of Rights Debate Rests on a Mistake' (2012) 93 *Pacific Philosophical Quarterly* 104

- Dworkin R, *Law's Empire* (Belknap Press 1986)
- —, *Justice in Robes* (Belknap Press 2006)
- Earp BD, Sandberg A and Savulescu J, 'Natural Selection, Childrearing, and the Ethics of Marriage (and Divorce): Building a Case for the Neuroenhancement of Human Relationships' (2012) 25 *Philosophy and Technology* 561
- Edmundson WA, 'Political Authority, Moral Powers and the Intrinsic Value of Obedience' (2010) 30 *Oxford Journal of Legal Studies* 179
- Edwards J, 'Harm Principles' (2014) 20 *Legal Theory* 253
- Eisenberg M, 'Why There Is No Law of Relational Contracts' (1999) 94 *Northwestern University Law Review* 805
- Ekins R, *The Nature of Legislative Intent* (Oxford University Press 2012)
- Emmet D, *Rules, Roles and Relations* (Macmillan 1966)
- —, *The Role of the Unrealisable: A Study in Regulative Ideals* (St Martin's Press 1994)
- Endicott T, *Administrative Law* (3rd edn, Oxford University Press 2015)
- Enoch D, 'A Right to Violate One's Duty' (2002) 21 *Law and Philosophy* 355
- —, 'Moral Luck and the Law' (2010) 5 *Philosophy Compass* 42
- —, 'Reason Giving and the Law' (2011) 1 *Oxford Studies in the Philosophy of Law* 1
- —, 'Authority and Reason-Giving' (2014) 89 *Philosophy and Phenomenological Research* 296
- Essert C, 'A Dilemma for Protected Reasons' (2012) 31 *Law and Philosophy* 49
- Feinberg J, 'The Nature and Value of Rights' (1970) 4 *The Journal of Value Inquiry* 243
- Finnis J, 'Some Professorial Fallacies About Rights' (1971) 4 *Adelaide Law Review* 377
- —, 'The Authority of Law in the Predicament of Contemporary Social Theory' (1984) 1 *Notre Dame Journal of Law, Ethics & Public Policy* 115
- —, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011)

- —, 'Reason, Authority and Friendship', *Reason in Action: Collected Essays Volume I* (Oxford University Press 2011)
- —, 'Revolutions and Continuity of Law', *Philosophy of Law: Volume IV* (Oxford University Press 2011)
- —, 'Law as Co-Ordination' (1989) 2 *Ratio Juris* 97
- Foot P, 'Moral Realism and Moral Dilemmas' (1983) 80 *Journal of Philosophy* 379
- Fraassen BCV, 'Values and the Heart's Command' (1973) 70 *Journal of Philosophy* 5
- Frankfurt HG, *The Reasons of Love* (Cambridge University Press 2004)
- Fried C, 'Privacy' (1968) 77 *Yale Law Journal* 475
- —, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, Oxford University Press 2015)
- Fuller L, 'Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction' [1975] *Brigham Young University Law Review* 89
- —, *The Morality of Law* (Yale University Press 1969)
- —, 'Consideration and Form' (1941) 41 *Columbia Law Review* 799
- Gardner J, 'The Purity and Priority of Private Law' (1996) 46 *The University of Toronto Law Journal* 459
- —, 'Legal Positivism: 5½ Myths' (2001) 46 *The American Journal of Jurisprudence* 199
- —, 'Reasons for Teamwork' (2002) 8 *Legal Theory* 495
- —, 'Wrongs and Faults' in Andrew Simester (ed), *Appraising Strict Liability* (Oxford University Press 2005)
- —, 'Relations of Responsibility' in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford University Press 2011)
- —, 'What Is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1
- —, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012)

— —, 'Some Rule-of-Law Anxieties about Strict Liability in Private Law', *Private Law and the Rule of Law* (Oxford University Press 2014)

— —, 'What Is Tort Law For? Part 2. The Place of Distributive Justice', *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014)

Gardner J and Macklem T, 'Reasons' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press 2002)

General Medical Council, 'Protecting Children and Young People: The Responsibilities of All Doctors' (Explanatory Guidance, 2012)

Gerstein RS, 'Intimacy and Privacy' (1978) 89 *Ethics* 76

Gilbert M, *A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society* (Oxford University Press 2006)

— —, *Joint Commitment: How We Make the Social World* (Oxford University Press 2013)

Goldberg J and Zipursky B, 'The Moral of Macpherson' (1998) 146 *University of Pennsylvania Law Review* 1734

Green L, 'Law, Co-Ordination and the Common Good' (1983) 3 *Oxford Journal of Legal Studies* 299

— —, 'Law, Legitimacy, and Consent' (1989) 62 *Southern California Law Review* 795

— —, *The Authority of the State* (Clarendon Press 1990)

— —, 'The Concept of Law Revisited' (1996) 94 *Michigan Law Review* 1687

— —, 'Positivism and Conventionalism' (1999) 12 *Canadian Journal of Law and Jurisprudence* 35

— —, 'Law and Obligations' in Jules Coleman and Scott Shapiro (eds), *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press 2002)

— —, 'The Duty to Govern' (2007) 13 *Legal Theory* 165

— —, 'Law as a Means' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Oxford University Press 2010)

- —, 'Introduction' in HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012)
- —, 'Legal Obligation and Authority' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2012, 2012)
<<http://plato.stanford.edu/archives/win2012/entries/legal-obligation/>>
- —, 'Should Law Improve Morality?' (2013) 7 *Criminal Law and Philosophy* 473
- Grice HP, *Studies in the Way of Words* (Harvard University Press 1989)
- Griffin J, *Well-Being: Its Meaning, Measurement, and Moral Importance* (Clarendon Press 1986)
- Halpin A, 'The Concept of a Legal Power' (1996) 16 *Oxford Journal of Legal Studies* 129
- Hardimon M, 'Role Obligations' (1994) 91 *Journal of Philosophy* 333
- Hare C, 'Voices From Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?' (2007) 117 *Ethics* 498
- Hare RM, *The Language of Morals* (Clarendon Press 1952)
- Hart HLA, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175
- —, 'Legal and Moral Obligation', *Essays in Moral Philosophy* (University of Washington Press 1955)
- —, 'Bentham on Legal Rights' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1973)
- —, *Essays on Bentham* (Oxford University Press 1982)
- —, 'Legal Duty and Obligation', *Essays on Bentham* (Oxford University Press 1982)
- —, 'Positivism and the Separation of Law and Morals', *Essays on Jurisprudence and Philosophy* (Clarendon Press 1983)
- —, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008)
- —, *The Concept of Law* (3rd edn, Oxford University Press 2012)
- Hayward T, 'On Prepositional Duties' (2013) 123 *Ethics* 264

- Hedahl M, 'The Significance of a Duty's Direction: Claiming Priority Rather Than Prioritizing Claims' (2013) 7 *Journal of Ethics and Social Philosophy*
- Helm B, 'Love' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2013, 2013) <<http://plato.stanford.edu/archives/fall2013/entries/love/>>
- Herrestad H and Krogh C, 'Deontic Logic Relativised to Bearers and Counterparties', 25 *Years Anthology—Norwegian Research Center for Computers and Law* (Tano forlag 1995)
- Hershovitz S, 'Legitimacy, Democracy, and Razian Authority' (2003) 9 *Legal Theory* 201
- —, 'The Role of Authority' (2011) 11 *Philosopher's Imprint* 1
- Herstein OJ, 'A Legal Right to Do Legal Wrong' (2013) 34 *Oxford Journal of Legal Studies* 21
- Hohfeld WN, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1919)
- Honoré AM, 'Responsibility and Luck' (1988) 104 *Law Quarterly Review* 530
- —, 'The Dependence of Morality on Law' (1993) 13 *Oxford Journal of Legal Studies* 1
- Hooker B, *Ideal Code, Real World* (Oxford University Press 2000)
- —, 'When Is Impartiality Morally Appropriate?' in Brian Feltham and John Cottingham (eds), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford 2010)
- Horton J, *Political Obligation* (Humanities Press International 1992)
- Horty J, 'Reasons as Defaults' (2007) 7 *Philosophers' Imprint* 1
- —, *Reasons as Defaults* (Oxford University Press 2012)
- —, 'Constraint and Freedom in the Common Law' (2015) 15 *Philosophers' Imprint* 1
- Hurka T, 'Good' and 'Good For' (1987) 96 *Mind* 71
- —, *Perfectionism* (Oxford University Press 1993)
- —, *Virtue, Vice, and Value* (Oxford University Press 2003)
- —, 'Value and Friendship: A More Subtle View' (2006) 18 *Utilitas* 232

- Hurka T and Tasioulas J, 'Games and the Good' (2006) 106 *Proceedings of the Aristotelian Society* 237
- Inness JC, *Privacy, Intimacy, and Isolation* (Oxford University Press 1996)
- Jackson F, 'Decision-Theoretic Consequentialism and the Nearest and Dearest Objection' (1991) 101 *Ethics* pp. 461
- Jeske D, 'Special Relationships and the Problem of Political Obligations' (2001) 27 *Social Theory and Practice* 19
- —, 'Special Obligations' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2014, 2014) <<http://plato.stanford.edu/archives/spr2014/entries/special-obligations/>>
- Joyce R, *The Myth of Morality* (Cambridge University Press 2001)
- Kahn CH, 'Aristotle and Altruism' (1981) 90 *Mind* 20
- Kamm F, *Intricate Ethics* (Oxford University Press 2007)
- Kant I, *The Metaphysics of Morals* (Mary Gregor ed, Cambridge University Press 1996)
- —, *Critique of Pure Reason* (Paul Guyer & Allen W. Wood trs, Cambridge 1998)
- Keller S, *Partiality* (Princeton University Press 2013)
- Kelsen H, *General Theory of Law and State* (Lawbook Exchange 1945)
- Kimel D, *From Promise to Contract* (Oxford University Press 2003)
- —, 'The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model' (2007) 27 *Oxford Journal of Legal Studies* 233
- Kolodny N, 'Love as Valuing a Relationship' (2003) 112 *Philosophical Review* 135
- —, 'Which Relationships Justify Partiality? General Considerations and Problem Cases', *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010)
- —, 'Which Relationships Justify Partiality? The Case of Parents and Children' (2010) 38 *Philosophy and Public Affairs* 37

- —, 'Instrumental Reasons' in Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (Oxford University Press 2015)
- Korsgaard CM, 'Two Distinctions in Goodness' (1983) 92 *Philosophical Review* 169
- —, *The Sources of Normativity* (Cambridge University Press 1996)
- Kramer M, 'Rights Without Trimmings' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights* (Oxford University Press 1998)
- —, *Where Law and Morality Meet* (Oxford University Press 2008)
- —, 'Legal and Moral Obligation' in Martin P Golding and William A Edmundson (ed), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Pub 2005)
- —, *Objectivity and the Rule of Law* (Cambridge University Press 2007)
- —, 'Refining the Interest Theory of Rights' (2010) 55 *American Journal of Jurisprudence* 31
- —, 'Some Doubts About Alternatives to the Interest Theory of Rights' (2013) 123 *Ethics* 245
- Kramer M and Steiner H, 'Theories of Rights: Is There a Third Way?' (2007) 27 *Oxford Journal of Legal Studies* 281
- Kratzer A, 'The Notional Category of Modality' in Hans-Jurgen Eikmeyer and Hannes Rieser (eds), *Words, worlds and contexts: new approaches in word semantics* (de Gruyter 1981)
- Kraut R, *What Is Good and Why: The Ethics of Well-Being* (Harvard University Press 2007)
- Kutz C, 'The Collective Work of Citizenship' (2002) 8 *Legal Theory* 471
- Lacey N, 'Analytic Jurisprudence and Descriptive Sociology Revisited' (2006) 84 *Texas Law Review* 944
- Lamond G, 'Coercion and the Nature of Law' (2001) 7 *Legal Theory* 35
- Lasersohn P, 'Context Dependence, Disagreement, and Predicates of Personal Taste' (2005) 28 *Linguistics and Philosophy* 643

- Lazar S, 'The Justification of Associative Duties' (2016) 13 *Journal of Moral Philosophy* 28
- Leib E, 'Friends as Fiduciaries' (2009) 86 *Washington University Law Review* 665
- Lewis D, 'Languages and Language' in Keith Gunderson (ed), *Minnesota Studies in the Philosophy of Science*, vol 7 (University of Minnesota Press 1975)
- Liao SM, 'The Idea of a Duty to Love' (2006) 40 *Journal of Value Inquiry* 1
- —, 'The Right of Children to Be Loved' (2006) 14 *Journal of Political Philosophy* 420
- —, 'Parental Love Pills: Some Ethical Considerations' (2011) 25 *Bioethics* 489
- —, *The Right to Be Loved* (Oxford University Press 2016)
- Lindahl L, *Position and Change: A Study in Law and Logic* (Synthese 1977)
- Lyons D, 'The Correlativity of Rights and Duties' (1970) 4 *Noûs* 45
- —, *Rights, Welfare and Mill's Moral Theory* (Oxford University Press 1994)
- Lyons J, *Semantics*, vol 2 (Cambridge University Press 1977)
- MacCormick N, 'Rights in Legislation', *Law, Morality and Society* (Clarendon Press 1977)
- —, 'Children's Rights: A Test Case for Theories of Rights' (1976) 62 *ARSP: Archiv für Rechts-und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy* 305
- Macklem T and Gardner J, 'Value, Interest, and Well-Being' (2006) 18 *Utilitas* 362
- MacNeil I, *The Relational Theory of Contract: Selected Works of Ian MacNeil* (David Campbell ed, Sweet & Maxwell 2001)
- Makinson D, 'On the Formal Representation of Rights Relations' (1986) 15 *Journal of Philosophical Logic* 403
- May SC, 'Moral Status and the Direction of Duties' (2012) 123 *Ethics* 113
- —, 'Directed Duties' (2015) 10 *Philosophy Compass* 523
- McClennen EF, 'The Rationality of Being Guided by Rules' in Piers Rawling and Alfred R Mele (eds), *The Oxford Handbook of Rationality* (Oxford: Oxford University Press 2004)

- McEwan I, *Enduring Love* (Jonathan Cape 1997)
- Mill JS, *Utilitarianism* (Roger Crisp ed, Oxford University Press 1998)
- Miller D, 'Reasonable Partiality Towards Compatriots' (2005) 8 *Ethical Theory and Moral Practice* 63
- Moore GE, *Principia Ethica* (Cambridge University Press 1903)
- Nagel T, 'War and Massacre' (1972) 1 *Philosophy and Public Affairs* 123
- Nietzsche FW, *On the Genealogy of Morality* (Cambridge University Press 2007)
- Nozick R, 'Love's Bond', *The Examined Life: Philosophical Meditations* (Simon & Schuster 1989)
- Oberdiek J, 'Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights' (2004) 23 *Law and Philosophy* 325
- —, 'Specifying Rights Out of Necessity' (2008) 28 *Oxford Journal of Legal Studies* 127
- —, 'What's Wrong with Infringements (Insofar as Infringements Are Not Wrong): A Reply' (2008) 27 *Law and Philosophy* 293
- Okin SM, *Justice, Gender, and the Family* (Basic Books 1989)
- O'Neill O, 'Children's Rights and Children's Lives' (1988) 98 *Ethics* 445
- Owens D, *Shaping the Normative Landscape* (Oxford University Press 2012)
- Parfit D, *Reasons and Persons* (Oxford University Press 1984)
- —, *On What Matters*, vol 1 (Oxford University Press 2011)
- Pateman C, 'Feminist Critiques of the Public/Private Dichotomy' in Stanley Benn and Gerald Gaus (eds), *Public and Private in Social Life* (Croom Helm 1983)
- Pateman C, *The Sexual Contract* (Stanford University Press 1988)
- Perry A, 'The Internal Aspect of Social Rules' (2015) 35 *Oxford Journal of Legal Studies* 283
- Perry R, 'Correlativity' (2009) 28 *Law and Philosophy* 537

- Perry S, 'Political Authority and Political Obligation', *Oxford Studies in Philosophy of Law: Volume 2* (Oxford University Press 2013)
- —, 'Torts, Rights and Risk' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014)
- Phillimore S and Drane A, 'No More of the "No Order" Principle' [1999] *Family Law* 40
- Pietroski PM, 'Prima Facie Obligations, Ceteris Paribus Laws in Moral Theory' (1993) 103 *Ethics* 489
- Plunkett D, 'Legal Positivism and the Moral Aim Thesis' (2013) 33 *Oxford Journal of Legal Studies* 563
- Potts C, 'Into the Conventional-Implicature Dimension' (2007) 2 *Philosophy Compass* 665
- Rabinowicz W and Rønnow-Rasmussen T, 'A Distinction in Value: Intrinsic and for Its Own Sake' (2000) 100 *Proceedings of the Aristotelian Society* 33
- Rachels J, 'Why Privacy Is Important' (1975) 4 *Philosophy and Public Affairs* 323
- Railton P, 'Alienation, Consequentialism, and the Demands of Morality' (1984) 13 *Philosophy and Public Affairs* 134
- Rawls J, *Political Liberalism* (Columbia University Press 1993)
- —, *A Theory of Justice* (Revised Edition, Belknap Press 1999)
- —, *Lectures on the History of Political Philosophy* (Belknap Press of Harvard University Press 2007)
- Raz J, 'Promises and Obligations' in Joseph Raz and PMS Hacker (eds), *Law, Morality and Society* (Oxford University Press 1977)
- —, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, vol 21 (Oxford University Press 1980)
- —, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1
- —, 'Authority, Law and Morality' (1985) 68 *The Monist* 295
- —, *The Morality of Freedom* (Oxford University Press 1988)

- —, 'Facing Up: A Reply' (1989) 62 Southern California Law Review 1153
- —, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994)
- —, 'Explaining Normativity: On Rationality and the Justification of Reason' (1999) 12 Ratio 354
- —, *Practical Reason and Norms* (2nd edn, Oxford University Press 1999)
- —, *Value, Respect, and Attachment* (Cambridge University Press 2001)
- —, *The Practice of Value* (Oxford University Press 2003)
- —, 'Incorporation by Law' (2004) 10 Legal Theory 1
- —, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009)
- —, 'The Problem of Authority: Revisiting the Service Conception', *Between Authority and Interpretation* (Oxford University Press 2009)
- —, 'On Respect, Authority, and Neutrality: A Response' (2010) 120 Ethics 279
- —, *From Normativity to Responsibility* (Oxford University Press 2011)
- —, 'Is There a Reason to Keep a Promise?' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014)
- —, 'Promises in Morality and Law' 95 Harvard Law Review 916
- Raz J and MacCormick N, 'Voluntary Obligations and Normative Powers' (1972) 46 Proceedings of the Aristotelian Society, Supplementary Volume 59
- Regan D, *Utilitarianism and Co-Operation*, vol 33 (Oxford University Press 1980)
- —, 'Authority and Value: Reflections on Raz's "Morality of Freedom"' (1988) 62 Southern California Law Review 995
- —, 'Why Am I My Brother's Keeper?' in R Jay Wallace, Samuel Scheffler and Michael Smith (eds), *Reason and Value: Themes from the Philosophy of Joseph Raz* (Clarendon Press 2004)
- —, 'Law's Halo' (1986) 4 Social Philosophy and Policy 15

- —, 'How to Be a Moorean' (2003) 113 *Ethics* 651
- Ripstein A, 'Private Law and Private Narratives' (2000) 20 *Oxford Journal of Legal Studies* 683
- —, *Equality, Responsibility, and the Law* (Cambridge University Press 2001)
- —, 'Philosophy of Tort Law' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002)
- —, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009)
- —, 'Civil Recourse and Separation of Wrongs and Remedies' (2011) 39 *Florida State University Law Review* 163
- Rønnow-Rasmussen T, 'On for Someone's Sake Attitudes' (2009) 12 *Ethical Theory and Moral Practice* 397
- Rosati CS, 'Objectivism and Relational Good' (2008) 25 *Social Philosophy and Policy* 314
- Ross WD, *The Right and the Good* (Philip Stratton-Lake ed, Oxford University Press 2002)
- Rundle K, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing 2012)
- Russell B, 'The Monistic Theory of Truth' in Bertrand Russell (ed), *Philosophical Essays* (Routledge 2009)
- —, *Principles of Mathematics* (2nd edn, WW Norton 1937)
- Sacks A, 'Lon Luvois Fuller' (1978) 92 *Harvard Law Review* 349
- Sanger C, 'Regulating Teenage Abortion in the United States: Politics and Policy' (2004) 18 *International Journal of Law, Policy and the Family* 305
- Satz D, 'Feminist Perspectives on Reproduction and the Family' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2013, 2013)
<<http://plato.stanford.edu/archives/win2013/entries/feminism-family/>>
- Scanlon TM, *Moral Dimensions: Permissibility, Meaning, Blame* (Belknap Press of Harvard University Press 2008)

- —, *What We Owe to Each Other* (Harvard University Press 1998)
- —, 'Reply to Leif Wenar' (2013) 10 *Journal of Moral Philosophy* 400
- Schauer F, *The Force of Law* (Harvard University Press 2015)
- Scheffler S, 'Relationships and Responsibilities' (1997) 26 *Philosophy and Public Affairs* 189
- —, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press 2002)
- —, 'Morality and Reasonable Partiality' in Brian Feltham and John Cottingham (eds), *Partiality and Impartiality: Morality, Special Relationships, and the Wider World* (Oxford University Press 2010)
- —, *Death and the Afterlife* (Oxford University Press 2013)
- Seglow J, *Defending Associative Duties* (Routledge 2013)
- Shapiro S, 'Authority' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford University Press 2002)
- —, *Legality* (Harvard University Press 2011)
- Shapiro SJ, 'On Hart's Way Out' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press 2001)
- Sidgwick H, *The Methods of Ethics* (Macmillan 1877)
- Simmonds NE, 'Rights at the Cutting Edge' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights* (Oxford University Press 1998)
- Skorupski J, *The Domain of Reasons* (Oxford University Press 2010)
- Smart JJC and Williams B, *Utilitarianism: For and Against* (Cambridge University Press 1973)
- Soper P, *The Ethics of Deference: Learning From Law's Morals* (Cambridge University Press 2002)
- Sreenivasan G, 'A Hybrid Theory of Claim Rights' (2005) 25 *Oxford Journal of Legal Studies* 257

— —, 'Duties and Their Direction' (2010) 120 *Ethics* 465

Stapleton J, 'Duty of Care Factors: A Selection from the Judicial Menu' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998)

— —, 'Evaluating Goldberg and Zipursky's Civil Recourse Theory' (2006) 75 *Fordham Law Review* 1529

Steiner H, *An Essay on Rights* (Blackwell 1994)

— —, 'Working Rights', *A Debate Over Rights* (Oxford University Press 2000)

Stevens R, *Torts and Rights* (Oxford University Press 2007)

— —, 'The Conflict of Rights' in Andrew Robertson and Hang Wu Tang (eds), *The Goals of Private Law* (Hart Pub 2009)

— —, 'Rights and Other Things' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Pub 2012)

Tamanaha B, *Law as a Means to an End: Threat to Rule of Law* (Cambridge University Press 2006)

Thompson M, 'What Is It to Wrong Someone? A Puzzle About Justice', *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Clarendon Press 2004)

Thomson JJ, *Rights, Restitution, and Risk: Essays in Moral Theory* (Harvard University Press 1986)

— —, *The Realm of Rights* (Harvard University Press 1990)

Toh K, 'An Argument Against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)' (2008) 27 *Law and Philosophy* 445

— —, 'Four Neglected Prescriptions of Hartian Legal Philosophy' (2014) 33 *Law and Philosophy* 689

Velleman JD, *Foundations for Moral Relativism* (OpenBook Publishers 2013)

von Wright GH, *Norm and Action* (Routledge 1963)

- Waldron J, 'A Right to Do Wrong' (1981) 92 *Ethics* 21
- —, *Theories of Rights* (Oxford University Press 1984)
- —, 'Autonomy and Perfectionism in Raz's Morality of Freedom' (1988) 62 *Southern California Law Review* 1097
- —, *The Right to Private Property* (Clarendon Press 1990)
- —, 'When Justice Replaces Affection: The Need for Rights' (1988) 11 *Harvard Journal of Law and Public Policy* 625
- Walker ADM, 'Aristotle's Account of Friendship in the "Nicomachean Ethics"' (1979) 24 *Phronesis* 180
- Wallace RJ, 'Reasons, Relations and Commands: Reflections on Darwall' (2007) 118 *Ethics* 24
- —, 'Duties of Love' (2012) 86 *Aristotelian Society Supplementary Volume* 175
- —, 'The Deontic Structure of Morality' in David Bakhurst, Margaret Olivia Little and Brad Hooker (eds), *Thinking About Reasons: Themes From the Philosophy of Jonathan Dancy* (Oxford University Press 2013)
- —, *The View From Here: On Affirmation, Attachment, and the Limits of Regret* (Oxford University Press 2013)
- Webber G, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2012)
- Weinrib E, *Corrective Justice* (Oxford University Press 2012)
- —, *The Idea of Private Law* (Revised, Oxford University Press 2013)
- —, 'Correlativity, Personality, and the Emerging Consensus on Corrective Justice' (2001) 2 *Theoretical Inquiries in Law*
- —, 'Corrective Justice in a Nutshell' (2002) 52 *The University of Toronto Law Journal* 349
- Wellman C, *A Theory of Rights: Persons Under Laws, Institutions, and Morals* (Rowman & Allanheld 1985)

- —, 'Relative Duties in the Law' (1990) 18 *Philosophical Topics* 183
- —, *Real Rights* (Oxford University Press 1995)
- —, 'Relative Moral Duties' (1999) 36 *American Philosophical Quarterly* 209
- —, 'Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun "My"?' (2000) 110 *Ethics* 537
- Wenar L, 'The Nature of Rights' (2005) 33 *Philosophy and Public Affairs* 223
- —, 'The Analysis of Rights' in Matthew H Kramer (ed), *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy* (Oxford University Press 2008)
- —, 'Rights and What We Owe to Each Other' (2013) 10 *Journal of Moral Philosophy* 375
- —, 'The Nature of Claim Rights' (2013) 123 *Ethics* 202
- —, 'Rights' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2015, 2015) <<http://plato.stanford.edu/entries/rights/>>
- Wielenberg E, 'Goodness Without Qualification' (1998) 32 *Journal of Value Inquiry* 93
- Williams B, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge University Press 1981)
- Williams G, 'The Problem of Domestic Rape: Part I' (1991) 141 *New Law Journal* 205
- —, 'The Problem of Domestic Rape: Part II' (1991) 141 *New Law Journal* 246
- Williamson T, *Knowledge and Its Limits* (Oxford University Press 2000)
- Witting C, 'Duty of Care: An Analytical Approach' (2005) 25 *Oxford Journal of Legal Studies* 33
- Wolf S, *Meaning in Life and Why It Matters* (Princeton University Press 2010)
- Zagzebski L, 'The Inescapability of Gettier Problems' (1994) 44 *Philosophical Quarterly* 65
- Zimmerman MJ, 'Cooperation and Doing the Best One Can' (1992) 65 *Philosophical Studies* 283

— —, *The Nature of Intrinsic Value* (Rowman and Littlefield 2001)

— —, *Ignorance and Moral Obligation* (Oxford University Press 2014)

Zipursky B, 'Legal Malpractice and the Structure of Negligence Law' (1998) 67 *Fordham Law Review* 649

— —, 'Civil Recourse, Not Corrective Justice' (2002) 91 *Georgetown Law Journal* 695

— —, 'Substantive Standing, Civil Recourse, and Corrective Justice' (2011) 39 *Florida State University Law Review* 299

— —, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 *Vanderbilt Law Review* 1