

## THE ROLES OF RIGHTS

It is still important to remember that there may be codes of conduct quite properly termed moral codes (though we can of course say they are "imperfect") which do not employ the notion of a right .... Human actions in such systems would be evaluated or criticised as compliances with prescriptions or as good or bad, right or wrong, wise or foolish, fitting or unfitting, but no one in such a system would have, exercise, or claim rights, or violate or infringe them.<sup>1</sup>

It is hard to conceive of a moral code which imposed no obligations or prohibitions and confined itself to recommending or dis-recommending certain courses of action. Easier to imagine is the society described by Hart in which no one thinks of themselves as possessing rights, as being owed things by other individuals or as owing things to other individuals.<sup>2</sup> How exactly would such a moral code differ from our own? One might answer this question by examining the role of the abstract noun 'a right' in our ethical discourse. I doubt there is enough neutral data about our usage of this noun to settle the nature of a right. Instead I'll introduce a distinctive but familiar moral idea, one which I'll call *ethical individualism*, an idea absent from the society Hart imagines, and I'll claim that the language of rights is widely used as a vehicle for expressing this moral idea.

Ethical individualism combines three connected but separable thoughts. The first is that we are often forbidden to do certain things primarily because we owe it to a specific individual (the right holder) to refrain from doing them. The fulfillment of an obligation is owed to someone where the obligation exists because of some fact about the individual to whom the obligation is owed. Shortly I'll be a bit more specific about what sort of fact that might be. Ethical individualism also holds that where the relevant obligation (or obligations) is grounded in some fact about an individual, that individual often has certain forms of control over the normative significance of what happens to them, a control which includes the

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<sup>1</sup> Hart 1955, 176-7.

<sup>2</sup> See also Feinberg 1980 and Hart 1982, 162-3.

ability to rescind the obligation and the ability to forgive its violation.<sup>3</sup> Finally ethical individualism maintains that the individual to whom performance is owed should often play a special role in deliberation about whether to discharge that obligation. I'll consider each element of ethical individualism in turn over the next three sections.

Hart's point is that a human society might reject this whole package of ideas whilst still employing notions of right and wrong, of the permitted and the forbidden but the possibility of Hart's 'right-less' society can be obscured by the difficulty of imagining human life as devoid of resentment. Human beings react to wrongdoing not just with blame, guilt and indignation but also, at least where their own interests are affected, with resentment and, it has been maintained, things could not be otherwise.<sup>4</sup> Fair enough but members of Hart's society might be angry on their own behalf, might resent it when wrongdoing harmed their personal interests whilst still having no time for ethical individualism, or so I shall urge. The proscriptions that constitute their moral code may be grounded in quite other considerations.

## **1. Rights and Wrongings**

Let's begin by asking whether Hart's right-less code has any room for the idea that one person can wrong another. To wrong someone involves at least committing a wrong, i.e. behaving in a way that you are obliged not to behave. Talk of obligation has two connotations. First blame, guilt and indignation at the wrongdoing are in place, both from those directly involved and (guilt excepted) from third parties. Second, it makes sense for the wrongdoer to refrain from behaving in that way simply because they are obliged to do so. If the wrongdoing also wrongs someone then the wronged party is entitled to resent the wrong, to be angry about it on their own behalf (provided the wrongdoer has no excuse, their victim is not in habit of doing the same thing themselves and so forth). For

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<sup>3</sup> This paper is focused on the rights of individuals but the same apparatus could be applied to collective rights. I consider the possibility of familial rights below.

<sup>4</sup> Strawson 1974, 9-11.

example, the wrongdoing might have wronged the victim by harming their interests. Hart does not explicitly exclude such reactive attitudes from his rights-less society and we should explore the idea that wronging as well as wrongdoing may be present.

On some views, the possibility of wronging is enough to ensure that rights are recognized after all. Consider the following claim:

*Equivalence Hypothesis:* To have a *right* to A from X is just for it to be the case that you would be *wronged* by X were A not to be forthcoming from X.

This hypothesis is not offered as an analysis or explanation of the concept of a right ('wronging' and 'a right' are coeval) but it might be thought to narrow our focus in a helpful way, to zero-in on those breaches of obligation that involve the violation of some right. Yet if we do treat 'a right' as the counterpart of 'a wronging' then a society without rights would be no easier to imagine than a society in which feelings like inter-personal anger and resentment were never felt or regarded as appropriate. Should the *Equivalence Hypothesis* be accepted?<sup>5</sup>

When harmed by the wrongful behavior of another, I resent it. To feel entitled to my resentment, I need not imagine that this behavior is wrong (even in part) *because* of the way that it affects me; I need not imagine that its harmful impact on me helps to *explain* its wrongfulness. Many societies establish a Day of Remembrance during which they commemorate their war dead with a period of silence. During this period, my peaceful contemplations are disturbed your noisy rehearsal. Though there is no general obligation not to disturb other people, because of the memorial silence you *have* behaved wrongfully by failing to interrupt your rehearsal. Furthermore I will feel entitled to resent your wrongdoing because you have disturbed me and this is so whether or not I happen to be recalling relatives who died in the war. Perhaps I am just prevented

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<sup>5</sup> I endorsed the hypothesis in earlier work (Owens 2012, 46). Cornell 2015 has persuaded me otherwise.

from getting on with my writing or from enjoying a romantic daydream; in any case the concerns driving my resentment need have nothing to do with the justification for the period of silence, a prohibition which gets its force from the interests of the dead or from some other social interest.<sup>6</sup> I am wronged by your breach even though nothing about me explains the wrongfulness of your breach and so no right of mine is violated by your breach. In contrast, by-standers undisturbed by your rehearsal may be indignant at what happened but they are in no position to resent it (unless perhaps a relative died in the war).

Suppose I intentionally relied on your respecting the silence; don't I at least have a *derivative* right to rely on others conformity to valid social prohibitions even if the point of the prohibition is not to serve that reliance interest? But I may have discovered only later that your rehearsal violated a social prohibition and was placing no reliance on your observing it, yet I would still feel entitled to resent *your* disturbance in retrospect. Furthermore ethical individualism entails that at least some rights have a fundamental (i.e. non-derivative) role to play in explaining our obligations. A moral code in which harm to personal interests was grounds for resentment only where there was a prior violation of some impersonal prohibition would not be individualistic in the relevant sense. Under such a moral code, particular individuals may still feel wronged by wrongdoing and so feel entitled to react as third parties cannot; we can even imagine that those wronged parties are specially authorised to express their resentment in public complaints or in demands for compensation. Still all of this is a mere by-product of a deontic structure ungrounded in their personal concerns.

In this paper, I'll consider a specific version of ethical individualism, replacing the *Equivalence Hypothesis* with the

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<sup>6</sup> Perhaps other conditions need to be satisfied for resentment to be apt e.g. I mustn't be a pacifist.

*Grounding Hypothesis*: Y has a right that X does A where X is obliged to do A because of some interest of Y's.<sup>7</sup>

I suspect many of the points that follow would hold good even if we based an individual's rights on features other than the right-holder's interests (e.g. on their dignity as a rational agent) but I leave that open. According to the *Grounding Hypothesis* a system of rights is a system of obligations grounded in the interests of individuals.<sup>8</sup> Were a wronging just a rights-violation seen from another angle, the latter could not explain the former.<sup>9</sup> By contrast, by noting that X violated Y's rights one can explain why X wronged Y given that the invocation of rights draws our attention to some right-generating interest (or some other obligation grounding feature) of Y.<sup>10</sup>

Can the *Grounding Hypothesis* also explain the fact that rights characteristically give the right holder some control over the normative situation? The forms of control on which I shall focus include first the ability to permit activity that would otherwise be prohibited and second the ability to forgive the wrongdoer for what they have done should they go ahead without permission.<sup>11</sup> Though a full consideration of the forms of control available to the right-holder must wait until the next section, it is already clear how the *Grounding Hypothesis* might help. Where the rationale for the act's wrongfulness lies in my interests and those interests generate a further interest in being able to exercise control over the normative significance of that act, there is a case for my having powers of this

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<sup>7</sup> The *Grounding Hypothesis* is a relative of the interest theory of rights. See Mill 1991, 162-4 and Raz 1986, ch 7. Here A's interests are a matter of what is good for A. Note the hypothesis is formulated so as to leave open the possibility that an act may be wrong because of some interest without harming that interest (Owens 2012, Part 2).

<sup>8</sup> The interests of the right holder need not be the only interests grounding the relevant obligations but they must play a significant role in grounding them (Raz 1986, 178-9).

<sup>9</sup> Cornell 2015 133.

<sup>10</sup> The Hohfeldian analysis of 'a right' recognizes no such explanatory asymmetry (Hohfeld 1917).

<sup>11</sup> It is a question whether either forgiveness or consent involves the exercise of a normative power; elsewhere I argue that consent does whilst forgiveness does not (Owens 2012, secs 10-11 and ch 7). Here I shall assume only that both consent and forgiveness involve choices that ensure that a certain act otherwise worthy of blame, guilt and resentment, is no longer. I shall not consider others forms of normative control often associated with rights e.g. the power to transfer or assign them to others.

sort but where the wrongfulness of the act has nothing to do with its bearing on my interests, why should I exercise such control over its normative significance even if I happen to have an interest in so doing? (Plausibly the same case can be made where the act's wrongfulness is instead grounded in my dignity as a rational agent.)

We can illustrate the point once more by reference to the Day of Remembrance. I am certainly in no position to permit you to disturb me by breaking the memorial silence – no one can do that except perhaps for a public official. It is equally true that I can't forgive you for having broken it.<sup>12</sup> Where a crime is a public crime the ability to forgive resides with the public authority. Can I at least forgive you for having disturbed *my* peace, even though I can't forgive you for the breach itself and for harms to others that may arise? Indeed one can say 'so far as I am concerned, I'll no longer hold this against you' and then it would be inapt for *me* to continue to blame you but my forgiving attitude has no bearing on whether others can blame you for the disturbance you caused, including to me. If on the other hand the authority does forgive you for disturbing me then you have been forgiven and continued blame for this from anyone at all is no longer appropriate. Some affected party might complain that the authority was wrong to forgive you and they might even consider themselves wronged by that decision but they consider themselves wronged precisely because they think you have been wrongly forgiven.

## **2. Rights and Normative Control**

Some may reject the conclusions of the first section, simply denying that anyone could intelligibly resent a certain act on the grounds that it harmed them unless they also thought of such harms as having a further normative significance, as being able to ground prohibitions and so generate rights. I suspect this curbs our moral imagination. Still we can work with this restriction by re-focusing our discussion on moral codes that do acknowledge the existence of rights. Within

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<sup>12</sup> So a 'derivative right' not to be disturbed would not give me a right-holder's control over the normative situation.

these codes the distinction between wronging someone and violating their rights remains.

For example, a promise generates a right in the promisee to fulfillment of the promise:

X promises Y in return for some favor that he will look after Y's aged mother in his absence. Rights arise out of this transaction, but it is surely Y to whom the promise has been made and not his mother who has or possesses these rights. Certainly Y's mother is a person concerning whom X has an obligation and a person who will benefit by its performance, but the person to whom he has an obligation to look after her is Y.

Hart goes on

This is something due to or owed to Y, so it is Y, not his mother, whose right X will disregard and to whom X will have done wrong if he fails to keep his promise, though the mother may be physically injured. And it is Y who has a moral claim upon X, is entitled to have his mother looked after, and who can waive the claim and release Y from the obligation. Y is, in other words, morally in a position to determine by his choice how X shall act and in this way to limit X's freedom of choice; and it is this fact, not the fact that he stands to benefit, that makes it appropriate to say that he has a right (*ibid.*).<sup>13</sup>

We should endorse what Hart says in the first passage – performance of the promise is owed to Y and not to his mother, though the mother alone may stand to benefit from performance. We should also agree that it is Y who has the power to release X from their obligation to help Y's mother but this second point requires more careful formulation since, at least on the normal understanding of such promises, Y's mother is entitled to refuse X's help and when she does so X is no longer obliged (or even permitted) to help her.

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<sup>13</sup> Hart 1955, 180. See also Hart 1982, 187-8.

Hart is concerned with the right that Y acquires from X specifically in virtue of X's promise and Hart's point is that in acquiring this right, Y also acquires the authority to waive X's obligation simply in virtue of the fact that this obligation originates in a promise made to them by X. Y's mother can also 'waive' X's obligation only because the promise happens to have an implicitly conditional content (it is a promise to help Y's mother if she wants help or requests it). Should both X and Y know that Y's mother is no longer in any fit state to take decisions about her own treatment, the natural understanding of the content of the promise changes and Y's mother would lose any ability to 'waive' X's obligation without this diminishing Y's authority over X. I would argue that the interest which makes the promise binding is Y's *authority interest*, Y's interest in having control over X's obligations, rather than any other interest either of Y's or of his mother's and this is why the promissory character of the obligation by itself ensures that Y (but not his mother) has the power to waive it.<sup>14</sup>

Hart's second passage contains two misleading implications: one is that Y's mother is not wronged by breach of the promise, the other is that the interests of Y have nothing to do with the bindingness of X's promise. As to the second point, according to ethical individualism, the right-holder is able to control the normative significance of violation where the wrongfulness of the act is grounded in their interests in a way which makes it good for them to possess such control. Hart remarks that the promisee may not stand to benefit from the fulfillment of the promise and this is true but it does not follow that the promisee's interests are irrelevant to the bindingness of the promise for (as I just observed) whether or not the promisee has an interest in the performance of the promise, they may still have an interest in asserting 'moral control' over the promisor, in being able to determine what the promisor is obliged to do, an interest distinct from any interest in what they will actually do.<sup>15</sup> This authority

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<sup>14</sup> Owens 2012, 146-50. A legal parallel to such third party beneficiary cases are rights within trusts. For discussion of trusts see Hayton 1996.

<sup>15</sup> The fact that authority interest need not be harmed by breach of promise is not a problem given that the *Grounding Hypothesis* does not require that the grounding interest be harmed by the rights violation. See Note 7.

interest of the promisee is precisely what makes the promise bind. By contrast, the interests of third parties (like Y's mother) in performance do not explain why the promise binds and so it is not them to whom performance is owed.

Hart's other misleading implication is that the mother is not wronged by X's breach. Should the mother be seriously inconvenienced by X's failure to keep their promise, she surely can resent X's behavior.<sup>16</sup> Unlike Y, Y's mother must actually suffer some injury (or at least risk of injury) for this to be so; were she completely unaware of the promise and would receive the help she needed in any case from some other source, bare breach of promise wrongs Y but not her. Yet, once injured, she is wronged by that injury, can complain on her own behalf and direct those complaints to X.

Cornell adds that the mother is also able to forgive the inconvenience she suffers but this point is more tricky. I would argue that the ability to forgive the breach and its consequences rests with the right-holder, rather than with someone like their mother who happens to have been harmed by the breach. The mother can indeed decide not to complain about the breach and not to seek compensation, if compensation is owed to her. What she can't do is make it the case that it is inappropriate for others to blame X for what X did to her: Y may continue to resent X not merely for the breach of promise but also for the inconvenience caused to his mother by X's breach, whatever attitude his mother adopts. At least until Y has forgiven him, X should continue to feel guilty about what he did to Y's mother as well as to Y.<sup>17</sup> On the other hand, Y can forgive X for the inconvenience caused to Y's mother, in which case that inconvenience is no longer an apt focus of guilt on X's part. Should the mother subsequently

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<sup>16</sup> Cornell 2015, 115-9.

<sup>17</sup> Two clarifications. First blame and resentment involve more than the mere judgement that you have done wrong (Owens 2012, ch 1). The right-holder's forgiveness should not prevent the rest of us from sticking to this judgement, nor from acting on it in certain ways. What their forgiveness renders inapt is continued anger at the perpetrator. Second forgiveness will sometimes be out of place or even altogether impossible whatever the victim may think (just like consent). My point is that the victim has a special authority to forgive, not that this authority is absolute (Owens 2012, 51). Cornell denies that right holders have any special authority in this matter (Cornell 2017, 254) and implies that each wronged party gets to determine whether the wrongs done to them are forgiven (Cornell 2015, 117 and 141).

approach X with her complaints, X could simply express regret, point out that they have been forgiven and refer her to Y. Where she thinks Y's forgiveness was unjustified, the mother may then complain to Y that he forgave the breach. Here Y can't respond that, whether or not he did right, his forgiveness concerns only his stake in the matter and then encourage the mother to resume her own representations; Y's forgiveness undermines her standing to complain.<sup>18</sup> As the right holder, Y has the power to control the normative significance of X's action by way of both consent and forgiveness.<sup>19</sup>

We've mentioned two forms of normative control in connection with Hart's example, both of which seem to reside with the right holder rather than with the wronged party: consent and forgiveness. With a promise it is plausible to suppose that the right-holder has both forms of control but in other cases that may not be so. One is where the supposed right-holder is incapable of exercising such control and so could hardly benefit from having it. Hart maintains that we shouldn't apply the notion of 'a right' here:

These considerations should incline us not to extend to animals and babies whom it is wrong to ill-treat the notion of a right to proper treatment, for the moral situation can be simply and adequately described here by saying that it is wrong or that we ought not to ill-treat them or, in the philosopher's generalized sense of "duty," that we have a duty not to ill-treat them.<sup>20</sup>

A more concessive response than Hart's would note that this extension of the notion of a right to animals and babies is perfectly intelligible within the

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<sup>18</sup> There are circumstances in which the mother is owed an independent apology. She has her own right to performance where the magnitude of the harm done to her by breach is such that X ought to take that harm into account independently of the fact that it is the result of a breach of his promise.

<sup>19</sup> Many acts which violate someone's rights also have a wider social significance e.g. an act of violence which threatens public order or displays contempt for a certain class of people. I myself overlooked this point in earlier work when I used rape as an example of a wrong the right-holder has the authority to forgive (Owens 2012, 56). Acts of this sort are not simply private wrongs and are suitable objects of criminalization. In their case we should not expect the right-holder's forgiveness to render third party blame or indignation inapt. A personal promise is different.

<sup>20</sup> Hart 1955, 181.

framework just sketched. Our obligation not to mistreat animals and babies is clearly grounded in their interests rather than in the interests of third parties. Furthermore were they able to make use of one of the forms of normative control described above, they would have it. That is just what happens once a baby becomes an adult and acquires the ability to forgive what was done to them as a child.

Another controversial case is that of inalienable rights. I would argue that the extension of 'a right' to cover potentially inalienable rights makes sense within the framework of ethical individualism so long as the obligation to respect the right is rooted in an important interest of the right holder. Whether the right holder can prospectively waive or even retrospectively forgive the violation of their right depends on whether that interest also makes it the case that it would be good for the right-holder to be able to do these things.<sup>21</sup> Consider whether I have a right not to be killed by you. There are two separate questions here (a) whether I have an interest in not being killed which means that you owe it to me not to kill me and (b) whether I have an interest in controlling whether other people are obliged not to kill me which grounds a power to permit you to kill me. Considerations supporting a positive answer to (a) need not also suggest a positive answer to (b). In the case of promise, the whole point is to give the promisee authority over the promisor, an authority they can choose whether to exercise but it is much less clear that the very interest which generates an obligation not to kill me (e.g. my interest in staying alive) also ensures that it is in my interests to be able to permit you to kill me.<sup>22</sup>

We can illustrate the same point by considering a rather different case, namely loyalty in friendship. You have a right to your friend's loyalty and you have this right because you benefit from having it, because the bonds of friendship are

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<sup>21</sup> Other considerations (e.g. broader social effects) may help to determine what normative powers are attributed to given individuals but if we are thinking of such powers as an aspect of their rights, those individuals must benefit in the relevant way from possession of the power.

<sup>22</sup> I would argue that whilst a property right is grounded in an interest in having some form of normative control over the relevant item (e.g. the ability to permit its use or transfer ownership) that isn't true of all rights over the body.

part of what makes friendship the good that it is.<sup>23</sup> It does not follow that controlling the normative significance of disloyalty would also be good for you, would also enhance the distinctive value of the friendship (*ibid* p. 173). For example, it is doubtful that one can consent to disloyalty in friendship, that one can permit one's friend to fail to offer basic forms of help and support, to make uncharitable assessments of their character to third parties who are not well disposed and so forth.<sup>24</sup> Such permissions would tarnish the value of the relationship and thus undermine the case for saying that the relevant bonds of loyalty existed in the first place. We should not suppose that having this power is part of their friendship in the way that having the ability to permit various intimacies may well be. The situation is very different when it comes to forgiveness. Even though my disloyalty wronged you and there is nothing you could have done about that, the ability to forgive me, to make it the case that it is no longer appropriate for you or anyone else to blame me for what I did (and for me to feel guilty about it) is a beneficial aspect of a good friendship, one often consistent with the value of the bonds that I breached. Of course, some acts of forgiveness are more appropriate than others and some may be so inappropriate that they lack their purported normative significance but having that option within friendship is usually a good thing.

### **3. Rights and Deliberation**

In this section we'll consider the third element of ethical individualism namely the special weight that should be given to the right-holder in our practical deliberations, in our thoughts about what to do. Though the rights of affected individuals surely must be registered in practical deliberation, it remains a question whether that deliberative role is distinctive of rights as opposed to the more general phenomenon of obligation or duty. The fact that an act is forbidden is not just one count against my going ahead with it: should I feel obliged to respect the silence on the Day of Remembrance, I won't think of this just as a

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<sup>23</sup> Owens 2012, ch 4.

<sup>24</sup> I am not denying that the attitude of the friend you are proposing to betray makes no difference here, merely that it cannot render disloyalty entirely permissible.

desirable thing to do but as something I am *bound* to do. Thinking of it in this way involves excluding from my deliberations various considerations which count in favour of breaking the silence, involves treating for example one's need to rehearse as being irrelevant to what one will do, as being a consideration on which one should not act.<sup>25</sup> Yet I can approach the matter thus without imagining that any individual has a right that I observe the period of silence. So does the special deliberative significance of rights go beyond the exclusions implicit in any obligation?

Here is one line of thought inspired by Cornell.<sup>26</sup> My violation of an obligation whose performance is owed to A may adversely affect B also in such a way that B may aptly resent what I did to them but where the obligation is grounded purely in the interests of A, the harm I shall cause B should play no role in my deliberations. I need be no more reluctant to violate my obligation just because of the impact it has on B: for deliberative purposes the effect on B is screened off by the effect on the right-holder A. After all I'm not obliged to avoid causing harm as such (e.g. to rivals in a fair competition) and where the harm to B derives its normative significance entirely from its effect on A, the harm to B should make no additional contribution to my deliberations.

Cornell is correct that right-holders should have a special place in our practical deliberations but his account of the matter faces a couple of objections. First he appears to move from a claim of dependence to a claim of irrelevance yet from the fact that harm to B has deliberative significance only given its connection with harm to A it does not follow that harm to B can be discounted from the deliberative standpoint: harm caused to B might be a consideration with a significance additional to, though dependent on, that of harm to A. Second, in cases where both A and B are harmed by the violation but performance is owed to A and not to B, Cornell discerns an asymmetry between the *ex-ante* standpoint of deliberation and subsequent reactions. Here B is entitled to resent what you have done to them *ex post*. Nevertheless, in Cornell's view, your awareness of B's

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<sup>25</sup> Owens 2012, ch 4.

<sup>26</sup> Cornell 2015, sec 7.

stake in the matter should have no impact on whether you commit the wrong to begin with. *Ex-post* complaints from B are in place but *ex-ante* demands would be out of order.<sup>27</sup> This might strike us as peculiar: shouldn't the issue of whether B could resent your decision *ex-post* bear on the question of whether you should take that decision in the first place, in which cases B's interests are directly relevant to whether or not you should violate A's rights?

I would maintain that when obligation alone is in play, the interests of all who would be wronged by the violation of an obligation should be taken into account in the deliberations of a prospective wrongdoer. So, for example, you should be more reluctant to rehearse during the memorial silence when you know many people will be disturbed by your rehearsal than if it is only me whose peace will be destroyed and this is so even though none of us have a right to your silence. Whether or not he agrees with this Cornell will insist that, where the obligation is grounded in someone's rights, the right-holder alone should count in the deliberations of a prospective wrongdoer. By contrast, I shall claim that this is so only where the interests of the right holder also give them the authority to control the normative situation. That is the grain of truth in Cornell's overambitious claim.

Take promises once more. I'm supposing that the binding force of a promise is grounded in the promisee's interest in controlling the obligations of the promisor. True, at the formation of the promise the promisor must agree to be bound. Still the basic point of the transaction is not to enable the promisor to (voluntarily) bind themselves but rather to enable the promisee to control whether the promisor is obliged to perform, a control the promisee exercises either by holding them to their promise or else by releasing them from it. Now promises affect not just what promisors should do but also, given the phenomenon of exclusion, how they should conduct their deliberations. By controlling the obligations to which the promisor is subject, the promisee

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<sup>27</sup> In the view of the possibility of anticipatory resentment and pre-emptive forgiveness we might (as Tom Dougherty suggested) instead distinguish the standpoint of deliberation from the standpoint of grievance but, for expository ease, I'll stick with Cornell's temporal formulation.

thereby controls which considerations they can and can't act on in the matters covered by those obligations and thereby determines what sort of considerations should enter into the promisor's practical deliberations. In particular, the promisee gets to determine the practical significance of third party interests. So, for example, by first accepting X's promise and then deciding whether to release them from it, Y settles whether X has to take account of the needs of Y's mother. Harm or distress to third parties consequent upon breach of promise, however predictable the harm and reasonable the distress, should not (*qua* consequences of a breach of promise)<sup>28</sup> be relevant to X's deliberations; they are relevant only in so far as the right holder deems them to be relevant, which Y does (in respect of Y's mother) so long as they hold X to a promise that involves the interests of Y's mother.

Let's suppose that Y's mother's neighbour will feel obliged to stand in for X if the mother does not receive the promised help and so be seriously inconvenienced. Cornell is right that this fact should play no role in X's deliberations as to whether they ought to keep their promise.<sup>29</sup> Y would be understandably miffed if they discovered that X kept their promise out of concern for this neighbour. Where a promisor on their own initiative treats the impact of breach on a third party as being directly relevant to whether they should fulfill a promise, they are already being less than conscientious, just as much as if they were to treat their own personal convenience as relevant and this so whether or not they end up breaching their promise. These are considerations of the sort that the obligation should exclude from the promisor's deliberations unless they are included in the content of promise. The promisee is free to consider the promisor's personal

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<sup>28</sup> The parenthetical qualification is needed because we may all have an obligation to avoid doing things that will foreseeably cause significant harm to others, provided we can avoid this without undue sacrifice etc. It follows that where breach of promise will cause substantial harm, we may be obliged to perform but, if so, our being bound does not depend on the fact that we are causing harm specifically by breaching a promise. In such a case, the promisee (as opposed to the victim) has no special ability to forgive the consequences of breach since the obligation to avoid harm does not depend on the promisee's rights in the matter.

<sup>29</sup> Cornell does agree that X should take the impact on Y's *mother* into account when determining whether to keep their promise, even though the mother is not the right holder. He says this is due to 'unique features of promising' (Cornell 2015, 132 n. 46).

convenience or indeed that of their mother's neighbour in determining whether to hold the promisor to their promise; the promisor cannot.<sup>30</sup>

If the above account is correct, Cornell's asymmetry should not appear in cases where the right holder has no such discretion. Where a right is inalienable, we should find that the interests of any party who would be wronged by that violation should figure in the deliberations of the potential perpetrators, not merely the interests of the right holder (though the deliberative significance of the former would indeed depend on that of the latter). To test this final hypothesis, we need examples of inalienable rights that are clearly private rights and without a wider public significance.<sup>31</sup> We would also need a better account than I can offer of the scope of legitimate resentment, of precisely which people are wronged when a right is violated. Neither Cornell nor I think that everyone adversely affected by a wrong counts as wronged by that wrong, even if the effect could have been foreseen.<sup>32</sup> For example those upset when they read about some outrage in the newspaper are not thereby wronged by those deeds, are not entitled to resent them (even if they are really quite upset) absent some closer connection between themselves and the victims. Still the perpetrator and the people they wrong might be perfect strangers as the Day of Remembrance demonstrates.

Here is one example. I've said that we have inalienable rights not to be betrayed by our friends. Does this mean the interests of my friend's family are potentially relevant to whether I betray my friend? Suppose the betrayal causes great pain. I am not a friend of the family and have no separate obligation to them but the distress caused to my friend casts a pall over the life of that family. What should be said here? It could be argued that since our friendship is a private matter

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<sup>30</sup> Here 'convenience' refers to considerations which are not trivial in that it remains appropriate to regret the inconvenience keeping the promise will cause (to oneself or to others) but which are still such that you ought to be excluding them from your deliberations. I don't deny that other countervailing considerations, including some considerations of self-interest, are sufficiently serious not to be excluded.

<sup>31</sup> In discussing these matters, Cornell's uses examples of reckless endangerment, something there is a public interest in forbidding (Cornell 2015, 126-34)

<sup>32</sup> Cornell 2015, 126 n.35.

between the two of us, my friend's family is not wronged by my betrayal and any familial resentment should be directed towards my friend for getting involved with such an unreliable character in the first place. (Obligations of friendship seem more personal than promissory obligations that can easily bind two strangers). If this is the correct way to think about the situation, it would also be odd for me to take the family's interests into account when deciding whether to betray my friend. Alternatively, perhaps my betrayal would wrong not just my friend but also the family as whole given their intimate connection; they have a right that I not betray them also. On this hypothesis it would also be appropriate for me to be more reluctant to betray my friend because of the devastation caused to his family.<sup>33</sup> The family could issue an *ex-ante* demand: 'though you don't care enough about your friend to desist you could at least give us some thought'.<sup>34</sup> I doubt Y's mother's neighbour could say a similar thing to X, given that Y has not deemed their interests relevant in the matter of the promise and this is so even though the neighbour's involvement with Y's mother remains close enough to entitle the neighbour to resent the breach on their own behalf.

According to ethical individualism, many obligations are grounded in facts about individuals, facts which mean that their fulfillment is owed to those individuals and which often give those individuals the ability to consent to or to forgive their violation. In this section I've argued that where the second condition is satisfied, a further connotation of 'a right' comes into play, namely the idea that the person to whom performance of the obligation is owed should be the sole focus of deliberation about whether to perform. But this connotation is absent in many cases where we continue regard performance as being owed to an individual because the interests which ground this obligation are not control interests and

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<sup>33</sup> Suppose I am forced to betray my friend in one of two different ways, equivalent in their effect on him but differing in their effect on his family. Shouldn't the effect on his family now be relevant to my decision? If the family would be wronged by my betrayal, shouldn't I take the effect on his family into account? Cornell (*ibid.*) considers other cases where there are two different right holders, one of whose interests must be sacrificed to the other but only one of whom has third party connections. Here it is, as he argues, much less clear that third party interests ought to be taken into account when determining who ought to be harmed but that may be due to special issues raised by inter-personal aggregation.

<sup>34</sup> They are also entitled to a say in whether the traitor should be forgiven, or even to forgive the traitor themselves in the absence of their relative.

give the right holder no special influence over the normative situation created by the obligation.

#### **4. Conclusion**

In this paper, I've been arguing that our use of the language of rights is informed by an ethical individualism which involves three interconnected ideas: (a) that the performance of many obligations is owed to specific individuals (b) that where this is so those individuals often have certain kinds of control over those obligations and (c) that those controlling individuals should also play a special role in deliberation about whether to discharge the obligation that is owed to them. My aim here has been to refine these three ideas, to trace their interconnections and to distinguish all three from the rather different notion that particular individuals might be entitled to resent breach of an obligation. I have not argued that the abstract noun 'a right' is properly used only where this whole cluster of moral ideas is present, nor that it should be tied to one or more elements of that cluster, nor even that it must be used (as I have used it) to differentiate 'rights' from 'wrongings'. This paper concerns the underlying moral ideas and not the words used to express them.

My theoretical framework serves to highlight both the strengths and the occasional weaknesses of Hart's treatment of rights. Hart thought normative control essential to right-holding and so regarded talk of animal rights and children's rights as dubious extensions of a notion more properly at home in the realm of promise and consent. Discussing legal rights, Hart makes the distinction between civil and criminal law turn on the fact that the plaintiff in civil law controls the legal obligations of the defendant in ways that the victim of a crime does not control the legal obligations of its perpetrator e.g. the plaintiff can 'forgive' the violation by declining to enforce it, a course of action unavailable to the victims of crime<sup>35</sup>. I would add that this difference is further explained by observing that the rights recognized by civil law are grounded to a large extent in the right holder's interest in controlling their normative (and specifically their

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<sup>35</sup> Hart 1982, 182-6.

legal) situation, whilst what drives the criminal law is more the public's interest in the preservation of social order.

An account of rights like Hart's which gives promise and consent a central role may better fit the genealogy of the concept than one that treats the human right not to be tortured, say, as the paradigm case of a right. Nevertheless, rights language could, and perhaps has in certain circles (academics, NGOs), developed in such a way as to make human rights the central case and turned normative control and the special deliberative significance of the fact that we 'owe it to someone' which I've associated with promissory rights into dispensable accompaniments of the ascription of a right. Such an evolution in the language of rights would be perfectly intelligible within the above theoretical framework.<sup>36</sup>

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