Living Without Rights-- In Manners, Religion, and Law

Richard Stith

Available at: https://works.bepress.com/richard_stith/38/
The rhetoric of rights permeates and dominates American legal thought today. Even ethics is often considered to involve fundamentally a mutual respect for "moral rights." Understanding human rights is taken to be a sufficient condition for knowing how we do and should order our life together.

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

All this is commonplace. With some frequency in the academic literature, it has been noted that our times are peculiarly "rights infatuated."¹ And with similar frequency, this fact has been lamented.² There are many who do not agree that

2. See, for example, Louden, "Rights Infatuation and the Im-
rights alone can provide an adequate basis for human community.

But recent analyses have been able to show only that significant normative values lie outside some sphere of immediate individual relationships which must still be relegated to rights.\(^3\) I want to point out something more: that our practices reveal alternatives to rights even within that sphere. I think I have found something not only in addition to rights but also instead of rights. Some rights can and ought to be rejected in favor of what I call "duties of generosity."

The practices to which I turn first for non-rights-based relations are part neither of morals nor of law, however. They belong to what is called "manners" or "courtesy" or, more descriptively, "graciousness."\(^4\) After considering at length polite practices of mutual generosity that cannot be described in terms of rights, we shall look briefly at Christian religious tradition for analogues. Martin Luther and William of Ockham will help us to understand what it might mean to expand these duties of graciousness throughout the political and even the cosmic worlds. Last of all we shall ponder whether and how to conserve or to change modern civil law itself, so that it might best lead us to live more generously together.

---

3. See especially works cited in notes 7-10 herein.
4. So far as I have been able to determine, recent normative theory has been curiously uninterested in the structure of modern manners, as opposed to that of modern morals or of modern law. Ronald Dworkin has used "philosophy of courtesy" as a foil (see Law's Empire [London: Fontana Press, 1986], pp. 45-86), but I know of no one who has seriously taken up this task.
DO DUTIES IMPLY RIGHTS?

One conceptually clear way to understand the limitations of rights begins with the commonly held "correlativity thesis." This thesis is that for every right there exists a correlative duty and that for every duty there exists a correlative right.\(^5\) For example, if A has a duty to pay a debt to B, it is said to follow necessarily that B has a right to be paid by A. And likewise wherever B has such a right, A has such a duty.\(^6\) "Such" is an important word here, because the correlativity thesis applies only to rights that are claims against another, not to rights that are merely liberties. A may well have a liberty right to run his competitor B out of business without B having any duty to close up shop.

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

Why so? Well, if there is a right for every duty, then it follows that the set of rights is equal to or greater than the set of duties. If every duty implies a right, then the modern primacy of

---

5. Alan White, for example, asserts the commonness of this view, though he does not himself share it (see Rights [Oxford: Clarendon Press, 1984], p. 85). Those who have proposed the thesis appear to include S. I. Benn and R. S. Peters, The Principles of Political Thought (New York: Free Press, 1959), pp. 102, 107; and Charles Fried, Right and Wrong (Cambridge: Harvard University Press, 1978), p. 81. John Finnis seems implicitly to hold such a view when he states "The concept of rights is not . . . of less importance or dignity [than the concept of duties]: for the common good is precisely the good of those individuals whose benefit, from fulfillment of duty by others, is their right because required of those others in justice" (Natural Law and Natural Rights, p. 210 n. 1). See also Carleton Kemp Allen, Legal Duties (Oxford: Clarendon Press, 1931), pp. 156-220; R. W. M. Dias, Jurisprudence, 4th ed. (London: Butterworth's, 1976), pp. 36-39; and George Whitcross Paton, A Textbook of Jurisprudence (Oxford: Clarendon Press, 1972), p. 285. Other philosophers have denied the second half of the thesis, as explained later in the text.

6. This analysis of correlativity is, of course, that of Wesley N. Hohfeld, Fundamental Legal Conceptions (New Haven: Yale University Press, 1919).
rights talk is justified. Rights analysis covers the normative universe in that it ends up describing all rights and all duties according to this side of the correlative thesis. On the other hand, if some duties do not imply rights, then thinking about rights must be supplemented by thinking about duties if some of the latter are not to be overlooked. The adequacy of rights-based thinking is, therefore, appropriately attacked by pointing to duties that do not correspond to rights.\(^7\)

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

---

7. Benditt (in Rights), Louden (in “Rights Infatuation and the Im-poverishment of Moral Theory”), and Raz (in “Right-Based Moralities”) all point out that we may well have rights that we ought not to exercise. This “ought” is something else that rights talk misses. I do not mean to deny or minimize this important critique of rights, but it is not germane to this part of my analysis. It is a critique as much of the must do’s of duties as of the must have’s of rights, for it points out that both duties and rights may miss the more subtle oughts and shoulds of human relationships. My first interest here is to demonstrate that rights are inadequate even to convey all the strong and clear imperatives of duty.

8. John Austin calls these rightless duties “absolute” (Lectures on Jurisprudence, vol. 2 [New York: Burt Franklin, 1861], pp. 66-75; cf. the critiques by Allen in Legal Duties and by Paton in A Textbook of Jurisprudence.


But not one of these arguments, whatever their merits may be, points to situations in which I have a duty to benefit a particular human being without that person having a right against me. These arguments thus appear to concede that our duties to benefit other human individuals are fully described in terms of rights. Yet it is just this implicit concession that I refuse. I want to discover ways to hold onto neighborly duties without invoking neighborly rights.

Some readers may fault me here for having failed to mention the many “will-based” theories of rights, which make the existence of rightless duties to individuals obvious.\textsuperscript{10} Not every particular beneficiary of someone else’s duty is a rightholder, so these theories contend, for in order to have a right one must have a choice. Someone’s duty to give me a steer does not per se imply that I have a property or a contract right to it. I have this right only if I have some remedy I can use effectively to obtain the steer if it is withheld, or perhaps also unless I have the ability to waive (or even to transfer) a claim to it. Such choices are not open to me, under English law for example, where I am a third-party beneficiary of a contract between my father and a rancher or where the state has simply commanded the cattleman to redistribute his wealth under pain of criminal punishment. Criminal law duties, according to these theories, often impose duties on individuals without granting rights to other persons. Although you have a duty not to kill me, I have no full right not to be killed by you, because I cannot make the state provide me

with police protection, nor can I or my estate force the state to punish an unsuccessful or successful attempt to murder me. And, of course, I cannot sell my right to life to some rich sadist in exchange for some preferred benefit to my family. Similarly, according to some theories, duties to infants and to the very senile (not to mention to fetuses and to animals) cannot involve rights, because the beneficiaries of said duties are presently physically unable to exercise rational choice.  

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

Nor have benefit-based theories of rights surrendered entirely to will-based theories in the academic world, though they have been refined in response to some of the arguments we have already noted.  

A leading advocate of the benefit theory of rights has recently claimed that being a “direct, intended” beneficiary of a duty is sufficient for having a right. It is these of this sort that I shall oppose, not by redefining rights more narrowly but by calling attention to duties directly to benefit other individuals that cannot be translated into anyone’s language of rights. In so doing, I will be attacking the very core of correlativity and presenting the possibility of the rejection of rights in human relationships founded on duty.

---


13. David Lyons, Rights, pp. 63, 73. I am referring to duties to benefit specific other persons, not to so-called “useful duties.”
SOME DUTIES OF MUTUAL GENEROSITY

Consider the following commonly accepted social rule for tea parties and the like: "No one may take the last cookie." Translated into our terms here, the rule becomes "Everyone has a duty to leave the last cookie." There is a mutual duty to leave the last cookie uneaten.\textsuperscript{14}

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

Can this cookie-leaving duty be translated into the language of rights, as the correlativity thesis would demand? Certainly it cannot without contradiction be straightforwardly transformed into a statement of individual claim rights. The rule "Everyone has a right to take the last cookie" is self-contradictory, if by it we mean that every person both has a binding claim in his or her favor and also has equally binding claims in opposition. Or, put another way, our normative practices do not permit us coherently to assert that A has a valid claim to the cookie, while B, C, and the rest also have identically valid claims. Rights in a

\textsuperscript{14} Some readers may object that the term duty seems too strong here. I have two responses. The first is that our language permits the word duty to designate all behavior mandated by a nonoptional social institution. Only so long as an institution is felt to be optional does the word duty seem excessive. For example, it strikes us as odd to say that a man has a duty to dance with a woman, but a dancing instructor of young people might well say "A gentleman has a duty to ask a lady sitting by herself to dance," because he and his audience are at that time committed to the conventions of social dance. Similarly, if we consider the breach of proper cookie behavior to be unthinkable, the word duty seems appropriate. My second response is that nothing turns on the word duty anyway. My point is not to rank such behavior high or low, in a normative hierarchy, but to discern its inner logic. I want to ask whether and when sentences in the imperative form referred to by the word duty entail correlative rights. I have chosen the word solely for this purpose, not for its connotations or as part of any wider axiological assertion.
conclusory or absolute sense must be exclusive, but any lesser degree of rights would not adequately represent the unequivocal duties of our original formulation. Moreover, even reducing the rights involved to nonabsolutely weighted interests would not eliminate the antinomy, for even these lesser claims, being all identical, are incapable of leading to a resolution of the problem of what to do with the cookie. No one can eat the cookie without violating many other equal rights. Yet to leave it on the table would be worst of all, for only this solution would violate everyone’s rights. By contrast, there is no contradiction nor even any slight tension in the original duty formulation. The result is never in doubt. If everyone abides by his or her duty, the cookie simply remains uncontested and uneaten.

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

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

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

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

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

15. One could adduce less rich examples where the impossibility of waste as a goal would be still more obvious. Consider what happens when two similarly situated persons reach a closed door simultaneously. Each has a duty to open and hold the door for the other, while neither has a right to have the door held open. It cannot be that the purpose of this mutual duty is to have the benefit of first entry go to waste—that is, to have each refuse to go through the door until the other has done so, leaving both permanently outside.
16. The suggestion was made by Professor James Albers.
imagine all to be satisfied. Furthermore, the duty-to-the-host idea does not fully capture the practice we have already described. If the host were the real intended beneficiary, then surely it would be within the rights, and even the duties, of each guest tactfully to stop others from eating the cookie. But this is not done.

Moreover, if by some chance all other persons have left the room without eating the cookie, I know of no rule still forbidding one to eat the cookie. Similarly, it is common (though quite difficult because politeness discourages candor) to attempt to determine whether in fact anyone else present really wants the cookie. If no one else does, then one is free to eat it. This fact shows that others as intended beneficiaries are absolutely essential to the original rule. When they are absent, or when they are already satisfied and so cannot benefit, the rule has no application. Therefore, the rule does not aim at waste or at pleasing a host. Even when rule compliance makes the cookie go uneaten, it remains on the table as a symbol of our mutual care for one another.\textsuperscript{17}

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

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

That last description of the beneficiary of this duty is not quite complete, however. Someone who takes the last cookie when others might want it not only has no right to possess it but also violates a duty to leave the cookie for others. Yet others at

\textsuperscript{17} I owe this felicitous expression to my secretary Pat McRae.
the table not only should not object, but should be pleased—since the cookie is being consumed by an intended beneficiary.

Notice how strange this intended beneficiary has become: the last cookie is left precisely for someone who does not do his or her duty. Our duty is to leave the cookie for someone whose appetite is so imperious that duty’s command is ignored. This mutual duty of generosity is a duty to benefit those who do wrong. Such duties are nearly unheard of in legal and moral systems, but they abound in manners and in religion.

Consider, for example, the following: “A host has a duty to provide as many towels as a guest might desire. A guest has a duty not to request any towels which a host might desire.” Here we are dealing no longer with identical duties incumbent upon all participants in a practice of graciousness. (The guest has no duty to provide towels for the host.) The prior example envisioned only one role (that of potential cookie eater), while here there are two (those of host and of guest). It is important briefly to consider this variation on mutual duties of generosity, since it would seem to be rather more common. Complementary duties are more numerous than identical duties in human interactions.

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

Can these duties be coherently translated into rights? No, for the same reasons we have already explored. A guest cannot have a right to towels desired by a host and the host at the same time have a right to towels desired by the guest. Such a translation incoherently pits one’s rights against another’s rights and against one’s own duties. Yet from duties there results no contradiction, and we do find our way to a clear if rough solution: the host should provide as large a pile of towels as a guest could possibly wish, even to the point of skipping his or her own bath if towels are scarce, while a guest who suspects such a scarcity should take few if any towels from the pile (insofar as, but no further than, the guest has reason to hope that the towels left behind might end up being used by the host).
A variant practice also exists: the original towel possessor (the host) offers additional towels to a bath-hungry guest who graciously refuses to take them. The host then "insists" and the guest continues to refuse until one or the other gives in. This resolution occurs either because one has been convinced that the other truly does not desire the towels or because one has breached the duty to be towelless. (It is also possible that the towels have been retained not out of a desire for towels but rather out of a desire to respect the other's sense of duty to relinquish them, of which more later.) This variant has the obvious advantage that the towels do not go to waste, but it does not involve any essential alteration of duties.

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

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

A THEORY OF GENEROSITY DUTIES

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

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

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

It is essential to ask here whether property still exists in a practical sense in the buffer zones. That is, is there any difference (from the point of view, say, of the owner of Whiteacre) between the yardage the frontier zone intrudes into Whiteacre and the yardage it intrudes into Blackacre? I think not, though from a certain formal point of view the first remains the “property” of the owner of Whiteacre, while the second remains alien. Similarly, the cookie duties and the towel duties were not significantly different, despite the fact that, by hypothesis, the last cookie was the property of none of the potential eaters, while the towels were the property of the host. What we have along the border is, therefore, a realm without property or rights, a realm of what one might call “lawless altruism.”

We may observe in passing that private property is thus not necessary to generosity, a conclusion frequently disputed.18 When-

---

18. Feinberg puts it this way: “consciousness of one’s rights is necessary for the supererogatory virtues, for the latter cannot even be given a sense except by contrast with the disposition always to claim one’s rights” (Rights, Justice, and the Bounds of Liberty, p. 157).
ever one, without being coerced, relinquishes de facto possession of a good to someone who does not have a right to possession, one is being generous. This statement remains true even if one is under a duty so to act, as we have seen. Note that it is not essential that one be giving up one's own property. Generosity is possible even among thieves and even in a Hobbesian state of nature. And from the point of view of the recipient who had no right to what he or she obtained (and may even have had a duty to refuse it), gratitude is called for.

Is a world without property, a world of "lawless altruism," any more stable or desirable than one of "lawless egoism"? The simple answer is that two people can sacrifice the same object more easily than two can acquire the same object. As long as we are willing to put up with waste, or willing to see the buffer not as waste but as a symbol of mutual regard, peace would seem to ensue. However, it must be admitted that in the most gracious of all worlds, each side would actually plead with the other to use the entire zone (the "I insist" we noted before), and the other side would wish to use the zone not in order to obtain some personal gain but in order to please his or her altruistic neighbor. Since both sides would feel the same, at each level and ad infinitum, a kind of good-natured "battle" might occur. A dialectical synthesis might be found in which both sides could come to sacrifice themselves for the other: the one by deferring to the other's territorial desires and the latter by occupying the territory in deference to the former's desire to be dutiful. The first sacrifices land, and the second sacrifices virtue.

Even the defects of such a system constitute a strength. Waste or a battle over generosity is in fact not likely to occur, because people are not going to be wholly duty-minded, and the system has anticipated this fact. Minor violations of duty are expected and promote efficiency, while extreme violations are checked by rights as well as by conscience. "Lawless altruism" is, therefore, clearly preferable to "lawless egoism."

In all my analysis so far, I have presumed mutual identical or complementary duties. Indeed, it is the fact of mutuality that has enabled us to establish that duties can exist without correlative rights. Can this presupposition be removed? Can one have duties of generosity toward those who have neither rights nor duties toward one? I do not see why not. If I can dutifully leave
a cookie for a rational adult who ought to do the same for me, why can I not leave a cookie for a small child not yet subject to duties? If the rational adult has no right to the cookie, why need the child have a right? I think that nothing requires the child to have any right (or at least any claim right) to the cookie, though no wrong is done when the child eats it.

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

Joel Feinberg has used the language of aristocracy to call a world without rights— even one in which most people conscientiously do their duties— “servile.”¹⁹ Property and rights are needed, he would seem to be saying, in order to promote human dignity. But do our experiences in this rightsless realm of graciousness bear him out? I think not. Rights subject us to each other, while duties subject us only to a common law. One might say that rights convert the law itself into something that can in part be privately owned. Rights, not duties, are the baser way to order our life together. To be generous and self-sacrificing on the one hand, and gratefully to accept benefits recogniz-

¹⁹. Feinberg, Rights, Justice, and the Bounds of Liberty, p. 156.
ing that one does not have a right to them on the other, is the more noble life.

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

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

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

DOES RELIGION RADICALIZE THESE DUTIES?

Similarities between the small-scale duties of self-sacrifice so far described and the more extensive commands of the Christian
gospel cannot have passed unnoticed. Let us look more closely at this apparent congruence, for it may reveal the possibilities or limits of last-cookie relationships.

An absolute extension of the cookie model is not difficult to conceive abstractly. Each human being would have a duty generously to give up any part of himself or herself—be it possessions, liberty, or life—that might be desired by someone else. Others would have identical or complementary duties. Not only would the ideas of rights and property not exist but even the idea of justice would have no meaning. All distributions of mutually desired goods would be equally appropriate and inappropriate. In the absence of an abundance so great that all persons could be satisfied, only waste or endless generosity battles would be called for—though in fact we could presume that self-interest would result in possession and consumption (limited to some degree by conscience and by power).

Does Christianity demand such a world? In his 1523 essay “Temporal Authority: To What Extent It Should Be Obeyed,” Luther at first glance appears to be fully as radical as our model would require. He begins with the Scriptures:

Christ says in Matthew 5[:38-41], “You have heard that it was said to them of old: An eye for an eye, a tooth for a tooth. But I say to you, Do not resist evil; but if anyone strikes you on the right cheek, turn to him the other also. And if anyone would sue you and take your coat, let him have your cloak as well. And if anyone forces you to go one mile, go with him two miles,” etc. Likewise Paul in Romans 12[:19], “Beloved, defend not yourselves, but leave it to the wrath of God; for it is written, ‘Vengeance is mine; I will repay, says the Lord.’” And in Matthew 5[:44], “Love your enemies, do good to them that hate you.” And again, in I Peter 2[:9], “Do not return evil for evil, or reviling for reviling,” etc. . . . Be certain too that this teaching of Christ is not a counsel for those who would be perfect, as our sophists blasphemy and falsely say, but a universally obligatory command for all Christians. Then you will realize that all those who avenge themselves or go to law and wrangle in the courts over their property and honor are nothing but heathen masquerading under the name of Christians. It cannot be otherwise, I tell you. Do not be dissuaded by the multitude and common practice; for there
are few Christians on earth—have no doubt about it—and God’s Word is something very different from the common practice.\textsuperscript{20}

In short, Christians are duty-bound to see "that they do evil to no one and willingly endure evil at the hands of others."\textsuperscript{21} What is this if not a radicalization of our duty of generosity into an absolute duty to sacrifice ourselves to others’ desires, in total disregard of ordinary notions of justice?

Luther does not really go so far. The word \textit{evil} in the last quotation indeed shows that for him there remains some standard of justice (or at least some standard of good and evil) besides compliance with the duty of self-sacrifice. And this standard becomes the actual object of enforcement for Luther when the interests of others are at stake:

The true meaning of Christ’s words in Matthew 5[:39], “Do not resist evil,” etc. . . . is this: A Christian should be so disposed that he will suffer every evil and injustice without avenging himself; neither will he seek legal redress in the courts but have utterly no need of temporal authority and law for his own sake. On behalf of others, however, he may and should seek vengeance, justice, protection, and help, and do as much as he can to achieve it. Likewise, the governing authority should, on its own initiative or through the instigation of others, help and protect him too, without any complaint, application, or instigation on his own part.\textsuperscript{22}

Luther, then, seems necessarily to retain some notion of just allocation of goods that it is “evil” to disturb and that the Christian individually and through the state has a duty to restore whenever the interests of others are at stake. Luther must, in other words, be willing to distinguish between the \textit{proper needs} of others and their mere \textit{desires}. The protection of the former takes priority


\textsuperscript{21} Luther’s Works, 45:92. Luther later adds the important proviso that such deference may not contravene divine law, such as the Ten Commandments (45:111-12). But this limitation is not ordinarily applicable for Luther.

\textsuperscript{22} Luther’s Works, 45:101.
over deference to the latter. His vision is not one of a radical absence of justice and property but of a willingness to give up one’s own claims while enforcing the just claims of others.

Nevertheless, Luther has achieved a striking reduction in rights consciousness. He has succeeded in separating will rights and benefit rights. He has cut out the self-centered core of rights. We as Christians must struggle to give to others that which is their due. In this duty we certainly have no will right, for there is no option for self involved. We must simply make sure everyone except ourselves gets his or her share of cookies. Others retain benefit rights, but the absence of will rights changes the character even of benefit rights. Because others are also under a duty to sacrifice and not to appeal to the rules to protect themselves, we can no longer even imagine them to be making “self-righteous” claims to the cookies. We thus can secure to others that which is just for them to have without assuming them to have self-centered rights of any sort thereto.

In a sense, what Luther has done is both utterly modern and utterly antimodern. He has separated off from justice the self-centered power to will that is at the core of modernity—but he has done so only in order to reject it. He has taken what amounts to our contemporary concept of “standing to sue,” which means having one’s own interests at stake, and has made that the single situation in which one may not ask that justice be done. When we do ask that justice be enforced, as I have just argued, we need not imagine an imperious power claim on the part of those we are seeking to benefit. We need not think in terms of rights at all. We remain not under men but under God and the law.

And, in an act of dialectic, Luther holds out to us a further hope:

You may ask, “Why may I not use the sword for myself and for my own cause, so long as it is my intention not to seek my own advantage but to punish evil?” Answer: Such a miracle is not impossible, but very rare and hazardous. Where the Spirit is so richly present it may well happen. For we read thus of Samson in Judges 15[:11], that he said, “As they did to me, so have I done to them.” . . . Samson was called of God to harass the Philistines and deliver the children of Israel. Although he used them as an occasion to further his own cause, still he did not do so in order to
avenge himself or to seek his own interests, but to serve others and to punish the Philistines [Judg. 14:4].

In other words, Luther allows the promotion of justice even for oneself as long as one is not (primarily?) seeking one’s own interests. A mother, for example, could be under a duty to make claims for herself on behalf of her children. (We might today call this an assertion of “parental rights,” but in so doing we would evoke a different image.) Clearly there is great room for hypocrisy here, but the possibility exists for Luther that justice might become a common project, pursued neither for oneself nor against oneself but with indifference to oneself. No longer would the moral and legal worlds be envisioned as matters of competition and allocation among private wills. Doing justice would be promoting that which is right, not securing individual rights.

The great drama Luther describes, then, is indeed related to the more petty interactions that have been our concern in this essay. Both offer ways in which the domination of rights might be resisted. But the ways are somewhat different, and Luther’s writings do not encourage us to press our antinomian duties of generosity beyond the borders of human relationships where we originally discovered them.

Luther, of course, did not attempt to use words with juridical precision. And it is I who have imposed the word rights upon Luther’s thoughts here. But there is someone else who had already attempted a legalistic refinement of a system very similar

23. Luther’s Works, 45:104. Luther’s radical heirs continue to struggle to discern the fine line drawn here by Scripture. See for example The Use of the Law: A Summary Statement Adopted by the Mennonite Church General Assembly, August 11-15, 1981 (Scottdale, Pa.: Mennonite Publishing House, 1982).

to that of Luther: the nominalist philosopher William of Ockham (ca. 1285-1349).

As a Franciscan, Ockham was faced with the difficult task of justifying the order’s use of material goods despite its vow of corporate and individual poverty. An earlier solution, declaring the pope to be the true owner of the property which the friars merely used, had broken down under John XXII— who wished to force the would-be radical order to acknowledge the impossibility of life without property.

According to the philosopher-historian Michel Villey, Ockham’s response for the first time defined the idea of “rights” in a way we would recognize today, but did so only in order to permit the Franciscans to reject them. A right (jus) for Ockham is a power (potestas) over a good that civil law vindicates. That is, one has a right to some good if, when one is deprived of power over the good without one’s fault or consent, one can recur to a court to obtain redress. By vowing not to defend themselves in civil courts, Ockham seems to argue, the Franciscans have thus wholly given up their rights to property, however much they may continue to make use of its physical benefits. Christ himself, after all, accepted the benefits of this life, though he did not defend them in court.

Ockham’s rejection of will rights is quite similar to Luther’s, though Ockham’s is professedly on a much smaller scale, being confined to Franciscans rather than extended as a duty to all Christians. And, like Luther, Ockham has not eliminated property or justice itself. Under divine law, the Franciscans remain en-

titled to retain their holdings. And even under the civil law, I would imagine that others should in justice leave the Franciscans alone. The only thing that must not take place is for the Franciscans to defend themselves according to human law.

I have added the example of Ockham partially in order to call attention to the profound reflections of Professor Villey that accompany his exposition and that, I think, help us better to understand the situation confronted by Luther as well as by Ockham. Villey connects Ockham’s individual power-based notion of a right to his conception of the cosmos as one presided over by a voluntaristic deity—which seems also to be Luther’s conception of God. The cosmic and human worlds are made up of individual entities interacting arbitrarily rather than of organizing ideas expressed in human nature and elsewhere, as the ancients thought.

In the ancient view, legal relationships—even those of great personal benefit—essentially involved responsibilities for this order rather than opportunities for the private satisfaction of arbitrary desires. All rights were rights to do what is right, as we might put the matter today. Law was considered a means to (and a part of) the Good rather than a means to the free exercise of will or to the private satisfaction of appetite. What happened,

26. Villey suggests, however, that for Ockham this divine law was itself merely a kind of will right of a lawless God, a point contested by Tierney (“Droit Subjectif I,” p. 17). Tuck suggests that the earlier Franciscan Dun Scotus still more radically rejected even natural and divine rights to property (Natural Rights Theories, pp. 20-24). Yet even Scotus seems to concede natural rules for appropriate use, based on need.


28. See Villey, “Droit Subjectif I,” especially p. 154. Martin Golding has given us a nice example in which we may sense this contrast:

It is plain that the grand ethical systems of Plato and Aristotle do not give the concept of rights any prominence, and the same is true of ancient Greek law. The concept of rights, if present at all, remains below the level of consciousness from the time of the Greek philosophers until late medieval times. For example, in Plato’s dialogue, the Crito, Socrates is faced with a question that we would put in the following manner: Does a person who believes himself to have been unjustly convicted of a crime have
according to my reading of Villey, is that sometime in the Middle Ages the sense of law as a common project for human excellence was lost, and the idea of jus as "that which is right" degenerated into Ockham's (and our) notion of jus as a power that is privately possessed. \(^{29}\) Political society even came to be considered limited by and derived from such individual rights. We can thus appreciate still more deeply Luther's difficult attempts to reconstruct a common project of justice despite emerging concern for modern self-centered rights. \(^{30}\)

I do not understand Villey to be saying that the ancients were more unselfish than we are today. People then as well as now surely sought personal power and benefits through the law. But the law that they invoked did not elevate this contingent and derivative private advantage to a fundamental principle. In a similar fashion, a legislative lobbyist today often presents arguments based on the common good. Even where self-interest is transparently

the right to escape from jail? An examination of Plato's text, however, shows that this dialogue is not formulated in the language of rights. There is no term in the text that literally translates into "a right." Instead, Socrates is concerned with whether it would be right or just for him to escape from jail. Now it might seem, at first blush, that there is only a subtle difference of language between asking whether an act is the right thing to do, on the one hand, and asking whether an individual has the right to do it, on the other. Yet behind this subtlety lies a momentous difference of substance. ("The Concept of Rights: A Historical Sketch," p. 46)

The distance between "must" and "ought" would seem to be less for the ancient view. Cf. note 7 herein.

29. Villey argues that an intermediate step toward this degeneration was the Christian use of jus to mean divine commands, or what I have called duties. One way to put the point of the earlier discussion of manners would be to say that this allegedly intermediate idea of jus can subsist without the jus of either the ancients or the moderns.

30. Underneath the new concern for rights may have been a new understanding of human will and action. No longer believed to seek some good (and properly a rightly ordered good), desire came in Hobbesian fashion to be thought to aim only at itself, only at its own satisfaction. Perhaps this new view underlies Luther's critique of monastic life as well as his hostility to one's personal pursuit of the goods of life. For an analysis of the contradictions inherent in this modern conception of desire, see my essay "A Critique of Fairness," Valparaiso University Law Review 16 (1982): 459-81, 464-65.
present, the lobbyist seldom focuses upon his or her private concerns that happen to be advanced by duties to the common good.

From Luther and Ockham I draw a lesson for our purposes. Although there are important analogies between their theories and the one developed in this essay, neither of them attempts entirely to abolish justice itself in order to eliminate the pursuit of rights. Perhaps we ought not be bolder than the Lutherans and the Franciscans. Our somewhat antinomian manners of mutual generosity should not be extended through all aspects of our life together. Arbitrary desiring for oneself should not be replaced only by deference to equally arbitrary desiring by others. Yet even if generosity duties cannot completely replace modern rights consciousness, they may have an important limited use. By their existence here and there in our life together, these courtesies both moderate the litigiousness consequent upon rights and serve to remind us that worlds without rights were once thinkable.

LEGAL DUTIES WITHOUT RIGHTS

I advocate the expansion of generosity duties into the public, legal world. I suggest that we ought to recognize mutual legal duties not to interfere with those who violate certain of their legal duties. It is thus appropriate to look briefly at our present legal practices to see whether such overlapping duties already exist and, if they do, whether they in fact bring about or exhibit the spirit of graciousness we are seeking.

To the best of my knowledge, nowhere in the modern American legal system (by contrast, perhaps, to those of the socialist world or of the Orient) is there a set of mutual duties fully analogous to our cookie or towel examples. Nowhere do duties overlap in a way that eliminates the concept of one correct and nonwasteful legal solution to every conflict of interest. (Liberty rights do not demand waste or a single solution to conflict, but duties are not involved there.)

Nevertheless, there are quite a few partially analogous legal

rules. I made mention early in this analysis of criminal law duties. Many persons have pointed out that these seem to involve benefit rights without will rights, in that individual citizens have no legal power to insist upon enforcement of the penal laws protecting them. But individual self-will is not wholly absent, as it is for tea partiers and for Lutherans, because there is no duty not to demand protection or retribution. It is not forbidden to complain to the police; it is only without necessary legal effect. But since a complaint may and does frequently have great practical effect, there is little or no sense that we have no right to protection against the criminal intrusions of others upon our interests.

More closely analogous are those situations in which, although we do no wrong in complaining about others' violations of their legal duties, the state is forbidden or unable to intervene in response. An obvious example is the case of de minimis infractions of the law. Here there are no identical duties to leave the same entire buffer zone alone, but there are similar unilateral duties not to enter into what is respectively alien. These duties give rise to no effective remedy where a fence crossing is only slight. There is no point in asking for civil or criminal redress in such situations. No doubt this nonenforcement rule exists largely because any social benefit is not worth the social cost—but also, I think, because of the pettiness, the ignobility of an individual or a system that would make or vindicate such claims. One is reminded of the old maxim “Equity does not stoop to pick up pins.” The rule does, therefore, teach and express a kind of minimal generosity in legal relations.

Similarly, one traditional line of case law in the United States recognizes intrafamily tort immunity. A child cannot sue a parent for an injury caused by the parent. The latter is still subject to possible criminal law penalties, however, so the parental duty not to harm subsists—but without a full correlative right on the part of the child. The stated purpose of this immunity is the discouragement of litigiousness and the promotion of family tranquility.

32. For example, Model Penal Code §2.12. Note, however, that this code makes punishable even infractions “within a customary license or toleration” if said toleration is “expressly negatived by the person whose interest was infringed,” §2.12(1).

33. The landmark case is Hewlette v. George, 68 Miss. 703 (1891).
These last examples may make it seem that I am opposed to the effective enforcement of duties. But there is nothing in the theory here advanced that forbids enforcement per se. Indeed, I think that all duties must sometimes be enforced if they are to be firmly entrenched and if expectations of originally wrongful benefits are not to develop into assertions of rights. It is probably important that last-cookie grabbers sometimes not be invited to the next tea party. But the enforcement of duties to benefit others is tricky, for it may give rise to a rights consciousness (as in the criminal law examples). In other words, nonenforcement of private remedies may be necessary in order to overcome rights consciousness, even though noncompliance with duty may well thus be left without serious penalties. In the best of worlds, there would be some duty enforcement, but never at the behest of the beneficiary of the duty.

There is another class of statutes that impose duties without rights by not providing any immediate redress. An Indiana noise control statute is a good example. Although it imposes a duty on all persons not to make "unreasonable noise," no penalty may be imposed until after the allegedly offending party has been warned and has subsequently repeated his or her offense. Initial unreasonable noise is, therefore, a legal wrong against which there is no legally effective protection or remedy. The overall effect of the statute would seem to be to encourage both neighborly toleration of noise and neighborly desistance of noise without any demand for rule enforcement.

Beyond these peripheral matters, there are some important legal duties that do not correspond to anyone's rights. I am thinking here of our duties not to be neglectful, negligent, or reckless. It is common in penal (and more so in tort) law for there to be no penalty for criminal omissions, negligence, or recklessness except in the minority of cases in which these can be shown to have caused harm. Of course, one could argue that our duties here are only to avoid negligently causing harm rather than not to avoid negligence per se. But a duty not to have some physical event beyond one's control occur hardly makes sense. So our duty must be simply to be careful, since this is the only matter under our control, even though we are punished only when harm happens to result from our lack of care.

34. Indiana Code 35-45-1-3(2).
When we are merely negligent, when we wrongfully endanger our fellow citizens, they have as yet no legal recourse. Whether we are finally to be punished depends not at all upon their will but only upon the accidental event of possible harm actually occurring. In other words, we all have a duty not to endanger others, but others have no legal will right not to be endangered. And because there exists no way officially to complain about nonharmful negligence, we do not ordinarily imagine that the law has created even benefit rights to have other people be careful. We think, in these areas, primarily about duties, and we put up with a great deal of sloppiness to which we might well object if we thought in terms of rights.

Cigarette smoking provides a good example of a situation in which the law appears to be in transition from the accommodationist style I have advocated to one of precise prohibitions. Smoking, I shall suppose, negligently or recklessly endangers the lives of nearby nonsmokers—that is, I assume that it increases their risk of health problems for no sufficient social purpose. I think there is, therefore, a legal-moral duty not to smoke in public. Yet violation of this duty is only remotely likely ever to be the basis of a private suit or a manslaughter charge, because each smoker’s marginal effect is hard to trace. Under such a system, we may well not say or feel that we have a right not to have smokers nearby.

I think this result is appropriate. Although it is wrong to smoke in public, I think it is also ungracious and ungenerous to object to smoking. Though in smoking, smokers perform no useful public function, their private appetites are often so compelling that they ought to be excused by the rest of us—at least as long as we are not involuntarily confined in very close proximity to them for substantial lengths of time.

Many today are not satisfied with this result. They wish instead to see smoking punishable in all cases. I am willing to go along on one condition: that in addition to making smoking punishable we also make discrimination against smokers punishable.

I just suggested that the appetites of smokers ought to be “excused” by the rest of us. The use of that word brings up the last major area of the law in which I have run across duties without rights, and I have found it primarily in European rather than in American law.
An action that is excused (rather than justified) is one that violates a duty but for which punishment is for certain reasons inappropriate—for example, because the actor in some sense could not do otherwise. In our nation, excuse is fairly well confined to duress and to insanity, but in European law it often embraces the broader principle that no one should be punished for not complying with the law where compliance is "too much to demand" by means of the penal law.

One place this doctrine has been applied is that of abortion. The West German Constitutional Court recognized in 1974 that unborn children are included as part of "everyone" in the Basic Law's protection of human life. There is thus a constitutional duty of the state to protect the unborn and a resulting criminal-law duty of women not to have abortions. Yet the same court acknowledged no "subjective right" to life for the child, with the result, as I understand it, that neither an unborn child nor its representative could bring suit to stop an abortion nor to recover damages. Even further, the court concluded that the state need not exact a penalty for abortions committed when the continuation of a pregnancy would have been "too much to demand" ("unzumuthbar"). In such a hardship situation, there would seem to be a duty not to kill the fetus without much correlative will right or benefit right not to be killed.

Such a result seems to me quite sophisticated and worthy of serious consideration. The net effect, as intended by the court, is not so much to impose exact limits upon abortion as to teach the constitutional legal duty to respect life in every case, whether or not a particular abortion will be punished by law. Insofar as our American "standing" requirements may permit, we should consider retaining constitutional duties while narrowing constitutional rights, so that the law may come to be more a teacher of generosity and less an enforcer of rights.35

35. For a more complete comparative analysis of the German approach, see my essay "New Constitutional and Penal Theory in Spanish Abortion Law." See also Mary Ann Glendon's very sensitive Abortion and Divorce in Western Law (Cambridge: Harvard University Press, 1987). She argues that Europeans in general have considerable political flexibility in the nonpunishment of abortion, perhaps precisely because they do not label it a "right."