Classical and Anti-classical Views on the Relationship between Rights and Duties

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1. The classical view on rights

Overall, the following quote from a widely read textbook of jurisprudence gives a fairly accurate general description of what I shall call the “classical view” concerning the relationship between rights and duties:

“There are four elements in every legal right: (1) the holder of the right; (2) the act or forbearance to which the right relates; (3) the res concerned (the object of the right); (4) the person bound by the duty. Every right … involves a relationship between two or more legal persons, and only legal persons can be bound by duties or be the holders of legal rights. Rights and duties are correlative, that is, we cannot have a right without a corresponding duty or a duty without a corresponding right. When we speak of a right, we are really referring to a right-duty relationship between two persons, and to suppose that one can exist without the other is just as meaningless as to suppose that a relationship can exist between father and son unless both father and son existed. Some examples will make this clear. If Jones owes Smith five pounds, then Smith has a right that Jones should do an act (pay) relating to a res (the money). If Brown owns Blackacre, then Brown has a right to exclude persons generally from the object of the right—the land. Persons generally are under a duty to refrain from trespassing.” (Paton 19724, 284f.)

According to the classical view as described here, rights and duties depend existentially on each other. There can be no rights without duties, and no duties without corresponding rights. Moreover, since rights require a holder and duties a bearer, to speak of rights and duties is to refer to a right-duty relationship between persons. Assuming that it is impossible to have a right against oneself, it follows that it takes at least two persons to have a right or a duty, and in the simplest case, it takes exactly two.¹ A paradigmatic example of such a right-duty-relationship is the one between creditor and debtor. “Indebtedness”, writes Joel Feinberg, “is the clearest example of one person owing something to another; and … it is unquestionably true that when one person owes something to another, the latter has a right to what is owed.” (Feinberg 1966, 130)

It appears plausible to interpret talk about right-duty correlativity in a logical fashion by understanding it as being about a relationship of mutual inferability between propositions that ascribe rights and duties to persons. Thus, if A has a right to X against B, it follows that B has a duty to X against A; and vice versa: If B has a duty to X against A, it follows that A has a right to X against B. This is what philosophers of law usually express by saying that the two propositions stand in a relation of logical equivalence:

¹ This last point is illustrated well by Paton’s example of the father-son relationship. However, since there can be fathers without sons, it fails to capture the mutual existential dependence of rights and duties owed.
Presumably, it is this relation of mutual inferability or logical equivalence between *propositions ascribing rights and duties* that philosophers of law have in mind when they talk about the correlativity of *rights and duties* (simpliciter).

It may be difficult to find lawyers or philosophers who believe that literally all rights imply duties and that literally all duties imply rights without any qualification whatsoever. However, I consider it to be a characteristic feature of the classical view that *some* version of (Corr) is upheld for at least *some* central cases of rights, usually for claim-rights. To be sure, there are classical theorists who believe that, as it stands, the right-to-duty implication of (Corr) is wrong since not all rights imply duties. Others think that the converse duty-to-right implication is false in this general form for the reason that there are duties that fail to imply rights. And still others hold that *both* sides of (Corr) stand in need of serious qualification. Nonetheless, up until recently, probably most philosophers of law, from Bentham and Jhering to Feinberg and Alexy, adhered to *some* version of (Corr) and are therefore representatives of the classical view as I propose to understand in this text. What unites the classical theorists is their belief in a mutual entailment relation between at least one paradigmatic type of rights and their corresponding duties along the lines of (Corr); what separates them are the different answers they give to the question which set of qualifications is needed to make (Corr) true.² Moreover, all classical theorists take for granted that *propositions ascribing rights* to persons exhibit the interpersonal relational form “A has a right to X against B”, and that, derivatively, the same can be said of the rights themselves so ascribed. They, too, have a relational aspect. Classical theorists often express this by holding that (simple) rights are relations between two persons and an object: the right-holder, the duty-bearer, and the good or value that forms the right’s content.

2. A recent challenge to the classical view on rights

I said that “up until recently” most philosophers of law seemed to have believed in some version of the classical theory of rights. The reason for this qualification is that Ronald Dworkin, Neil MacCormick, H. J. McCloskey, Joseph Raz, and Jeremy Waldron (among others) have seriously challenged this view in the last 40 years. These anti-classical theorists think that we “should have doubts about the thesis that rights-statements and duty-statements are logically equivalent.” (Waldron 1988, 69) This is an understatement, however, since anti-classical theorists have more than just doubts about (Corr). They argue that (Corr) is hopeless beyond repair and should not be qualified, but dismissed entirely. According to their alternative view, there is only one basic type of right, which does not necessarily imply duties and is not essentially relational in the sense of always holding “against” a duty-bearer since there may not be one. Anti-classical theorists argue

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² Even the old dispute between the champions of the “will” (or “choice”) and the “benefit” theory of rights can be seen, I think, as a controversy about the right kind of constraints to be imposed on (Corr).
that (Corr) should be replaced by a principle that supports a considerably weaker link with duties. Their central idea, which they regard to be incompatible with (Corr), is that “rights and duties may stand in a generational or justificatory relationship to each other, rather than in relationships of logical equivalence …” (Waldron 1988, 69f.) Dworkin gives the following example and combines it with a rejection of (Corr): “Your duty to respect my privacy … may be justified by my right to privacy. I do not mean merely that rights and duties may be correlated as opposite sides of the same coin …, but [that] one is derivative from the other …” (Dworkin 1977, 171). Raz makes this “generational or justificatory” view of rights the central feature of his definition of rights, according to which it is essential for a right to “justify holding some other person or persons to be under a duty” (Raz 1986, 166). It is important to see, however, that “holding others to be under a duty” is a disjunctive propositional attitude for Raz. It is either judging that others already have a duty corresponding to the right or that they do not have such a duty yet, but that it should be imposed on them at some point in the future (ibid. 179).

According to Raz, the classical view has been refuted by Neil MacCormick who has “convincingly argued … that rights can exist independently of duties” (Raz 1970/80, postscript, 225). Waldron agrees that the classical view “… is no longer reputable. Neil MacCormick has shown that even in technical legal relations, the determination of who has a right often precedes the determination of who has the corresponding duty and in some cases may even form part of the reason for assigning duties …” (Waldron 1993, 16). MacCormick’s offers the Succession (Scotland) Act 1964 as a counterexample to (Corr)’s right-to-duty implication and therefore as a rebuttal of the classical view. This inheritance law provides that an intestate’s children inherit the whole of the estate. According to MacCormick, upon the intestate’s death it gives rise to a corresponding right to his children. But, he continues, until a court has appointed an executor of the intestate’s will, nobody is under any duty relative to the children’s right. Thus, in the time span between the intestate’s death at $t_1$ which give rise to the right and the appointment of an executor at $t_2$, the right is not directed against any duty-bearer (MacCormick 1977, 199–202). Therefore, concludes MacCormick, (Corr) is false.

3. Meaning and normative function

Since I cannot plausibly pretend to be an expert in Scottish Inheritance law, I am not in a position to assess the adequacy of MacCormick’s interpretation of that statute. However, it seems to me doubtful that a philosophical view on the nature of rights can be refuted in this manner. After all, classical theorists may well turn the tables and argue that, lest the Scottish legislature is confused about the concept of a right, MacCormick must be wrong. For, if it were indeed true that the Succession Act 1964 fails to impose a duty on anyone, as MacCormick claims it does, it would follow from the nature of rights (as classical theorists see it) that the statute provides at best a title that falls short of being a full right until the executor is appointed. On the other hand, if MacCormick’s interpretation is correct and the law does confer a right in the full sense, there must be a
correlative duty as well. Classical theorists may argue, for example, that the right is a right to have an executor appointed by a court, which correlates with the court’s duty to appoint one. Thus, here as elsewhere in philosophy, what is one person’s explanation is another person’s reductio. In any case, I think that classical theorists need not be too impressed by MacCormick’s argument.

However, we cannot just leave things there. The first step out of this impasse is the recognition that “our concept of a right is loose enough to be defined in a way that accommodates what we want to use it to say.” (Waldron 1993, 16) Of course, this observation is of little help if it is taken to suggest that “anything goes”, that “right” means whatever we want it to mean. A perhaps more fruitful interpretation takes Waldron to make two interrelated points. The first is that our everyday concept of a right is “loose” in the sense that its application is guided by an inchoate variety of often conflicting intuitions. Waldron’s second point is that stipulations as to how the term should be used depend on “what we want it to mean”, or better: on what we want the concept to do for us. That is, we should evaluate the reasonableness of different stipulations with an eye on the normative role we would like the concept to play in our practical thinking. Thus, the second step out of the above impasse directs us to reflect on the normative function we would rights to fulfill. The suggestion is that it is this function that largely determines the concept’s significance. If so, the question becomes: What is the normative function of rights? And how is this function reflected in the classical and anti-classical theories? The idea is that the answers to these questions will give us criteria for assessing philosophical accounts of the meaning of “right” and will help us to put the anti-classical critique in perspective.

4. Rights as protectors of the well-being of persons

So, what are rights good for? What do they do for the people who “have” them? The fact that we tend to think of rights, in contrast to duties, as advantages offers a first clue. There is little doubt that, under normal circumstances, it is better to have a right than not to have it. This tendency to regard rights as valuable is easily explained if we assume that it is their primary purpose to protect and foster the well-being of persons. Rights achieve this by safeguarding the enjoyment of certain goods by their holders. At the core of each right is some good or value, access to which the right is meant to secure. For easier reference, we can call the good that plays that role the right’s “content”. The content of a right is what the right is a right “to” and is given by the accusative object X in “A has a right to X”. Thus, what A’s right secures for A is access to the value X. The right puts A’s nametag on the value X, so to speak, and thereby claims A’s share. Moreover, it seems plausible to assume that rights are directed against other people’s

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3 For some good replies to MacCormick’s argument from a classical point of view, cf. the contributions by Matthew Kramer and Nigel Simmonds in Kramer et al. 1998; also Simmonds 1986, 133ff.
4 “Rights, in law, are (as in non-legal usage) beneficial.” Llewellyn 1951, 93. It seems safe to say that this is accepted on both sides.
interferences, in a wide sense, with the right-holders enjoyment of the good protected. Thus, A’s right to X is a defense against certain doings or forbearings of one or more, possibly all other persons. It is this form of directedness of a right that is usually expressed by saying that rights are held against or towards others. Let’s call those against whom rights are directed their “addressees”. We can then say that rights protect their holders by limiting the normative freedom of action of their addressees.5

So far I don’t think that there is anything classical and anti-classical theorists necessarily disagree about. Both sides take rights to protect the well-being of their holders by somehow making a normative difference for others. Indeed, what makes rights such valuable commodities in the first place is the consequences they have for other people’s behavior towards the right-holder, that is, what they may and may not do to her. I propose to call this power to make a normative difference the “regulative force” of a right. The stronger a right’s regulative force, the better the protection it offers to its holder.

5. The protective mechanism: classical and anti-classical models

This much seems uncontroversial between classical theorists and anti-classical theorists. However, important differences emerge if we look at the details of the protective mechanisms envisaged by each side and their impact on regulative force.

Let’s start with the classical theorists. According to one of their most prominent members, the regulative force of rights is particularly strong. H. L. A. Hart characterizes the peculiar tone of urgency of claims of the form “I have a right to X” as “peremptory”. “The word ‘peremptory’”, he explains, “means cutting off deliberation, debate, or argument …” (Hart 1982, 253) Thus, according to Hart, in virtue of their peremptory regulative force, rights do not leave the addressee of a right very much of a choice. It is as if the right-holder says to the addressee of his right: “Never mind what you may think you should do, my having a right to X is in and by itself a sufficient reason for you to let me have or do X.”

5 Following Hohfeld, some classical theorists argue that there are two ways of normatively limiting the addressee’s freedom of action and that at least two types of rights should be distinguished accordingly. Rights of the first type, Hohfeld’s “claims”, prohibit the addressee to (not) do an action by imposing a duty on her. Thus, Hohfeldian claim-rights are duty-imposing rights. The second type, called “immunity” by Hohfeld, normatively disables the addressee from performing certain actions. Here the upshot of A’s having such a right against B is not that B should do or not do something (as on the first) but that B cannot do it, that any attempt to do so is normatively null and void from the outset. The inability of the US-Congress to interfere with free speech is sometimes given as an example. The First Amendment clause that “Congress shall make no law … abridging the freedom of speech”, it is said, does not prohibit the US-legislature to interfere with free speech but makes it impossible, thereby giving US-citizens an immunity against changes of their legal position concerning free speech. However, the question whether Hohfeldian immunities should be recognized as a distinct and irreducible type of right is controversial even among classical theorists, and duty-imposing rights are in any case more frequent and more important.
The tight relationship classical theorists assume between rights and duties as embodied in (Corr) is an attempt to do justice to the peremptory character of rights by vesting them with a maximum of regulative force. The demand that rights \textit{must} have direct consequences for the behavior of others is given a logical interpretation in the shape of a right-to-duty implication: \textit{must} is interpreted as logical necessity and \textit{consequences for the behavior of others} as referring to other people’s duties towards the right-holder. Thus, the regulative force that allows rights to fulfill their protective function is taken to be \textit{logically conclusive} force. For the classical theorist, the main rationale for the right-to-duty side of (Corr) is the peremptory character of rights which is interpreted as their power to imply duties for others. However, since right-based duties are duties \textit{owed} to the right-holder, the converse duty-to-right implication holds as well. The result is a version of (Corr).

However, if the point of the classical insistence on the right-to-duty implication in (Corr) is to account for the peremptory regulative force of rights, it is clear that the anti-classical dismissal of this implication in the course of their dismissal of (Corr) comes with a price tag. Indeed, on the anti-classical model, the regulative force of rights may sometimes be peremptory and sometimes not. In those cases where duties are completely lacking, it becomes especially hard to see how such \textquote{imperfect rights} (MacCormick 1982, 344) could fulfill their protective function. Thus, from the classical point of view, to insist \textquote{that rights can exist independently of duties} (Raz 1970/80, postscript, 225) comes dangerously close to the improbable suggestion that there are rights with \textquote{zero} regulative force whose possession makes no normative difference for anyone. But if this is so, the classical theorists asks, what could possibly be the point and value of having such a right?

From the classical point of view, to reject the tight connection between rights and duties embodied in (Corr) is to weaken the regulative force of rights. Now, as Waldron has pointed out, our ordinary concept of a right “is loose enough to be defined in a way that accommodates what we want to use it to say.” (Waldron 1993, 16) But why, asks the classical theorist, would anyone want it to mean that? In view of the high importance of their role as protectors of persons, what advantage could such a weak concept have over a strong one? Anti-classical theorists, however, believe to have a compelling reason for dismissing (Corr). Paradoxical as it may sound to the classical theorist’s ear, they argue in effect, that (Corr) is not what enables rights to fulfill their protective function. Rather, it is what makes it impossible. However, in order to understand why anti-classical theorists regard (Corr) as a stumbling block that must be removed for rights to play their protective role we must first take a closer look at the anti-classical account of the protective mechanism.

Anti-classical theorists emphasize the idea of rights as \textit{justificatory grounds} of duties. As mentioned above (§ 2), Raz considers it essential for rights to “justify holding some other person or persons to be under a duty” (Raz 1986, 166), where \textquote{holding others to be under a duty} is a disjunctive propositional attitude of either judging that others have a duty \textit{or} judging that a duty should be imposed on them. In the first case, the fact that
A has a right gives its addressees a reason for judging that they have a duty even though it may not be conclusive. However, if it is not conclusive, A’s having a right is at best part of a sufficient reason for thinking that others have duties. If so, the regulative force of such a right is not zero, but nonetheless quite weak. Indeed, how weak it can be becomes clear if we look at the second disjunct. It takes care of the possibility envisaged by MacCormick, that is, of the existence of “imperfect” rights without any duties attached. The second disjunct suggests a relation of rights not with duties, but with possible duties not yet in existence. We are told that, though there may not be any duties attached to them now, imperfect rights provide us with an enticing reason for assigning duties at some point in the future. However, as long as there is no assignment yet, an imperfect right is not directed against anyone. As a result, they are inviolable in a rather uncomfortable sense reminiscent of Hobbesian natural rights in the state of nature: nothing others could possibly do to the holder of an imperfect right counts as a violation of that right.

6. Does (Corr) make it impossible for rights to justify duties?

There is little doubt, I think, that the anti-classical proposal of the protective mechanism of rights confirms the classical theorist’s worst suspicions. The contrast with her own view seems all too clear. As the classical theorists see it, the fact that A has a right against B does not give B merely another enticing reason that has to be considered in deliberations about how to treat the right-holder. Everything else being equal, respect for A’s right leaves B no choice but to perform the duty associated with it. Having such a right-based duty is more than merely “having an enticing reason” to do something. It is more, since not acting on the implied duty is to violate the corresponding right, whereas enticing, but inconclusive reasons can be overridden by better reasons without necessarily wrongdoing anyone.\(^6\)

However, what classical theorists fail to notice, according to their rivals, is that the existence of a duty justified by a right—a so-called “right-based” duty—is made impossible by (Corr). If classical theorists fancy otherwise they are wrong. Why? Because the idea of grounding duties by justificatory appeal to rights presupposes that rights are logically prior to duties, not that they are logically equivalent as (Corr) says. This anti-classical intuition is stated clearly by Phillip Montague: “I am convinced that it is crucial to our understanding of the nature of rights that we affirm and do justice to the idea that rights serve as the grounds of obligations.” (Montague 1980, 374) In order to do so, however, we have to acknowledge that “rights are logically prior to the obligations to which they correspond, and … will justify or explain appropriate statements about obligations.” (Montague 1980, 373) Moreover, the equivalence relation asserted by (Corr)

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\(^6\) This does not prejudge the question whether, and under what circumstances, the addressee may be justified to flout the duty and to violate the right. In situations of irresolvable conflicts between rights, if they are possible, we may have no choice but to wrong right-holders for the sake of other, more important rights or values.
is particularly strong. According to some anti-classical theorists it amounts to a claim of identity for rights and duties. But, they argue, if rights and duties coincide completely there is no room for rights to function as justificatory grounds of duties. Rights “are not distinct from the obligations to which they correspond, and hence cannot serve as the grounds of those obligations.” (Montague 1980, 379). Generalizing we can say that a justificatory relation holds between two entities, that is, what is justified and the justifying ground. It cannot hold between what in view of (Corr) seem to be merely “opposite sides of the same coin” (Dworkin 1977, 171). Thus, the anti-classical insistence on a truly justificatory relationship between rights and duties is meant to separate what (Corr) illegitimately fuses into a single entity. Rejecting (Corr) is therefore a prerequisite for any theory that wishes to base rights on duties or duties on rights: “Thus the possibility that rights and duties may stand in a generational or justificatory relationship to each other, rather than in relationships of logical equivalence provides an opening for the distinction between right-based and duty-based theories …” (Waldron 1988, 69f.)

This, then, is at the heart of the anti-classical attack on (Corr) and the classical position in general. However, once more it seems to me that the classical theorist should not be overly impressed. I think that these anti-classical criticisms are based on misunderstandings of relations of logical equivalence in general and (Corr) in particular. Two mistakes stand out in particular. First, it is wrong that one side of (Corr) is a “mere notational variation” of the other, that “talk about rights [is] just a way of talking about duties” (Waldron 1988, 68 + 83). The sentence “A has a right against B” is certainly not synonymous with “B has a duty against A”, just “A is the husband of B” is certainly different in meaning from “B is the wife of A”. Second, (Corr) does not entail that the concept of a right and that of a duty are identical. Again, if A is the husband of B then B is the wife of A, and vice versa, but it is certainly not the case that the concepts husband and wife coincide. Finally, it is wrong that logical equivalence prevents a justificatory relationship between the two sides of the equivalence. All logical equivalences are “inference tickets” (the term is Ryle’s: s. his 1990): they license inferences. (Corr) approves of inferences from propositions about rights to propositions about duties and vice versa. Inferences from true propositions, however, are a paradigmatic form of justification. To draw such an inference is to justify a proposition (the conclusion) by appeal to one or more others (the premises). Thus, to use Dworkin’s example, the classical theorist can agree that I have a right to privacy because you have a duty to respect my privacy, that is, that my right is the justifying ground of your duty. To be sure, (Corr) also licenses the converse inference from the existence of a duty to respect privacy to the existence of a right to privacy. But this is how it should be since many legal rights are imposed indirectly by imposing the correlative duties.

If this is correct, the anti-classical case for weakening the protective link between rights and duties crumbles. In the end, anti-classical theorists leave us with an ill-motivated concept of a right that by itself may fail to normatively compel others to act in one way or another. This is the case whenever rights form only part of the reason for a duty, or, worse still, when they merely give reasons for assigning future duties. It is clear,
then, that on there is no intrinsic urgency in claims of the form “I have a right” on the anti-classical account. Though the regulative force of such rights is admittedly not nil, it can be uncomfortably close to nil. Such imperfect rights have no addresses and may well meet with complete indifference — and there may be nothing wrong with this reaction. Moreover, it is hardly a consolation for the right-holder that, in the long run, a duty will—hopefully!—be assigned to his right. As John Maynard Keynes once pointed out, in the long run, we are all dead.

References