

# In Defence of the Will Theory of Rights

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**Abstract** Nicholas Vrousalis has aimed to recast an old objection to the will theory of rights by focusing on Hillel Steiner’s version of that theory. He has argued that Will Theory must either be insensitive to the (values of the) lives of the unempowerable, or be incomplete, because it has no argumentative resources within its conceptual apparatus to ascribe or justify restrictions on the amount of discretion exercised by legal officials. I show that both charges are problematic. They rely on some of Steiner’s inferences which are simply unjustified because they are based on misinterpretations of the logic of Hohfeld’s terminology. The problem for Vrousalis is that his critique takes for granted some of these flawed arguments. The critique is also misdirected to the extent that it assumes that the problems with Steiner’s theory affect Will Theory in general.

**Keywords** Theories of rights · Legal rights · Moral rights · Hillel Steiner · Nicholas Vrousalis · Hohfeld · Analysis of rights

## Introduction

In a Comment published in this journal, Nicholas Vrousalis (2010) recasts an old objection against the Will Theory of rights: the complaint that Will Theory is too narrow—that it cannot account for many of the items that we commonly identify as ‘rights’. Vrousalis’s principal target is Hillel Steiner’s recent defence of Will Theory.<sup>1</sup> In itself, there is nothing objectionable about this: Steiner’s book *An Essay on Rights*

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<sup>1</sup> The abstract also mentions Nigel Simmonds’ defence, but for reasons that will become obvious Vrasoulis’ objections cannot be taken to apply to Simmonds’s version.

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(1994) is an intellectual *tour de force* and his defence of the Will Theory a formidable contribution to the debate, so it certainly deserves scrutiny. However, criticizing Steiner's version is one thing; criticizing Will Theory in general is quite another. One cannot simply assume, as Vrousalis seems to do, that the latter is entailed by the former, unless one has good reasons for believing that other versions of Will Theory share the relevant properties. My first aim in this response is to show that this is not the case. Will Theory is in fact more diverse than Vrousalis takes it to be: other versions of the account are not susceptible to the criticism offered against Steiner. Consequently, the critique merely highlights a problem with Steiner's argument rather than the Will Theory.

Vrousalis poses a dilemma for Hillel Steiner's account with the aim of showing that the Will Theory is either insensitive, in that it does not and cannot regard the lives of the unempowerable as meriting direct normative considerations, or else must be incomplete, in that it is unable to provide grounds for our duties to the unempowerable.<sup>2</sup> However, both propositions (which are supposed to constitute the horns of the dilemma) are problematic. The former is in fact straightforwardly flawed. It relies on the acceptance of some of Steiner's mistaken claims concerning the logic of Hohfeld's typology of rights, which has provided the terminology in which much of the debate between the Will Theory and the Interest Theory is cast. My second aim, then, will be to show that Vrousalis gives Steiner too much credit. The problem with this is that these conceptual errors affect Vrousalis's critique as well, since it relies on claims that are plainly mistaken.

In discussing the other horn, I shall distinguish between two different senses of 'incompleteness'. The traditional indictment that Will Theory is incomplete relies on an assumption that is rarely explicitly stated, but that often seems to be taken for granted in contemporary discussions regarding the nature of rights—i.e. that the principal test for a theory of the nature of rights is its ability to accommodate most of the normative incidents that we would ordinarily identify as 'rights'. Few people would be willing to defend the thesis that extensional adequacy (as we may call it) is the *only* relevant criterion in judging the merit of an account of rights. Yet recent debates between adherents of the Will Theory and the Interest Theory have been dominated by attempts to establish that one theory does a better job in accounting for our classificatory judgments than the alternative. Thus one might easily be tempted to think that it is taken to be the principal measure for evaluating a theory of rights. Once the assumption is identified as such, the charge of incompleteness will immediately lose some of its apparent force. My goal here will not be so much to discredit the significance of extensional adequacy. I will simply suggest that the charge of incompleteness is much less of an embarrassment to the Will Theory than it is made out to be.

The sense of 'incompleteness' that Vrousalis finds in Steiner's theory, however, is of a different nature. It is connected to an assumption which he dubs the 'correlativity axiom'<sup>3</sup>—the idea that for any legal duty there must be someone who holds a

<sup>2</sup> This formulations of the horns of the dilemma leaves some room for different interpretations as to their content, but pursuing them would lead us too far astray.

<sup>3</sup> Vrousalis's explanation of the axiom is misleading: Steiner's unfortunate use of terminology has led him to identify it with Hohfeld's notion of correlativity. But correlativity as used by Hohfeld is best understood as stipulative equivalence of terms. It is consistent with 'correlativity' so understood to accept

correlative right. Steiner doesn't, to my knowledge, explicitly defend this thesis. But it can perhaps be inferred from one of his claims regarding criminal law duties. This defence, however, also rests on a misunderstanding of the logic of Hohfeldian terms. The problem here is that, even if we accept some appropriately revised version of Steiner's correlativity thesis, we will not arrive at the position that Vrousalis needs in order to sustain the claim that Will Theory is incomplete in this second sense.

Consequently, my conclusion will be that there is no dilemma. Once we get the logic of rights straight, each of the supposed horns of the dilemma dissipates.

The twentieth-century debate between Will- and Interest Theory took off with Hart's famous critique of Bentham's Interest Theory. Hart regarded the idea of an individual's control over someone's duty as central to the concept of a right, 'so that in the area of conduct covered by the duty the individual who has the right is a small-scale sovereign to whom the duty is owed' (Hart 1982, p. 183). There was no doubt in Hart's mind that this account did not exhaust the way we invoke the notion of—even legal—rights (Hart 1982, pp. 188–93). Nor does Steiner think that the Will Theory accommodates all of the ways in which the notion of 'a right' is commonly invoked.

'Theories of rights don't come cheap', Steiner wrote. Accepting either Will Theory or Interest Theory involves paying a price 'in the currency of counter-intuitiveness' (Steiner 1998, p. 298). Whether and to what extent we should be willing to pay such a price is of course open for debate. But Vrousalis intends to show that Will Theory carries a price-tag that will discourage most of us from endorsing it.

In order to show this, he asks us to consider duties some of us might have regarding the *unempowerable*. Consider M, a severely mentally disabled person in need of medical treatment. Will theorists must deny M either the ability to have rights or (minimally) the ability to exercise them. Steiner nonetheless thinks that the duties—say, of doctors—to provide treatment are correlative to rights, only in this case the rights are not held by the persons who stand to benefit from the exercise of the doctor's duties. Rather, we must locate these rights in state officials who have powers to enforce or waive those duties (Steiner 1998, p. 261). The dilemma appears, according to Vrousalis, when we ask whether these officials have a duty to see to it that the doctors treat the disabled person. Steiner had argued that these officials must lack such a duty, because it would contradict what we already assumed—that they have a power to control the first-order duties of the doctors. If Will Theory denies that these officials have such duties, then—Vrousalis argues—it is guilty of insensitivity to the needs and interests of M, for it will put some government officials in a position in which they can waive doctors' duties *ad libitum*. He insists that there is in fact a strong case for thinking that officials have a duty to demand that doctors carry out their duties. 'But there is nothing within the will theory's conceptual armoury that warrants or justifies ascription of this duty' (Steiner 1998, p. 419). Hence Will Theory is not 'conceptually self-subsistent' and is thus incomplete.

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Footnote 3 continued

that some duties are not directed ('duties to someone') and therefore not correlative. The correlativity that Vrousalis assumes that Steiner defends is a substantive thesis which holds that for any legal duty we can find a correlative (Will Theory-) right. Simmonds (1998, p. 222) explicitly denies substantive correlativity (I have not taken over Simmonds' terminology for reasons that would take too much space to explain).

## Insensitivity

The insensitivity-charge holds that government officials should not have the freedom to waive the duties, say, of doctors to the unempowerable, but that Will Theory cannot but grant them that freedom. Why should that be so? Three claims seem to be working together to produce the conclusion that the Will Theory must grant government officials the freedom to waive the duties of doctors. These are (1) that duties are correlative to rights; (2) that the rights correlative to the duties of doctors are to be located in government officials, and (3) that having a right (a power) is inconsistent with being under a duty to exercise it.

I have deliberately formulated the first claim rather vaguely, because I am not convinced that Steiner really endorses the claim that all duties are correlative to rights. He certainly holds that criminal law duties are correlative to rights of government officials, and he also applies the reasoning by which he arrives at this conclusion to the duties regarding the unempowerable (claim #2). It should be obvious that the first claim is not necessarily part of any version of Will Theory. Neither is the second, for that matter. As far as I can see, there is nothing inconsistent about endorsing the Will Theory of rights while holding that some legal duties are not correlative to rights. This is the most obvious reason why the insensitivity critique does not apply to Will Theory per se.

There's more. We could ask whether the insensitivity critique applies even to Steiner's version. It certainly would if we accept all of Steiner's claims. Unfortunately, Steiner's defence of the Will Theory is not nearly as rigorous as Vrasoulis takes it to be, and this also undermines the latter's challenge. In particular, two of Steiner's analytical claims which are central to the challenge are in fact badly mistaken, and a third one is at the very least highly contentious.

To see how these mistakes affect Vrasoulis's critique, consider first a claim which Vrasoulis explicitly endorses—that having a power is inconsistent with having a duty to exercise it (that is the third claim on which the insensitivity critique rests). According to Steiner, a set of legal rules cannot grant me a power to waive a duty and a power to demand you to comply with your duty, while at the same time requiring me to waive your duty. In such a situation, he argues, one and the same set of rules thus would appear to vest me with the power (to demand compliance) and to *disable* me from exercising it (Steiner 1998, p. 243).

Steiner's claim is simply mistaken. Whenever I waive someone's duty, I thereby relinquish the right correlative to it, and thereby extinguish a power I previously had (i.e. by exercising my power of waiver, I also extinguish the very power I exercised). There is nothing in the logic of Hohfeld's terminology that makes it impossible for a set of legal rules to *require* me to exercise a power that I have. If exercising this power also means extinguishing it (as in the case of waiving a duty) then a rule system can oblige me to extinguish my own power (by exercising it). The requirement that I extinguish this power does not mean that the power has already ceased to exist. *A fortiori*, Steiner's conclusion does not follow. Steiner wrote that 'rejection of the suggestion that possession of powers implies the possession of corresponding liberties entails a straightforward contradiction' (Steiner 1998, p. 243). But there is no such contradiction.

Two examples may serve to illustrate this. Selling something is the exercise of a power. Upon the conclusion of a sale, the new owner will have acquired certain rights, whereas the previous owner will have lost some.<sup>4</sup> If Steiner is correct, the power to sell something implies a corresponding set of liberties to sell or not to sell the item. To think that someone might have a power to sell something and at the same time be prohibited from selling it would then be a conceptual mistake. But it is not. Like many other jurisdictions, Belgium prohibits the sale of cigarettes to minors. If a shop keeper ignores such a prohibition and sells a package of cigarettes to a 17 year old adolescent, he incurs a liability to be punished for doing something that he ought not to have done (selling the cigarettes). The sale, however, is considered to be valid. In other words, the shop keeper is liable to punishment because he exercised a power that he was not at liberty to exercise. It is simply mistaken to think that the prohibition to sell the package of cigarettes entails that there has been no sale. To avoid misunderstanding, I am not denying that any legal system might simply declare void any attempt to sell cigarettes to a minor. In that case, the shop owner might still be punished for handing over cigarettes to the 17 year old, but he would not—strictly speaking—be punishable for the sale of the cigarettes, because the minor never acquired legal ownership of them. What concerns us here, however, is the fact that it is perfectly well conceivable that a law *does* consider the sale as valid, *and* considers the shopkeeper as having committed an offence by exercising a power which he was not at liberty to exercise. The fact that it was *illicit* for him to do so does not mean he was *unable* to do it. Steiner's claim that normative ability implies permissibility must be rejected as a concatenation of two perfectly distinct ideas—as confounding deontic and alethic modal categories (for the distinction, see Sumner 1987, pp. 22–23).

Another example may serve to further illustrate the relevant distinction. Public officers often have a duty to exercise powers. The fact that they have a duty to exercise these powers does not mean, however, that the powers are activated independently of the actual decision of the official. A dramatic example of this was the crisis following the refusal of the Belgian King Baudouin to sign a law legalizing abortion (under certain circumstances). The law had been approved in Parliament and consequently the King had a duty to sign it. Nevertheless, the law would only take effect upon the King's approval. This created a rather uncommon situation: usually when the law requires us to do something it also foresees punishment in case of non-compliance, but in this case there was no way to punish the King for not fulfilling his duty. In the end he was declared unable to rule (for one day) so that the Government could endorse the law. Again, this case illustrates the distinctness of powers from normative requirements: the King's ability to change the normative positions of Belgians was not inconsistent with a requirement to use his power in a certain way.

The upshot of this is that Steiner was wrong in claiming that having a power is inconsistent with being under a duty to exercise it. A public official may well both have a power over a doctor's duty of care *and* be under a duty not to waive the doctor's duty. Hence the insensitivity critique is mistaken: it would have an object

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<sup>4</sup> A sale could be construed as involving the exercise of several powers (of buyer and seller) at different times, but these complications can be ignored for the present purpose.

only *if* Steiner's claims regarding Hoheld's logic were tenable. Since they are not, Will Theory need not deny that government officials who exercise powers can have duties of care. This dissolves the first horn of the supposed dilemma, and it suffices to conclude that there is no dilemma. In the next Section, I will show that the second horn of the supposed dilemma—the claim that Will Theory is incomplete if it accepts that legal officials' discretion over powers is restricted by duties of care—is unfounded as well.

## Incompleteness

The traditional incompleteness charge holds that Will Theory cannot account for many (too many) of the instances in which we take people to have rights. For example, Will Theory seems committed to denying rights to certain beings, such as children and mentally handicapped (Steiner 1998, p. 259, but see Simmonds 1998, p. 226 n. 138). Several Will Theorists have shown themselves susceptible to this critique. It may, for example, explain why Herbert Hart, in his discussion of legal rights, stepped back from his early stance that the notion of rights should not be extended to children (as suggested by Kramer 1998, pp. 69–70; compare Hart 1955, p. 181 with 1982, p. 184 n. 86).

The traditional incompleteness charge depends on the assumption that a theory of rights should aim to accommodate most of our ordinary judgments on the subject. This seems perfectly reasonable—provided we interpret the class of judgments broadly so that it encompasses accepted jurisprudential practices, rules, etc. What other yardstick could we use to test theories of the nature of rights? The crucial point, however, is indeed that the relevant class of judgments is broader than our intuitions regarding which normative incidents count as genuine 'rights'. Other measures may be the extent to which the theory conforms to common ideas regarding the way rights function in legal systems or moral theories; whether it captures the features that we ordinarily think of as characteristic of rights—such as peremptoriness or enforceability; whether it fits our ideas as to which beings can bear rights; or perhaps even our judgments regarding what rights are supposed to do for us (e.g. to protect interests or to enable us to control duties owed to us).

Thus we need not deny the importance of extensional adequacy as a criterion to determine the success of a theory of the nature of rights in order to appreciate why Herbert Hart may have been unimpressed with the charge of incompleteness. He plainly recognized that his analysis did not cover all normative incidences that we ordinarily refer to using the word 'right'. Nonetheless he felt that his theory laid bare important aspects of the concept of a right that Bentham's competing analysis had left out. If Hart was right about this, the Will Theory might still be the best available theory, despite the fact that it is more vulnerable to the charge of extensional inadequacy than Interest Theory.

The incompleteness charge as Vrousalis advances it against Steiner's version of Will Theory is slightly different from the traditional complaint. The concern here is not with instances where we would ordinarily recognize a right which the theory fails to account for; rather it is with duties for which the theory may not be able to

find a corresponding right. Vrousalis takes the position that no theory should leave the unempowerable at the mercy of some government official. He then castigates Will Theory for not having the conceptual resources to ascribe or justify the duties that he thinks officials should have.<sup>5</sup> This is a strange claim, since neither Will Theory nor Interest Theory aspire to justify duties. They are attempts at conceptual analysis, not normative theories. Their aim is not to provide reasons for holding people under a duty, but to clarify the nature of rights.<sup>6</sup> Nor does Vrousalis give us any argument as to why we should expect Will Theory to do what it didn't set out to do. In other words, the charge that Will Theory cannot justify the duty of a government official is a red herring.<sup>7</sup>

Putting the issue of justification aside, I suggest we can try to make sense of the claim that Will Theory is 'not conceptually self-subsistent' as follows: Vrousalis holds that most Will Theorists accept the correlativity axiom, which means that they think of duties as correlative to rights. Accordingly, if a doctor has a duty to treat the unempowerable, the Will Theorist must take someone to have a right correlative to this duty. Obviously, Will Theory cannot identify the unempowerable as holding the right, therefore it must find another right holder. Since Steiner identifies government officials as holders of rights correlative to criminal law duties it seems logical to assume he would follow the same route in the case of rights correlative to the doctor's duties. Steiner's ground for assigning rights correlative to criminal law duties to government officials, however, is his claim that for each criminal law duty there is (must be!) some government official who has the power to waive it. Hence if we assume that some government official has a right correlative to the doctor's duty, this official must also have a power to waive this duty. This government official is *ex hypothesi* also under a duty not to exercise the power he has. But according to Steiner having a power is incoherent with being under a duty not to exercise it. Thus, if we accept Steiner's claim, we must acknowledge that the higher official doesn't have a power over the doctor's duty after all. And if the official does not have this power, then—according to Will Theory—he has no right against the doctor. If we assume that the government official's duty is correlative to a right of some higher official, we end up with the same dilemma at this higher level, and so forth. And now we end up unable to account for both the doctor's duty and the government official's duty as well, since we started out with the assumption that any duty is correlative to a right.

Clearly this is an inconsistent set of claims. Are Will Theorists committed to it if they accept that some government official has a duty of care with regard to the unempowerable? They certainly need not be committed to Steiner's claim (which we rejected earlier) that no-one can have a power and be under a duty to exercise it. Still, the recognition that government officials can have a duty to exercise a power doesn't resolve the issue of incompleteness, as Vrousalis sees it, since it is not clear

<sup>5</sup> For if a will theorist were to argue, say, that M's crucial interests are at stake, and that is what grounds the official's duty, then he would be appealing to extra-will-theory considerations to defend himself. Indeed, he would be calling upon his perennial enemy, the interest theorist, to do so.

<sup>6</sup> Many thanks to an excellent referee for pointing this out.

<sup>7</sup> To be sure, Steiner's project in his *Essay on Rights* is not merely analytical, but this project has failed. See Simmonds (1995).



whether anyone holds a right correlative to the government official's duty of care. It seems Will Theorists either need to abandon the correlativity axiom, or show that someone has a right correlative to this duty. Both options are actually open to the Will Theorist.

Rejecting the correlativity axiom is the obvious way to escape incompleteness as defined by Vrousalis. Certainly when it is taken to apply to moral as well as legal duties and rights, the axiom is by no means intuitively compelling. We may have duties not to abuse animals even if we don't think of animals as rights bearers; or we may have imperfect duties—duties that are not directed to anyone in particular, such as the duty to give alms. These duties do not seem correlative to any right and it would require a strong argument to establish that our impression that they are not is in fact mistaken. Though it may not be so obvious, I believe this is also true in the realm of legal rights and duties. My legal duty not to trespass on your property seems correlative to your right that I do not trespass, but other legal duties—such as my duty to wear a helmet when driving a motorcycle or a minor's duty not to drink—are not obviously correlative to anyone's right. We may say that some duties are 'owed' to a particular individual whereas others are not, or we may say that some duties are directed and some are not. Whether in the end we wish to uphold this distinction between directed and undirected duties remains to be seen, but it is certainly not counter-intuitive. Since not all Will Theorists have accepted the correlativity axiom, and since Vrousalis hasn't given us any reason to think that they ought to accept it, we can conclude that Will Theory need not respond to any charge of incompleteness. Will Theory does not and need not claim the completeness which Vrousalis says it lacks. In the absence of an argument that casts doubt on the tenability of the distinction between directed and undirected duties, it is simply unwarranted to require of any analysis of rights that it should be 'complete' in the sense that it assigns a right holder whenever there is a duty.

This effectively eliminates the other horn of the supposed dilemma as well. Any real dilemma has two horns, but in this case we have none.

Even if Will Theory can do without the correlativity axiom, could we nevertheless agree with Vrousalis that Will Theory must be incomplete unless it abandons the correlativity axiom? Unfortunately we cannot. The problem that Vrousalis points to is specific to Steiner's version and, moreover, it rests on a claim that is again manifestly flawed—i.e. the argument that any criminal law duty must be correlative to some right vested in a state official. Vrousalis does not explicitly endorse the claim. In fact, in a footnote he mentions that it may strike many as highly contentious (Vrousalis 2010, p. 418 n. 7). Yet for the sake of his challenge to the Will Theory, he continues to rely on it. When the fallacy is clarified, however, it is easy to see that Steiner's fallacious inferences cannot be taken as a ground to criticize Will Theory.

Steiner argued that every criminal law duty correlates with a legal right of a government official. He adduced criminal law practices such as plea-bargaining and the granting of clemency to show that state officials sometimes have powers over our criminal law duties. An obvious objection is that though state officials may have powers over *some* criminal law duties, constitutional provisions deny them similar powers over other legal duties. Steiner thinks, however, that the logic of Hohfeld's scheme forces us to acknowledge that for every legal duty there must be a



government official who has relevant powers over it. The argument goes like this: Imagine that some government official is not able to waive compliance with the criminal law. Translated into Hohfeldian terminology, this official has a *disability* to waive compliance. Since disabilities are correlative to immunities, we must find someone to bear the correlative immunity. Steiner thinks this someone must be a higher official. He then asks whether we could imagine this higher official to be able to waive his own immunity (which would amount to granting a power to the lower official). If this higher official has a disability to waive his own immunity some even higher official, according to Steiner, must have an immunity correlative to that disability, and so on. A possible infinite regress can only be stopped, again according to Steiner, by positing an immunity that is waivable. Hence, 'unwaivable immunities (eventually!) entail waivable ones' (Steiner 1998, p. 254). But the argument is flawed: the threat of an infinite regress is a product of Steiner's imagination, not of Hohfeldian logic. The disability of any government official to waive criminal law duties is correlative to immunities of the citizens who bear those duties, *not* immunities held by higher government officials. This flaw has already been revealed by Nigel Simmonds (1995, pp. 317-20) in a detailed refutation of the central argument of Steiner's *Essay on Rights*.<sup>8</sup> We also do not need to assume—as Steiner does in his response in (Steiner 1998, p. 254, n. 32)—that the immunity correlative to the citizen's disability to waive her own immunity is located in this government official. We can locate it in the lawgiver. Moreover, even if Steiner had been correct in thinking that the immunity correlative to the official's disability to waive criminal law duties is located in the higher official, his conclusion would still not follow. The disability of this higher official to waive the immunity would correlate with immunities located in both officials, not in some even higher official. The upshot of this is that there is simply no basis for the claim that some government official must have a power correlative to the doctor's duty of care, nor that some higher official must have a power over a lower official's duty.

This critique of Steiner's claims might seem to strengthen Vrousalis's challenge rather than undermine it, for if there is no government official who exercises a power over the doctor's duty Will Theory would seem to be unable to account for that duty (since we are considering versions of the Will Theory that take duties to correlate with rights). Alternatively, if some government official *does* exercise control over the doctor's duty, this official must have duty of care (since we are assuming that no government official should be in a position of unrestricted discretion over the doctor's duty) and the Will Theory would again seem unable to account for this duty. It would indeed be unable to do so if it were bound to locate the holder of a right correlative to these duties either among ordinary civilians or in the government hierarchy. Some of our duties are simply not controlled by either. But we can locate the holder of correlative rights in the lawgiver. After all, Will Theory holds that a duty is owed to the agent who has a power over it, and legislation is the exercise of a (Hohfeldian) power. Moreover, most of the legal duties that we have continue to exist only as long as the legislative power doesn't

<sup>8</sup> Steiner recognizes this in a footnote in *A debate over rights* (254, n. 32). His response is, however, problematic for several reasons, but it would lead us too far to explain these in detail.

choose to eradicate them. Paul Graham (1996) has gone further in locating the rights correlative to legal duties outside the legal system, in the people that has established the jurisdiction.<sup>9</sup> Whatever your judgment on the overall desirability of this move, there is nothing logically incoherent about it. So again we can conclude that Will Theory is not incomplete, even if a Will Theorist decides to accept the correlativity axiom.

### Incompleteness Again

Vrousalis acknowledges that Will Theory allows for the existence of legal duties that are not correlative to rights, but complains that there is nothing within the conceptual apparatus of Will Theory that justifies ascription of duties of care to the unempowerable. As I argued above, this is to demand something of a theory of the nature of rights that it was simply not designed to do (and doesn't need to do). Yet perhaps there is a more profound complaint here. Steiner has characterized rights as 'essentially about who is owed what by whom' (Steiner 2006, p. 459). So if it follows from Will Theory that the unempowerable do not have rights, then our duties are perhaps not *owed to* them: rather they are simply duties *regarding* them, much like we may think of our duties not to mistreat animals as duties regarding them, but not *owed to* them. This way of looking at our duties to the unempowerable can't be right, according to Vrousalis: 'A duty to care for M ... must emanate in some way from him, or from his status as a human being, and is not, therefore, 'non-directed' as the will theorist must insist here' (Vrousalis 2010, p. 421).

As it is formulated here, however, the complaint is either too vague or too specific. The demand that a duty of care for M must emanate in some way from him in effect smuggles in an assumption of Interest Theory—that duties correlative to rights must in some appropriate way be grounded in an interest of the beneficiary.<sup>10</sup> Why should it be an embarrassment to Will Theory that it doesn't consider our duty to the unempowerable as owed to them? One of the main advantages of Will Theory, it could be claimed, is that (unlike Interest Theory) it gives us a clear-cut distinction between duties which are directed and those which are not directed to fellow citizens. Nor is there any reason to think that these duties are any less legal duties, or that they must have less force than duties which do correlate with rights of individual citizens. By comparison, consider that the mere fact that Will Theory regards criminal law duties as not correlative to rights of citizens does not prevent these duties from having the status of legal duties with equal force as civil law duties.

Alternatively, the demand that our duty to M must emanate from M's status *as a human being* begs the question. Why should the line be drawn between human and non-human beings? Why not draw the line between agents and non-agents, as surely both the law and our intuitions make a significant distinction between agents and non-agents? Or between animals and inanimate beings, since it doesn't sound

<sup>9</sup> See my (2012) for discussion of this suggestion.

<sup>10</sup> This is a very 'loose' formulation, to be sure, but it will do for the present purpose.

completely off the mark to say that we have duties to them (not to treat them cruelly), whereas it would sound outrageous to say that a duty not to walk on the grass is owed to the grass?

Vrousalis's final charge is both imprecise and insufficiently argued. But there's a more important lesson to be drawn. A decision where to draw the line between directed and undirected duties cannot be based on an isolated appeal to pre-theoretical intuitions. The reason is simply that some of our intuitions are too vague. Hence, no refutation of a theory of the nature of rights can rest on the indictment that it mismatches our intuitive judgment in any single case. The more sensible approach is to weigh the amount of overall 'intuitive fit' of different theories.

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