

1991

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## Recommended Citation

Richard Stith, *Generosity: A Duty Without a Right*, 25 *J. Value Inquiry* 203 (1991).

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## Articles

# Generosity: A duty without a right

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The rhetoric of rights permeates and dominates American legal thought today. Even ethics is often considered to involve fundamentally a mutual respect for “moral rights.” Understanding human rights is taken to be a sufficient condition for knowing how we do and should order our life together.

I disagree. I think that with regard to rights, as to so much else, our modern modes of thought fail fully to capture the ways we still live, and therefore wrongly limit our choices concerning how we should live.

All this is commonplace. With some frequency in the academic literature, it has been noted that our times are peculiarly “rights infatuated.”<sup>1</sup> And with similar frequency, this fact has been lamented.<sup>2</sup> There are many who do not agree that rights alone can provide an adequate basis for human community.

However, as explained below, recent analyses have been able to show only that significant normative values lie outside some sphere of immediate individual relationships which must still be relegated to rights.<sup>3</sup> I want to point out something more: that our practices reveal alternatives to rights even within that sphere. I think I have found something not only in addition to rights but also instead of rights. Some rights can and ought to be rejected in favor of what I call “duties of generosity.” The practices to which I turn for models of non-rights-based relations are part neither of morals nor of law. They belong to what is called “manners” or “courtesy” or, more descriptively, “graciousness.”<sup>4</sup>

## Do duties imply rights?

One conceptually clear way to understand the limitations of rights begins with the commonly held “correlativity thesis.” This thesis is that for every right there exists a correlative duty and that for every duty there exists a correlative right.<sup>5</sup> For example, if A has a duty to pay a debt to B, it is said

to follow necessarily that B has a right to be paid by A. And likewise wherever B has such a right, A has such a duty.<sup>6</sup> "Such" is an important word here, because the correlativity thesis applies only to rights which are *claims* against another, not to rights which are merely *liberties*. A may well have a liberty-right to run his competitor B out of business without B having any duty to close up shop.

Perhaps the existence of liberty-rights could be said to weaken the correlativity thesis, in that certain significant rights are thus shown not to correspond to anyone else's duty. But, for our purposes here, the wrong side of the thesis is weakened. We are interested not in whether there is a duty for every right, but in whether there is a right for every duty.

Why so? Well, if there is a right for every duty, then it follows that the set of rights is equal to or greater than the set of duties. If every duty implies a right, then the modern primacy of rights talk is justified. Rights analysis covers the normative universe, in that it ends up describing all rights and all duties, according to this side of the correlativity thesis. On the other hand, if some duties do not imply rights, then thinking about rights must be supplemented by thinking about duties, if some of the latter are not to be overlooked. The adequacy of rights-based thinking is, therefore, appropriately attacked by pointing to duties which do not correspond to rights.<sup>7</sup>

Many scholars have, in fact, sought to discredit the thesis that every duty of one individual implies a right of some other individual, by pointing to apparently rightless duties. It is said, for example, that alleged duties to oneself cannot correspond to rights. Again, it has been argued that duties to God or to the State are not perfectly captured by rights language suitable for other human individuals.<sup>8</sup> Likewise, it is contended that many of our duties are to classes rather than to individuals and that here no one can be said to have correlative rights. I may have a duty to give to the poor, but no particular beggar has a right to my money.<sup>9</sup>

But none of these arguments, whatever their merits may be, points to situations where I have a duty to benefit a particular human being without that person having a right against me. These arguments thus appear to concede that our duties to benefit other human individuals are fully described in terms of rights. Yet it is just this implicit concession which I refuse. I want to discover ways to hold onto neighborly duties without invoking neighborly rights.

Some readers may fault me here for having failed to mention the many "will-based" theories of rights, which make the existence of rightless duties to individuals obvious.<sup>10</sup> Not every particular beneficiary of someone else's duty is a rightholder, so these theories contend, for in order to have a right one must have a legally recognized choice. Someone's duty to give me a

cow does not *per se* imply that I have a property or a contract right to her. I have a cattle-right only if I have some remedy I can use effectively to obtain her if she is withheld, or perhaps also unless I have the ability to waive (or even to transfer) a claim to her. Such choices are not open to me, under English law for example, where I am a third-party beneficiary of a contract between my father and a rancher, or where the State has simply commanded the cattleman to redistribute his wealth under pain of criminal punishment. Criminal law duties, according to these theories, often impose duties on individuals without granting rights to other persons. Although you have a duty not to kill me, I have no full right not to be killed by you, because I cannot make the State provide me with police protection, nor can I or my estate force the State to punish an unsuccessful or successful attempt to murder me. And, of course, I cannot sell my right to life to some rich sadist in exchange for some preferred benefit to my family. Similarly, according to some theories,<sup>11</sup> no duties to infants and to the very senile (not to mention to fetuses and to animals) involve rights, because the beneficiaries of said duties are presently physically unable to exercise rational choice.

A moment's reflection will show, however, that this method of demonstrating the existence of duties without rights is not what we are seeking. It does not look for unnoticed duties which the catalogue of rights has missed. It simply takes the list of claim-rights and shortens it. Will-rights theory shows at most that a narrow definition of rights will not adequately bring to light all duties. It does not show that the commonsense notion of rights as legally or morally required benefits (which notion holds that both I and an infant have a right to life) is not sufficient. But it is this latter, popular notion that permits rights talk to dominate our thought. And so it is this that must be shown to give an inadequate account of duties.

Nor have benefit-based theories of rights surrendered entirely to will-based theories in the academic world, though they have been refined in response to some of the arguments made above.<sup>12</sup> A leading advocate of the benefit theory of rights has recently claimed that being a "direct, intended" beneficiary of a duty is sufficient for having a right.<sup>13</sup> It is theses of this sort which I shall oppose, not by redefining rights more narrowly but by calling attention to duties directly to benefit other individuals that cannot be translated into *anyone's* language of rights. In so doing, I attack the very core of correlativity and present the possibility of the rejection of rights in human relationships founded on duty.

### Some duties of mutual generosity

Consider the following commonly accepted social rule for tea parties and the like: "No one may take the last cookie." Translated into our terms here, the rule becomes "Everyone has a duty to leave the last cookie on the table." There is a mutual duty<sup>14</sup> to leave the last cookie uneaten.

Although I shall appeal a bit to our shared beliefs and practices in analyzing this rule below, my primary purpose is not anthropological but logical. Even someone unfamiliar with this rule, or someone who disagreed with my more detailed description of it, ought to concede that the duty I depict is a possible one. That concession is all that I need in order to show that we may have duties intended directly to benefit others that do not correspond to rights possessed by those others.

Can this cookie-leaving duty be translated into the language of rights, as the correlativity thesis would demand? Certainly it cannot without contradiction be straightforwardly transformed into a statement of individual claim-rights. The rule "Everyone has a right to take the last cookie" is self-contradictory, if by it we mean that every person both has a binding claim in his or her favor and also has equally binding claims in opposition. Or, put another way, our normative practices do not permit us coherently to assert that A has a valid claim to the cookie, while B, C, and the rest also have identically valid claims. Rights in a conclusory or absolute sense must be exclusive, but any lesser degree of rights would not adequately represent the unequivocal duties of our original formulation. Moreover, even reducing the rights involved to non-absolutely weighted interests would not eliminate the antinomy, for even these lesser claims, being all identical, are incapable of leading to a resolution of the problem of what to do with the cookie. No one can eat the cookie without violating many other equal rights. Yet to leave it on the table would be worst of all, for this solution alone would violate *everyone's* rights. By contrast, there is no contradiction nor even any slight tension in the original duty formulation. The result is never in doubt. If everyone abides by his or her duty, the cookie simply remains uncontested and uneaten.

Even if we try to restate our duties merely as liberty-rights (rather than as claim-rights), we are unsuccessful. If everyone had a liberty-right to the cookie, it is true that all could, without logical or normative difficulty, make a grab for the cookie. The fastest or strongest would eat it, and no one else could claim that his or her rights had been violated. But everyone who made such an effort would have violated (or at least attempted to violate) the duty not to take the cookie. To be at liberty means, by definition, that one is under no duty, so liberty-rights obviously cannot express a situation where everyone is under a duty.

One's supposed cookie claim-right, too, could not be exercised without a violation of one's duty, so that yet another contradiction in a claim-rights translation has been shown. One cannot have a right to do that which one has a duty not to do – where, as here, the duties and rights in question operate on the same level within the same institution. (It is possible to say, for example, that one has a legal right to do X but a *moral* duty not to do X. But one cannot say that one has a legal right to do X and also a *legal* duty not to do X.) Rendering mutual duties not to take the cookie straightforwardly as mutual claim-rights to the cookie brings about insoluble antinomies both among rights and between rights and duties.

There is, however, one rights formulation which at first glance appears adequately to express everyone's duty to leave the cookie alone: "Everyone has the right to have no one else eat the cookie," i.e. to have the cookie go to waste. Under this latter formulation, no one could claim the last cookie, but each could feel properly aggrieved and could rightfully complain if someone else took the cookie. I must agree that this translation is not self-contradictory in any way, nor does it contradict the original duty rule. But to state it is to reveal the incompleteness of our original rule statement. Those who practice the duty rule would surely also find it most impolite and ungracious for anyone seriously to complain when someone else ate the cookie. So let us temporarily reformulate the original rule as follows: "Everyone has a duty to leave the last cookie *and not to object if someone else takes the cookie.*"

Furthermore, the proposed translation of the duty to leave the cookie into the right to see that the cookie goes to waste seems to miss the intent of those who do their duty. That intention is to have someone else eat the cookie, not to have it left over. The whole point of rule compliance here, as it might be explained to a child learning it, is generously to grant other people's appetites precedence over one's own. To complain when one's wish is fulfilled would be to contradict that intent. We can thus combine the idea of non-complaint and that of the intended beneficiary into a simpler and final duty formulation: "Everyone has a duty to leave the last cookie *for someone else.*"<sup>15</sup>

Is it possible, however, that this duty to let others eat the cookie is but the indirect reflection of some other duty, which duty possibly could be expressed in terms of rights? For example, it has been suggested to me<sup>16</sup> that the duty here might really be to the host: Guests might leave the last cookie in order to keep the host from worrying that he or she had not provided enough food. This attractive idea, however, is open to several objections. For one thing, if such a duty to the host exists, it, too, does not correspond to any host rights. It would be absurd for a host to insist that no one eat the last cookie so that he or she could imagine all to be satisfied.

Furthermore, the duty-to-the-host idea does not fully capture the practice we have already described. If the host were the real intended beneficiary, then surely it would be within the rights, and even the duties, of each guest tactfully to stop others from eating the cookie. But this is not done.

Moreover, if by some chance all other persons have left the room without eating the cookie, I know of no rule still forbidding one to eat the cookie. Similarly, it is common (though quite difficult because politeness discourages candor) to attempt to determine whether in fact anyone else present really wants the cookie. If no one else does, then one is free to eat it. This fact shows that others as intended beneficiaries are absolutely essential to the original rule. When they are absent, or when they are already satisfied and so cannot benefit, the rule has no application. Therefore, the rule does not aim at waste nor at pleasing a host. Even when rule compliance makes the cookie go uneaten, it remains on the table as a symbol of our mutual care for one another.<sup>17</sup>

Nor, let it be emphasized, is the duty an ascetic one, meant to combat self-indulgent gluttony or to encourage self-sacrifice for its own sake, for, if it were, it would remain in force when one were alone as well as among others.

We have discovered, then, a duty directly to benefit other individuals which cannot be translated into rights, no matter how rights may be defined. What name should be given to this newly discovered creature? "Graciousness" seems almost correct, but a bit too broad and too connotative of style rather than of substance. "Deference" may be too small spirited. While I own that the title is not perfect, I would contend that the mutual duty we have unearthed is appropriately called one of "generosity" because it involves an obligation to relinquish potential possession to someone who has no right to possession. And it involves a *duty*, rather than a supererogatory act of generosity, because one does wrong in taking the cookie for oneself.

There is something quite odd in all this. Someone who takes the last cookie, when others might want it, not only has no right to possess it. He or she also violates a duty to leave the cookie for others. Yet others at the table not only should not object, but should be pleased – since the cookie is being consumed by an intended beneficiary. The last cookie is left precisely for someone who does not do his or her duty. Our duty is to leave the cookie for someone whose appetite is so imperious that duty's command is ignored. This mutual duty of generosity is a duty to benefit precisely and only those who do wrong. Such duties are nearly unheard of in legal<sup>18</sup> and moral systems, but they abound in manners and in religion.

Consider another example: "A host has a duty to provide as many towels as a guest might desire. A guest has a duty not to request any towels which

a host might desire." Here we are dealing no longer with identical duties incumbent upon all participants in a practice of graciousness. (The guest has no duty to provide towels for the host.) The prior example envisioned only one role, that of potential cookie-eater, while here there are two, those of host and of guest. It is important briefly to consider this variation on mutual duties of generosity, since it would seem to be rather more common. Complementary duties are more frequent than identical duties in human interactions.

The problem in essence is, however, the same. Just as we previously wondered what to do with a mutually wanted cookie, here we ask ourselves, as host or as guest, what should be done with mutually desired towels. And the answer, as a matter of duty, is equally clear: The towels should be left for the other, who (if he or she in fact retains or obtains the coveted towels) is violating a duty.

Can these duties be coherently translated into rights? No, for the same reasons we have already explored. A guest cannot have a right to towels desired by a host and the host at the same time have a right to towels desired by the guest. Such a translation incoherently pits one's rights against another's rights and against one's own duties. Yet from duties there results no contradiction and a clear if rough solution: The host should provide as large a pile of towels as a guest could possibly wish, even to the point of skipping his or her own bath if towels are scarce, while a guest who suspects such a scarcity should take few if any towels from the pile (insofar as, but no further than, the guest has reason to hope that the towels left behind might end up being used by the host).

A variant practice also exists: The original towel possessor (the host) offers additional towels to a bath-hungry guest who graciously refuses to take them. The host then "insists" and the guest continues to refuse until one or the other gives in. This resolution occurs either because one has been convinced that the other truly does not desire the towels, or because one has breached the duty to be towelless. (Perhaps, however, the latter has done so not out of a desire for towels but rather out of a desire to respect the other's sense of duty to relinquish towels, of which more later.) This variant has the obvious advantage that the towels do not go to waste, but it does not involve any essential alteration of duties.

Note that this practice, again, does not demand self-sacrifice for its own sake. It is perfectly all right not to offer towels (and also all right to request and use towels) that the other person cannot possibly desire – which is not to deny that at some point an additional duty not to be gluttonous or ungrateful might come into play to limit absolutely the number of towels one should hoard.

There seems little point in multiplying examples further. Courtesy duties



of generosity are so common and important to our life together that I would suppose they take more instructional time than do morals in educating the next generation, perhaps precisely because young children find it hard to grasp the fundamental point that such duties are not to be translated into rights. A child, in my experience, immediately converts the duty to let others play with the toys in his or her possession into a right to play with toys possessed by others. Indignant outrage follows, and must continue to follow, such a translation – because in terms of rights this rule is self-contradictory. Only when the mutual duty of generosity has been grasped can there be peace (which may not occur until toys become no more important than towels in the child's life).

### A theory of generosity duties

The special character of mutual duties of generosity, and its distinction from that of rights, can be further brought out in a real property metaphor.

The phenomenology, the *feel*, of a right is that of a rule-protected power (insofar as one has secured that to which one has a right) and of a rule-supported claiming or demanding such power (insofar as one is not yet in possession of that to which one has a right). As spheres of potentially absolute and arbitrary power, rights are litigious by nature, one might say, so that there can be no peace as long as rights seem to overlap or, *a fortiori*, as long as they actually do overlap (as in the translations of cookie, towel, and toy duties). A normative system of rights requires *exactitude*. There must be precise and known boundary lines between Whiteacre and Blackacre if incoherence and squabbling is to be avoided.

By contrast, mutual duties of generosity involve “buffer zones” extending back a bit from the boundaries to which rights would press. Each property owner has a duty to relinquish the use of these zones to the other. That is, each has a duty both not to use the buffer strip and also not to object to the use of the strip by the neighbor. The result is that litigation is lessened. Trespass does not trigger conflict. Minor infractions of duty are accepted, and even welcomed in the best of all worlds. Only major intrusions are brought to court (just as there might properly be objections if someone ate *all* the cookies).

It is essential to ask here whether property still exists in a practical sense in the buffer zones. That is, is there any difference (from the point of view, say, of the owner of Whiteacre) between the yardage the frontier zone intrudes into Whiteacre and the yardage it intrudes into Blackacre? I think not, though from a certain formal point of view the first remains the “property” of the owner of Whiteacre, while the second remains alien.

Similarly, the cookie duties and the towel duties were not significantly different, despite the fact that, by hypothesis, the last cookie was the property of none of the potential eaters, while the towels were the property of the host. What we have along the border is, therefore, a realm without property *or* rights, a realm of what one might call "lawless altruism."

We may observe in passing that private property is thus not necessary to generosity, a conclusion frequently disputed.<sup>19</sup> Wherever one, without being coerced, relinquishes *de facto* possession of a good to someone who has not a right to possession, one is being generous. This statement remains true even if one is under a duty so to act, as we have seen. Note that it is not essential that one be giving up one's own property. Generosity is possible even among thieves and even in a Hobbesian state of nature. And, from the point of view of the recipient who had no right to what he or she obtained (and may even have had a duty to refuse it), gratitude is called for.

Is a world without property, a world of "lawless altruism," any more stable or desirable than one of "lawless egoism"? The simple answer is that two people can sacrifice the same object more easily than two can acquire the same object. As long as we are willing to put up with waste, or are willing to see the buffer not as waste but as a symbol of mutual regard, peace would seem to ensue. It must be admitted that, in the most gracious of all worlds, each side would actually plead with the other to use the entire zone (the "I insist" we noted before). And the other side would wish to use the zone not in order to obtain some personal gain, but in order to please his or her altruistic neighbor. Since both sides would feel the same, at each level and *ad infinitum*, a kind of good-natured "battle" might occur. Still, a dialectical synthesis might be found in which *both* sides could come to sacrifice themselves for the other: the one by deferring to the other's territorial desire and the latter by occupying the territory in deference to the former's desire to be duty-observing. The first sacrifices land and the second sacrifices virtue. In any event, the defects of such a system are an important strength. Waste or generosity-battle is in fact not likely to occur because people are not going to be wholly duty-minded, and the system has anticipated this fact. Minor violations of duty are expected and promote efficiency, while extreme violations are checked by rights as well as by conscience. "Lawless altruism" is, therefore, clearly preferable to "lawless egoism."

In all our analysis so far, we have presumed mutual identical or complementary duties. Indeed, it is the fact of mutuality which has enabled us to prove that duties can exist without correlative rights. Can this presupposition be removed? Can one have duties of generosity toward those who have neither rights nor duties toward one?

I do not see why not. If I can dutifully leave a cookie for a rational adult

who ought to do the same for me, why cannot I leave a cookie for a small child not yet subject to duties? If the rational adult has no right to the cookie, why need the child have a right? I think that nothing requires the child to have any right (or at least any claim-right) to the cookie, though no wrong is done when the child eats it.

The reason we began with mutual duties is that the benefit-theory of rights could otherwise easily have argued that a duty to another person must by definition, as it were, involve a right on the part of that person. We can now see that this is not the case. To say the child has a right to the cookie *adds* something, phenomenologically, to the statement that I have a duty to let the child have the cookie. It adds an imaginary or real claiming of power over the cookie on the part of the child, a vain or effective appeal to rules to force me to give the cookie. The language of rights militantly reduces rules from an object of common loyalty to the status of security guards at the beck and call of the child. And I am likewise reduced from a servant of the law to a servant of the child. This phenomenological reflection shows, by the way, that will-based theories are nearer than benefit-based theories to the essence of rights. Rights always involve self-centered (which may not be equivalent to "selfish") acts of will – at least in the imagination. A duty not to make such an appeal is perhaps the easiest and most effective way to prevent a rights consciousness from arising, but it is not strictly necessary. What is necessary is only that no reductionist appeal by the beneficiary be imagined or realized.

Professor Joel Feinberg has used the language of aristocracy to call a world without rights, even one in which most people conscientiously do their duties, "servile."<sup>20</sup> Property and rights are needed, it would seem, in order to promote human dignity. But do our experiences in this rightless realm of graciousness bear him out? I think not. Rights subject us to each other, while duties subject us only to a common law. One might say that rights convert that law itself into something which can in part be privately owned. Rights, not duties, are the baser way to order our life together. To be generous and self-sacrificing on the one hand, and gratefully to accept benefits recognizing that one does not have a right to them on the other, is the more noble life.

A final touch should be added to this sketch of duties of generosity. Note that no mention has yet been made of the inculcation of the virtue of generosity nor of the enforcement of the duties pertaining thereto. The simple reason for this omission is that our purpose has been normative and logical, not genetic. How to bring about and maintain generous ways of living together is an empirical and psychological question separate from the question of how to describe the inner logic of a system of duties without rights.<sup>21</sup>

But mention should be made here of the peculiar logical irrelevance of enforcement mechanisms to the system which has been described. Neither party to a cookie dispute has any rational self-interest (other than envy) in violating the duty of non-complaint by appealing to higher powers. If such powers were to step in, they could do so only in order to remind *all* parties that *none* may have the cookie – not to allocate the cookie to anyone. This is what children finally learn after many futile attempts to make parents enforce their rights to toys.

Note, too, that even the intervention of higher enforcement authority does not recreate the exactitude of a system of rights. An enforcing power would require *both* property owners to move back from the buffer zone. It would not be interested in the erection or protection of a boundary fence (except insofar as this might be required for the definition of the buffer zone). The duty-enforcing state or community is not interested in total and exact control of the world, in deciding precisely who eats the cookie or farms the land. Unlike the Christian tradition in which there is a duty to turn the other cheek, the realm we have discovered is not simply one where individuals are duty-bound to submit to injustice, while a higher ideal of justice remains available and perhaps enforceable by God or by a civil authority. *There is no just allocation* of the cookie or the towels or the toys or the borderland. There is no “right” answer. There is only the possibility of possessing and the duty not to do so.

## Notes

1. R.B. Louden, “Rights Infatuation and the Impoverishment of Moral Theory,” *Journal of Value Inquiry* 17 (1983): 87–102. Among the best, albeit short, histories of the modern idea of rights are John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 205–210 and accompanying notes; and M.P. Golding, “The Concept of Rights: A Historical Sketch,” in *Bioethics and Human Rights*, ed. E.L. Bandman and B. Bandman (Boston: Little, Brown, 1978), pp. 44–50. See also Golding’s more refined treatment: “Justice and Rights: A Study in Relationship,” in *Justice and Health Care*, E.E. Shelp ed. (D. Reidel, 1981), pp. 23–35.
2. See, e.g., Louden, *id.*; Theodore Benditt, *Rights* (Totowa: Rowman and Littlefield, 1982); Karl Marx, “On the Jewish Question,” in *Early Writings* (New York: Random House, 1975), pp. 211, especially 230–231; J. Narveson, commentary on Feinberg’s essay “The Nature and Value of Rights,” *Journal of Value Inquiry* 4 (1970): 258–260; “Law and Ecological Ethics Symposium,” *Osgood Hall Law Journal* 22 (1984): 281–348; J. Raz, “Rights-Based Moralities,” in *Utility and Rights*, ed. R.G. Frey, (Minneapolis: University of Minnesota Press, 1984), pp. 42–59; Michael Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982); and Ch. Taylor, “Atomism,” in *Powers, Possessions and Freedom: Essays in Honour of C.B.*

*Macpherson*, ed. by A. Kontos (University of Toronto, 1979), pp. 39–61. Not to be neglected is the seminal, if controversial, work of the late Michel Villey, especially as found in his “Droit Subjectif I” *Seize essais de philosophie du droit* (Paris: Dalloz, 1969), pp. 140–178, originally published in *Archives de philosophie du droit* 9 (1964): 97–127.

3. See especially works cited in notes 7–10 *infra*.
4. So far as I have been able to determine, recent normative theory has been curiously uninterested in the structure of modern manners, as opposed to that of modern morals or of modern law. Ronald Dworkin has used “philosophy of courtesy” as a foil, but I know of no one who has seriously taken up this task. *Law's Empire* (London: Fontana Press, 1986), pp. 45–86.
5. Alan White, for example, asserts the commonness of this view, though he does not himself share it. *Rights* (Oxford: Clarendon Press, 1984), p. 85. Those who have proposed the thesis appear to include S.I. Benn and R.S. Peters, *The Principles of Political Thought* (New York: The Free Press, 1959), pp. 102, 107, and Charles Fried, *Right and Wrong* (Cambridge: Harvard University Press, 1978), p. 81. John Finnis, note 1, at 210, seems implicitly to hold such a view when he states “The concept of rights is not ... of less importance or dignity [than the concept of duties]: for the common good is precisely the good of those individuals whose *benefit*, from fulfillment of duty by others, is their *right* because *required* of those others in justice.” See also Carleton Kemp Allen, *Legal Duties* (Oxford: Clarendon Press, 1931), 156–220; R.W.M. Dias, *Jurisprudence*, fourth edition (London: Butterworth's, 1976), 36–39; George Whitcross Paton, *A Textbook of Jurisprudence* (Oxford, Clarendon Press, 1972), p. 285; other philosophers have denied the second half of the thesis, as explained later in the text.
6. The analysis of correlativity is, of course, that of Wesley N. Hohfeld *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).
7. Benditt (*supra*, note 2), Loudon (*supra*, note 1), and Raz (*supra*, note 2) all point out that we may well have rights which we ought not to exercise. This “ought” is something else which rights talk misses. I do not mean to deny or minimize this important critique of rights, but it is not germane to the present part of our analysis. It is a critique as much of the “must do”'s of duties as of the “must have”'s of rights, for it points out that both duties and rights may miss the more subtle “oughts” and “shoulds” of human relationships. By contrast, my first interest is to demonstrate that rights are inadequate even to convey all the strong and clear imperatives of duty.
8. John Austin calls these rightless duties “absolute.” II *Lectures on Jurisprudence* (New York: Burt Franklin, 1861), pp. 66–75. Cf. the critiques by Allen, *supra* note 5, and by Paton, *supra* note 5.
9. Besides Austin, *id.*, and Benditt, *supra* note 2; see John Stuart Mill, *Utilitarianism*, ed. H.B. Acton (London: J.M. Dent and Sons, 1972), pp. 46–47. Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton University Press, 1980), pp. 135–139, 144, mentions these “duties of charity.” Feinberg, *id.*, also refers obscurely to rightless “duties of self-sacrifice” and exemplifies them by acts of heroism taken from H.B. Acton, “Symposium on ‘Rights,’” *Proceedings of the Aristotelian Society* (1950), Supplementary Volume 24, pp. 107–108. Feinberg, Acton, and Benditt (*supra* note 2, p. 7) may be calling attention to duties without rights similar to those discussed in this essay. But their duties of heroic self-sacrifice are unlike the ones I discuss

below in that theirs are far more rare than mine. Moreover, at least some of theirs seem construable as duties without rights only because of a confused juxtaposition of two different subjective points of view. A hero may feel under a duty while his beneficiaries do not feel a right to his services. But within this own subjective world, a hero might well say that those who are aided have "a right" to his help, though they do not realize it. Finally, none of these writers draws attention to the mutuality of rightless duties which is the focus of the present work.

10. H.L.A. Hart is the leading figure here: "Bentham on Legal Rights," in *Rights*, ed. D. Lyons (Belmont: Wadsworth Publishing Company, 1979) pp. 125-148. See also Allen, *supra* note 5, Dias *supra* note 5, Finnis *supra* note 1, Golding *supra* note 1, and Paton *supra* note 5.
11. See, e.g., P. Montague, "Two Concepts of Rights," *Philosophy and Public Affairs* 9 (1980): 372 and 384.
12. See, e.g., the telling response to Hart by Neil MacCormick, "Rights in Legislation," in *Law, Morality, and Society*, ed. P.M.S. Hacker and J. Raz (Oxford, 1977), pp. 189, 198.
13. David Lyons, *Rights*, *supra* note 10 at 63, 73. I am referring to duties specifically to benefit certain other persons, not to so-called "useful duties."
14. Some readers may object that the term "duty" seems too strong here. I have two responses. The first is that our language permits the word "duty" to designate all behavior mandated by a non-optional social institution. Only so long as an institution is felt to be optional does the word "duty" seem excessive. For example, it strikes us as odd to say that a man has a duty to dance with a woman, but a dancing instructor of young people might well say "A gentleman has a duty to ask a woman sitting by herself to dance," because he and his audience are at that time committed to the conventions of social dance. Similarly, if we take proper cookie-behavior as something the breach of which would be unthinkable, the word "duty" seems appropriate. My second response is that nothing turns on the word "duty" anyway. My point is not to rank such behavior highly or lowly, in a normative hierarchy, but to discern its inner logic. I want to ask whether and when sentences in the imperative form referred to by the word "duty" entail correlative rights. I have chosen the word solely for this purpose, not for its connotations nor as part of any wider axiological assertion.
15. One could adduce less rich examples where the impossibility of waste as a goal would be still more obvious. Consider what happens when two similarly-situated persons reach a closed door simultaneously. Each has a duty to open and hold the door for the other, while neither has a right to have the door held open. It cannot be that the purpose of this mutual duty is to have the benefit of first entry go to waste, i.e., to have each refuse to go through the door until the other has done so, leaving both permanently outside.
16. By Professor James Albers
17. I owe this felicitous expression to my secretary Pat McRae.
18. I say "nearly" unheard of, because there are a few examples or near-examples in our law of such duties without rights, not counting the criminal laws already mentioned. Included would be juridical refusal to rectify *de minimis* duty violations, intra-family absence of rights to sue in tort when duties are violated, and the general civil and criminal lack of a right not to be endangered by another's failure to adhere to his or her duty of care (except in the exceptional

case where harm actually occurs). There may be more such one-way duty relations in foreign law. See, e.g., Inga Markovits, "Pursuing One's Rights under Socialism," *Stanford Law Review* 38 (1986): 689-761; and George P. Fletcher, "Human Dignity as a Constitutional Value," *University of Western Ontario Law Review* 22 (1984): 171-182, 180. See also Richard Stith, "New Constitutional and Penal Theory in Spanish Abortion Law", *American Journal of Comparative Law* 35 (1987): 513-558.

19. Feinberg puts it this way "... consciousness of one's right is *necessary* for the supererogatory virtues, for the latter cannot even be given a sense except by contrast with the disposition always to claim one's rights," *supra* note 9 at 157.
20. Feinberg, *id.* at 156.
21. I would suspect that all duties must sometimes be enforced if they are to be firmly entrenched, and if expectations of originally wrongful benefits are not to develop into assertions of rights. It is probably important that last cookie grabbers sometimes not be invited to the next tea party.

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Edited with introductions by

Carl Wellman

*University of Washington,  
St. Louis*

ROUTLEDGE  
*New York/London*

Published in 2002 by  
Routledge  
29 West 35th Street  
New York, NY 10001

Published in Great Britain by  
Routledge  
11 New Fetter Lane  
London EC4P 4EE

Routledge is an imprint of the Taylor & Francis Group.  
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10 9 8 7 6 5 4 3 2 1

#### Library of Congress Cataloging-in-Publication Data

Rights and duties / edited with introductions by Carl Wellman.

p. cm. — (Ethical Investigations)

Includes bibliographical references.

Contents: v. 1. The concept of a right and a duty — v. 2. The rational foundation of rights and duties — v. 3. Natural rights and duties—v. 4. Against rights and duties—v. 5. Duties and obligations to others—v. 6. Property as a right, distribution as a duty.

ISBN 0-415-93982-8 (set : alk paper) — ISBN 0-415-93983-6 (vol. 1 : alk. paper) — ISBN 0-415-93984-4 (vol. 2 : alk. paper) — ISBN 0-415-93985-2 (vol. 3 : alk. paper)—ISBN 0-415-93986-0 (vol. 4 : alk. paper)—ISBN 0-415-93987-9 (vol. 5 : alk. paper)—ISBN 0-415-93988-7 (vol. 6 : alk. paper)

1. Natural law. 2. Obedience (Law) .3. Duty. 4. Law and ethics I. Wellman, Carl II. Series.

K460.R46 2002

340'.112—dc21

2002020621

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