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MORAL INJURY AND THE PUZZLE OF IMMUNITY-VIOLATION

by

JESSE R. GERO

Under the Direction of Andrew Altman

ABSTRACT

The First Amendment gives U.S. citizens a Hohfeldian legal immunity that disables Congress from removing citizens' legal liberty to criticize the government. Any attempt by Congress to remove this liberty would fail, but such an attempt would still wrong citizens. The familiar concept of *claim*-violation does not fully account for this wrong. Claims name actions that *ought not* be performed and are violated when those actions are performed. Immunities names actions that *cannot* be performed. Congress would wrong citizens not by doing something it ought not do but by attempting and failing to do something it cannot do. Using elements of Jean Hampton's expressive theory of punishment, I analyze Congress' attempt (and other similar acts) as an expressive act that denies the existence of immunities. Congress' immunity-"contradiction" would wrong U.S. citizens by denying the value that generates the immunity, by causing damage to the acknowledgement of the citizens' value, and by threatening the existence of the immunity.

INDEX WORDS: Edmundson, Expressive wrong, First amendment, Hampton, Hohfeld, Immunity, Moral injury, Rights, Speech act, Violation

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by

JESSE R. GERO

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

2010

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2010

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August 2010

ACKNOWLEDGEMENTS

I owe a great deal to the faculty and students of the Georgia State University Philosophy Master of Arts program for giving me my first opportunity to acquire a holistic grounding in the Western philosophical tradition. Given that the GSU faculty and students introduced me to rights theory, it is more than an understatement to say the merits of this thesis, such as they are, would be fewer and less meritorious without the help they offered me as I worked out my ideas. My greatest debt is to my committee members. I am particularly grateful to Dr. Andrew Altman for taking me and fellow students through the book he recently co-authored with Kit Wellman, *A Liberal Theory of International Justice*.[1] Among other things, that experience showed me the justificatory power of the concept of rights. Over the last two years, Dr. Altman has generously and tirelessly offered intellectual mentorship whenever I have sought it. I am grateful to Dr. A. I. Cohen for helping me work through Thomas Nagel's "The Value of Inviolability"[2]—an essay that shaped my early interest in rights theory—and for introducing me to Jean Hampton. Dr. George Rainbolt generously agreed to lead me and a fellow student through a directed reading of his *The Concept of Rights*,[3] enabling me to take my first systematic foray into rights theory. This thesis grew out of a paper I wrote for Dr. Rainbolt on the problem of immunity-violation. Dr. Rainbolt's guidance has been invaluable. I would also like to thank Dr. William Edmundson for introducing me to *Walker v. The City of Birmingham*, for an exceptionally helpful conversation about his work on the *prima facie* duty to obey administration prerogatives,[4] and for incisive comments on drafts of the thesis.

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[1] Altman 2009.
[2] Nagel 2008.
[3] Rainbolt 2006.
[4] Edmundson 1998.

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INTRODUCTION

On April 12 and April 14, 1963, Dr. Martin Luther King, Jr. held demonstrations in Birmingham, Alabama with fellow civil rights activists. In doing so, Dr. King flouted an Alabama circuit court injunction to refrain from demonstrating in Birmingham without a parade permit, as required by a City of Birmingham ordinance. The City applied for a contempt order. At the hearing Dr. King argued that the court injunction restrained free speech and that the City ordinance, for the same reason, was unconstitutional. The case, *Walker v. City of Birmingham*, was eventually heard before the U.S. Supreme Court in 1967, and the Court affirmed the contempt order. In his analysis of the case, William Edmundson argues that the Court made the correct legal judgment even though Dr. King was clearly correct to point out that the City's ordinance restrained free speech and was therefore unconstitutional (Edmundson 1998, 51).

Rather than engage the details of Edmundson's argument, I want to consider a question suggested by its conclusion. Given the plausible assumption that Dr. King was wronged by the City when its ordinance restrained Dr. King's free speech, where can we locate this wrong if the Court was right to affirm the contempt order? One possible answer to this question could come from an analysis that showed how the City's mere appeal to the ordinance wronged Dr. King. The analysis would run something like this. The First Amendment of the U.S. Constitution protected Dr. King by making it the case that no legislative body—at the federal, state, county or city level—could give Dr. King a legal duty to refrain from enjoying freedom of speech. Any attempt to give Dr. King such a duty would be a legal nullity. In the language of W. N. Hohfeld, the First Amendment of the U.S. Constitution gave Dr. King a legal *immunity* against being given a legal duty to refrain from enjoying freedom of speech. When the City of Birmingham appealed to an ordinance that abridged the freedom of speech, declaring that the ordinance gave Dr. King a legal duty to refrain from exercising his freedom of speech by demonstrating with his fellows, the City wronged Dr. King. One might be tempted to argue that the City wronged Dr. King by giving him a legal duty to refrain from enjoying freedom of speech when the City should not have given Dr. King such a duty. In Hohfeldian terms, the City violated Dr. King's claim against them that they not give him a legal duty to refrain from enjoying free speech. But this cannot be right, because the First

Amendment made it the case that the City *could not* give Dr. King such a duty. The conclusion that the City failed to wrong Dr. King, since the City apparently failed to violate his claim, is not right either. The aim of this essay is to give an analysis of immunities and wrongdoing that will, among other things, show how the City treated Dr. King's immunity in such a way that it wronged him.

The first chapter will describe the puzzle of immunity-violation more clearly, starting with exposition of Hohfeld's taxonomy of legal relations (focusing on claims and immunities), defining violation and, finally, rejecting the idea that all candidate cases of immunity-violation can be explained as cases of claim-violation. In the second chapter I introduce Jean Hampton's expressive theory of punishment in order eventually to identify a way of treating Hohfeldian claims that wrongs the claim-holders without violating their claims. I call this way of treating Hohfeldian claims "claim-contradiction." Central to Hampton's account are the Kantian idea that to wrong a person is to disrespect her by causing damage to her value and the idea that acts can have expressive meanings determined by social rules. I also introduce Elizabeth Anderson and Richard Pildes' analysis of expressive wrongdoing, according to which an act that expresses inappropriate attitudes about a person's value wrongs that person whether or not it causes damage to her value. In chapter three I show how immunities can be contradicted and how immunity-contradiction wrongs immunity-holders; I also extend the completed analysis to legal claims and immunities, returning finally to Dr. King's case.

The following is a summary of the positive theses put forward in this essay regarding the ways in which one can treat an immunity and thereby wrong the immunity-holder. Claim-violation is one of many expressive actions that can constitute contradiction of a claim. Other expressive actions can constitute claim-contradiction; similar expressive actions can constitute immunity-contradiction. Of these claim- or immunity-contradictory expressive actions, some constitute denial of the value that generates the claim or immunity, while others constitute denial of the importance of that value. Such expressive actions wrong the claim- or immunity-holder regardless of their consequences. We can also understand these actions to wrong their victims by looking at their effects, including damage to the acknowledgement of the victim's value or its importance. Expressive acts that contradict *legal* claims and immunities can wrong the claim- or immunity-holders by threatening the existence of the claims and immunities in question.

CHAPTER 1: Claims, Immunities and Violation

In this chapter I begin with a distinction W. N. Hohfeld drew between claims and immunities. I will summarize William Edmundson's (successful) attempt to demonstrate our need for this distinction when explaining important differences between kinds of legal relations that can obtain between people. Broadly speaking, my purpose in this essay is to ask how the difference between claims and immunities maps onto differences between ways of wronging people. Claim-*violation* is a way of treating a claim that wrongs the claim-holder. Is there a way of treating an immunity that counts as immunity-violation and wrongs the immunity-holder? For various reasons that should become clear in this chapter, many will say that immunities, by definition, cannot be violated. On a strict definition of violation (which I will accept for the purposes of this essay) they are correct. Aside from violation, then, is there a way of treating an immunity that wrongs the immunity-holder? If there is, what is the nature of the wrong done? At the end of this chapter, I will consider the possibility that the answer to the former question is negative. I will try to dismiss this possibility. In the next chapter I will turn to the latter question.

1.1: Claims and Immunities

With the 1913 publication of his seminal work on legal relations, "Some Fundamental Legal Conceptions As Applied in Judicial Reasoning," Hohfeld offered a way out of the muddle legal professionals got themselves into when they assumed that all legal relations could be reduced to "rights" and "duties" (Hohfeld, 35). A number of meaningful distinctions could be drawn, he showed, between legal relations commonly called "rights" or "duties." Without lingering too long on Hohfeld's taxonomy, let me briefly introduce the fundamental legal relations he identified and highlight a few features of their interrelations that are central to the argument elaborated below.

Hohfeld identified the following eight relations: claim, duty, no-claim, liberty, immunity, power, liability and disability. A Hohfeldian relation always involves two parties—a subject and an object—and it always has a content, which concerns some action. Consider the following example.

1) Stanley has a *claim* against Leopold that Leopold pay Stanley 50,000 francs.

In 1), Stanley is the subject of the claim-relation and Leopold is its object. Stanley has a claim against Leopold only if Leopold *should*[5] perform the act named in the content of Stanley's claim.[6] We can more easily describe Stanley's having a claim against Leopold when we examine another relation that obtains between Stanley and Leopold: the duty-relation. The duty-relation is the *correlative* of the claim-relation. The subject of a claim-relation is always the object of its correlative duty-relation. The object of a claim-relation is always the subject of its correlative duty-relation. Thus, 1) is true only if the following is also true.[7]

2) Leopold has a *duty* to Stanley that Leopold pay Stanley 50,000 francs.

Notice that both the relations are about an act which Leopold should perform; indeed, both relations are about the same act. The act these relations are about is called the "content" of the relations. All correlative relations have the same content.[8]

In addition to having a correlative, every relation has an opposite. This is just to say that we have special terms we use to describe the relations that obtain between Stanley and Leopold (to continue with the same example) when Stanley does *not* have a claim against Leopold and when Leopold does *not* have a duty to Stanley. When Stanley does *not* have a claim against Leopold, we say that Stanley has a *no-claim* on Leopold; when Leopold does *not* have a duty to Stanley, we say that Leopold has a *liberty*

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[5] This is a somewhat simplistic description of the claim-relation that ignores some of the difficulties that arise in cases of rights conflict. In some cases, it may be sensible to say that Stanley has a claim against Leopold that Leopold do A but that it is nevertheless false that Leopold *should* (all things considered) do A. I do not address cases of rights conflict in this essay and have chosen to ignore certain difficulties to ease exposition. For one treatment of the problem of rights conflict, see Rainbolt 2006, Chapter 6.

[6] Claim-relations can be described as positive or negative, depending on the nature of the act named in the content of the claim-relation. Stanley's claim named in 1) is most straightforwardly described as a positive claim—a claim that Leopold *do A*. If, instead, Stanley had a claim against Leopold that Leopold not divulge certain information about Stanley's activities, then Stanley's claim is most straightforwardly described as a negative claim—a claim that Leopold *not do A*. For the purposes of this essay, I will say that all claims most straightforwardly described as positive claims can be redescribed as negative claims. So, Stanley's claim that Leopold pay 50,000 francs can be redescribed as a claim that Leopold *not* neglect to pay Stanley 50,000 francs. Likewise, claims most straightforwardly described as negative claims can all be redescribed as positive claims.

[7] Rainbolt agrees that all claims have correlative duties, but he argues that some duties (like the duty of charity) do not have correlative claims, that some duties are, in other words, "non-relational" (Rainbolt, 131-133). Such duties are also sometimes called "imperfect" (Edmundson, 99). If Rainbolt is right (and I think he clearly is, at least in the case of legal duties), then 1) and 2) are not inter-entailing. Rather, 1) is true *only if* 2) is true and 2) is true *if* 1) is true. As Edmundson points out, it is difficult to tell what Hohfeld himself would have thought of the idea of non-relational duties (Edmundson 2004, 99).

[8] Edmundson points out (Edmundson 2004, 95) that Hohfeld's analysis of rights conflicts with the idea that all rights are, fundamentally, rights against interference. Rather, duties correlative to claim-rights can be duties to perform some act that cannot be satisfactorily described as an act of refraining from interference.

against Stanley. Unsurprisingly, no-claims and liberties are correlative relations, and each has the same content as its opposite—namely, in this case, that Leopold pay Stanley 50,000 francs.

The structure of the remaining four relations—immunities, powers, liabilities and disabilities—is similar to the structure of the first four relations. These remaining relations have subjects and objects, and they are about some act. However, they are not about acts like paying someone 50,000 francs. The remaining four relations are always about an act that might or might not change some other relation. For this reason, they are called second-order relations, while the first four relations are called first-order relations. Consider the following example of a second-order relation.

> 3) Stanley has an *immunity* with respect to Leopold that Leopold not change "Stanley has a claim against Leopold that Leopold pay Stanley 50,000 francs" into "Stanley has a no-claim on Leopold that Leopold pay Stanley 50,000 francs" by saying, "Stanley, I don't have to pay you."

Stanley is the subject of this immunity, and Leopold is its object. The content of the immunity is Leopold's changing Stanley's claim (what we call the "original relation") into a no-claim (what we call the "resulting relation"). The act that might or might not cause this change to happen is called the "triggering act." Stanley has this immunity if and only if Leopold's performing the triggering act named *cannot* bring about the change named.

As one might expect, all second-order relations have correlatives and opposites, just as do first-order relations. Thus, 3) is true only if the following is also true.[9]

> 4) Leopold has a *disability* with respect to Stanley that Leopold not change "Stanley has a claim against Leopold that Leopold pay Stanley 50,000 francs" into "Stanley has a no-claim on Leopold that Leopold pay Stanley 50,000 francs" by saying, "Stanley, I don't have to pay you."

Disabilities and immunities are correlative relations; they both obtain when a certain change cannot be brought about by a certain triggering act. The opposite of an immunity is a *liability*. That is, Stanley does *not* have an immunity with respect to Leopold if and only if he has a liability with respect to Leopold. Leopold does *not* have a disability with respect to Stanley if and only if he has a *power* with respect to Stanley. Liabilities and powers are correlative relations; they both express the fact that a certain change *can* be brought about by a certain triggering act.

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[9] I write that 3) is true *only if* 4) is also true because I assume that there are non-relational disabilities, just as there are non-relational duties. This is not a question I will get into here. If there are no non-relational disabilities, then it would be more complete to write that 3) is true *if and only if* 4) is true.

It may be helpful, at this point, to reproduce versions[10] of the tables Hohfeld used to summarize the eight legal relations he identified and their interrelations. In the first table, each relation named in the first row is paired with its correlative relation, just below. In the second table, each relation named in the first row is paired with its opposite relation, just below.

Figure 1.1: Hohfeldian correlatives

claim	liberty	power	immunity
duty	no-claim	liability	disability

Figure 1.2: Hohfeldian opposites

claim	liberty	power	immunity
no-claim	duty	disability	liability

In the analysis that follows, I will follow other legal philosophers in using Hohfeld's taxonomy of legal relations to investigate not only legal claims and immunities but also moral claims and immunities.[11] There are certain difficulties in using Hohfeld's taxonomy in this way, but I believe my analysis avoids them.[12]

1.2: Edmundson on Immunities

Edmundson shows us that the right to free speech protected by the U.S. Constitution cannot be satisfactorily analyzed without the concept of immunity (see Edmundson, 2004, 88-91). I will return to the Dr. King example in Chapter 3; for now I will use the more general example Edmundson uses to make his case. Suppose Congress passes a law criminalizing speech that expresses disrespect for the U.S. Government—what we might call the "Anti-Sedition Act." We can understand this as wronging U.S. citizens in some way. But how should we understand this wrong? We might at first be inclined to say that

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[10] Hohfeld used the terms "right", "no-right" and "privilege" where I have used "claim", "no-claim" and "liberty", respectively. In using these alternate terms, I follow Rainbolt (and many other legal philosophers), who find that the alternate terms more clearly identify the relations Hohfeld was interested in. Hohfeld's original tables can be found on Hohfeld, 36.

[11] Edmundson notes: "Although Hohfeld was concerned solely with the analysis of legal rights, the opinion of moral philosophers has generally been that his work reveals most, though not all, of the fundamental logical interconnections and relationships of moral rights, as well as of legal rights" (Edmundson 2004, 94). For such an opinion, see Wellman 1985, 17 *sqq.* and Wellman 1995, 38 *sqq.* I do not mean to endorse the thesis that, in principle, moral rights are best explained through an extension of our analysis of legal rights—a thesis Raz (254) seems to attribute (perhaps wrongly) to Wellman—but rather the much weaker thesis that, as a matter of fact, Hohfeld's analysis of legal relations gives us terms that we can use to adequately individuate at least some important moral relations that we should and do call rights.

[12] For a helpful overview of some of these problems, see Edmundson on "duties not to" and "duties that", legal and moral interference, duties' entailing claims, and group and individual rights (Edmundson 2004, 94-102).

Congress' passing the Anti-Sedition Act violates a legal claim U.S. citizens have, created by the First Amendment of the U.S. Constitution, that Congress not pass laws "abridging the freedom of speech."[13] That is, we might understand the first amendment to make it the case that Congress *ought not* abridge the freedom of speech by passing laws like the Anti-Sedition Act. Edmundson shows that this is not in fact what the first amendment does. If Congress passes the Anti-Sedition Act, would it give U.S. citizens a legal duty to not speak disrespectfully of the U.S. Government? In other words, should we say that although Congress *ought not* abridge the freedom of speech by passing the Anti-Sedition Act, it nevertheless *can* make it illegal to speak disrespectfully of the U.S. Government by passing the Act? The correct analysis, according to Edmundson, shows that this is not the case. Passing the Anti-Sedition Act does not make it illegal to speak disrespectfully of the U.S. Government because the First Amendment prevents the Anti-Sedition Act from ever becoming law in the first place. The Anti-Sedition Act is a legal nullity. In Hohfeldian terms, the first amendment makes it the case that Congress lacks the legal *power* to give U.S. citizens a duty to not speak disrespectfully of the U.S. Government by passing an act like the Anti-Sedition Act. Congress has a *disability* with respect to creating such a duty, therefore; and U.S. citizens have an *immunity* with respect to Congress' turning their liberty to speak disrespectfully of the government into a duty to not speak disrespectfully of the government.

Edmundson shows that we need the concept of immunity to understand the right to free speech guaranteed by the U.S. Constitution. As to how we can understand the wrong that Congress does when it passes the Anti-Sedition Act, however, Edmundson remains silent. There are two separate questions that need to be answered. One has to do with the nature of Congress' treatment of the immunity: Does Congress "violate" U.S. citizens' legal immunities if it passes such a law, in the same way that it could violate citizens' legal claims if it performed some other act? The second question has to do with the nature of the wrong done the citizens through the Congress' treatment of the immunity: Does such "violation" wrong citizens in the same way that the violation of a legal claim would? In the following section I will show that certain aspects of Congress' treatment of claims it violates cannot apply in the case of

[13] The full text of the Amendment reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances." (U.S. Const. am. 1)

immunities. This raises a terminological question about the use of "violation" that is easily set aside. Showing that immunities cannot be violated (on a certain strict definition of violation) does little to advance the analysis. In Chapter 2 I begin identifying a way of treating immunities that wrongs the immunity-holders and begin explaining *how* this way of treating immunities wrongs the immunity-holders.

1.3: Immunity-"Violation"

On some understandings of violation, any assertion about the violation of an immunity will appear paradoxical. Such understandings of violation take as paradigm cases instances of claim-violation. By definition, if you have a claim against me, then I should not do certain things. It might make it the case that I should not drive your car without your permission, for example. The claim imposes normative limits on my actions; I violate your claim, on this view, when I disobey or disregard the normative limits your claim imposes on my actions—in this case, by driving your car without your permission. The paradigm case of violation, then, is one where the party holding the duty correlative to a claim fails to discharge the duty, doing what she *should not* do.[14] This analysis of violation is difficult to apply to immunities.

Immunities, like claims, can be thought of as imposing normative limits.[15] The normative limits immunities impose, however, are reminiscent of the limits imposed on us by physical laws. Much as I might like to fly about the city on my own power as could Superman, the law of gravity (in conjunction with various other natural laws) prevents me from doing so. Similarly, although the U.S. Congress might like to impose a duty on U.S. citizens to not speak disrespectfully of the U.S. Government—and, indeed,

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[14] Violation can, in certain contexts, be helpfully distinguished from infringement, where both are doing what a claim makes it the case one should not do but the latter is permissible and the former not. See Judith Jarvis Thomson for such a distinction, or Jeff McMahan, 10. Examination of the implications of such a distinction for the analysis I give here could prove fruitful; but I will not pursue that examination here.

[15] Indeed, this fact is central to Rainbolt's justified-constraint theory of rights, according to which both and only claims and immunities count as rights. My thinking about immunity-"violation" is heavily indebted to Rainbolt and to his account, and I believe Rainbolt could use my analysis to defend his account against the charge that immunities are not rights because they cannot be violated, but I do not want to explicitly endorse or reject Rainbolt's central argument about rights. I offer a partial endorsement of Rainbolt's idea of immunity-violation, and I later use what Rainbolt calls the "key argument form" in elaborating my account of immunity-"violation" (or, as I call it, immunity-contradiction).

might convince itself that it has imposed such a duty—U.S. citizens' immunities (granted by the First Amendment) impose limits on Congress that render it incapable of imposing that duty on them. Both immunities and claims impose normative limits. However, whereas we can, with some ease, speak of the violation of a claim—whose limits make it the case that its object *should not* do something—it is more difficult to say exactly what we might mean when we speak of the *violation* of an *immunity*—whose limits make it the case that its object *cannot* do something.

The difficulty of generating an adequate account of the violation of immunities is brought out more clearly when we try to extend the parallel drawn above between immunities and physical laws. Every now and then we make an observation that does not fit with our understanding of the laws of physics. Upon making such an observation, we are forced to confront a contradiction: this cannot happen (according to our understanding of the laws of physics) and yet it has happened. In such cases, it is sometimes unclear which to trust, our understanding of the laws of physics or our observations, but the issue is almost always resolved in one of two ways: either we decide our observation was inaccurate or we decide our understanding of the laws of physics was inadequate. If the observation persists (over many cases), it becomes difficult to conclude that the observation was inaccurate, and we are pressed to conclude that what had appeared to be a violation of the laws of physics was not a violation at all, but instead, the laws of physics are not as we originally thought.

Contrast this resolution with our response to the "violation" of an immunity. Lawyers do not usually conclude, when confronted with a case of immunity-violation, that they had been mistaken to believe that the immunity existed in the first place. Edmundson, for example, acknowledges the immunity generated by the First Amendment and argues that the immunity would make the Anti-Sedition Act a legal nullity. If Congress passes the Anti-Sedition Act, we do not conclude that we were mistaken to think the First Amendment grant U.S. citizens an immunity against Congress giving them a duty to refrain from speaking disrespectfully of the U.S. government. Of course, neither do lawyers conclude that the act of violation therefore never occurred, or that it was inaccurately reported. Edmundson still acknowledges that the Anti-Sedition Act would have been "passed", in some empty sense, and would be, in a very real sense, cause for a strong response. So lawyers speak as if the immunity persists, and they say that an act

has been committed that has *wronged* the immunity-holder. Edmundson's analysis might be summarized as follows: Congress may *say* that U.S. citizens now have a duty not to speak disrespectfully of the U.S. Government, but in fact, U.S. citizens still have the liberty to speak disrespectfully, because they have an immunity to Congress' annulling of that liberty; and Congress has wronged them by stating, falsely, that they no longer possess the liberty in question.

We are driven, therefore, to break from the analogy with physical laws. We observe a distinction between physical limits and normative limits. Physical limits determine, for any given physical action, what physical effects are possible. Normative limits of the sort imposed by immunities, on the other hand, determine, for any given physical action, what *normative* effects are possible. Although we rarely think we have achieved physical effects that are, in fact, impossible to achieve in the circumstances, we quite frequently think that we have achieved normative effects that are, in fact, impossible to achieve in the circumstances. We rarely convince ourselves that we have achieved self-powered flight; it is easy, on the other hand, to think of examples where people think they have created legal relations, for instance, which they have failed to create.

If by "violation" we just mean, "action by which one oversteps normative limits imposed on oneself," then we see that violation of an immunity is impossible. U.S. citizens' immunity places limits on what normative effects Congress can achieve through its actions—it cannot impose on U.S. citizens a duty to not speak disrespectfully of the government. Congress literally *cannot* overstep the limits imposed by the immunity. The above definition of violation may be too narrow. The important point, however, is that lawyers, lawmakers and philosophers clearly think there is *something* one *can* do to immunities that wrongs the immunity-holders. Whatever we *call* that something is beside the point. Lacking a better term, for the moment, I will use the term "immunity-violation" to refer to whatever it is one can do to an immunity that wrongs the immunity-holder. We have seen that immunity-violation is not like the violation of a physical law; we have also seen that it is not like the violation of a claim. What, then, is the nature of immunity-violation?

George Rainbolt suggests that a person violates another's immunity if she performs the triggering act mentioned in the immunity (the triggering act that *cannot* change the original relation into the

resulting relation) and then asserts that the triggering act has changed the original relation into the resulting relation (Rainbolt, 44 and 45). This explanation is intuitively plausible. Much more can be said, however, about the nature of this act of immunity-violation, as a way of treating an immunity and as a way of wronging the immunity-holder. The account I offer below tries to develop Rainbolt's explanation in these ways. It rejects, however, the idea that immunity-violation necessarily involves performing the triggering act mentioned in the immunity. The questions to answer are the following:

1) What way of treating an immunity wrongs its holder?
2) What kind of wrong is done to the immunity-holder when the immunity is treated in that way?

The first question can be understood to ask for a way of treating an immunity that is in some way analogous to claim-violation. The second question can be understood to ask how this way of treating an immunity wrongs the immunity-holder. The argument that begins in the second chapter does two things. It introduces Jean Hampton's analysis of the expressive meaning of wrongdoing and from it develops the notion of *contradiction*. Immunity-contradiction, I will suggest in the third chapter, is a way of treating an immunity that wrongs the immunity-holder. I will borrow a formal framework from Rainbolt to make more systematic the application of Hampton's analysis to the case of immunities.

1.4: Claim-reductionism: An Alternative Analysis

Some might suggest that the search for a way of treating immunities analogous to claim-violation is misguided. If we think more creatively about how the concept of claim-violation applies to the cases we have considered, the objection could press, we will begin to see that there is no need to look beyond the concept of claim-violation: every aspect of every case of supposed immunity-violation can be thoroughly explained with the concept of claim-violation. Congress' passing the Anti-Sedition Act does wrong U.S. citizens because it treats their legal immunities in a certain way, but we need say no more than that U.S. citizens have a legal claim against Congress that Congress not treat their immunities in that way. So, Congress (knowingly or unknowingly) acts as if U.S. citizens' free speech immunity does not exist—for now, I will refer to this treatment of the immunity as disregard of the immunity—and Congress has a duty not to disregard U.S. citizens' free speech immunity. The argument here is something like the following.

Suppose I have an apple and a claim against you that you not take my apple, touch it or mutilate it in any way. If you smash my apple with a hammer, you have certainly treated the apple in a way that wrongs me, but this is merely because the apple is something about which I have a claim. To say that there is some special kind of wrong done me through the treatment of my immunities is like saying there is some special kind of wrong done me through the treatment of my apple. Just as we need no concept of apple-violation, so we need no concept of immunity-violation.

This objection, which I will call the claim-reductionist objection, is theoretically implausible. Suppose, again, that Stanley has a claim (claim$_{I}$) that Leopold give Stanley 50,000 francs. Suppose, further, that claim$_{I}$ is "protected" by an immunity (immunity$_{I}$) that makes it impossible for Leopold to get rid of claim$_{I}$ by saying something like, "Stanley, you no longer have claim$_{I}$." The claim-reductionist suggests that Stanley has a further claim (claim$_{II}$) against Leopold that Leopold not disregard Stanley's immunity—that he not act as if he can get rid of Stanley's claim$_{I}$. It is the violation of claim$_{II}$, the claim-reductionist suggests, that explains how Leopold wrongs Stanley if Leopold disregards immunity$_{I}$. Now, it seems to me that the claim-reductionist would be quite willing to posit the existence of another immunity, immunity$_{II}$, that protects claim$_{II}$. Without the protection of immunity$_{II}$ Leopold could easily get rid of claim$_{II}$ and he would no longer be wronging Stanley if he disregarded immunity$_{I}$ by acting as if he can get rid of Stanley's claim. This would conflict with out intuitions about the (normal) moral requirements of owing someone money. But if Stanley has immunity$_{II}$, surely Leopold's disregarding *it* would also wrong Stanley. Leopold could say, perhaps, that he has gotten rid of Stanley's claim$_{II}$ against Leopold's disregarding immunity$_{I}$. The only way the claim-reductionist can explain why this wrongs Stanley is to posit yet another claim, claim$_{III}$, against Leopold's disregarding immunity$_{II}$. We would likely assume that there is then another new immunity protecting that claim (immunity$_{III}$), and a new claim against disregarding that new immunity (claim$_{IV}$), and a new immunity protecting that new claim (immunity$_{IV}$), and so on, *ad infinitum*. It is an open question whether such an infinite regress is vicious or not; but the claim-reductionist seems to carry at least an equal share of the burden of proof.

The analysis I offer in the following chapters is not so suggestive of an infinite regress. I aim to provide a rather direct way of understanding how certain ways of treating immunities wrong the

immunity-holders—without appealing to claims about immunities, or immunities about claims about immunities—and I should be able to show how my analysis accommodates various intuitions and considered opinions about real cases of wrongdoing. I will look at Hampton's murder example. Eventually I will return to the Anti-Sedition Act and the Dr. King example offered in the Introduction.

CHAPTER 2: Moral Injury, Denial and Contradiction

In this chapter I introduce Jean Hampton's analysis of expressive wrongdoing, I adopt weakened versions of several of her theses, and I suggest that we must look beyond her consequentialist conception of moral injury in order to identify another important form of expressive wrongdoing. Hampton's analysis deepens our understanding of claim-violation as wrongdoing by showing us how claim-violation causes moral injury; furthermore, her analysis makes it is easy to see how one can separate claim-violation from other elements in the cause chain for moral injury, namely claim-contradiction. Claim-contradiction, I will argue, need not cause moral injury in order to constitute expressive wrongdoing; rather, claim-contradiction can constitute another, direct form of wrongdoing. In the next chapter I will show how the analysis of these two ways of wronging through claim-contradiction can translate into an analysis of two ways of wronging through *immunity*-contradiction, and I will identify a third way of wronging someone through immunity-contradiction.

2.1: Hampton and the Expressive Meaning of Wrongdoing

In the 1988 articulation of her expressive theory of punishment, Hampton proposed that "part of what it is to view an act as immoral is to have the desire to reassert the victim's value through punishment" (Hampton 1988, 132).[16] We find here the idea that to view an act as immoral is, among other things, to have some view about what would be an appropriate response to the wrongful act. When attempting to distinguish types of wrongdoing, as I am, it can be informative, therefore, to consider arguments for different responses to wrongdoing. Such arguments attempt to show why a given response "fits" a particular wrongful act. They articulate a view not only of the nature of the response to the wrongful act but also of the nature of the wrongful act itself. I aim to identify a way of treating an immunity that wrongs the immunity-holder. I propose to identify this type of wrongdoing by examining

[16] See Hampton's "The retributive idea," Chapter 4 in Murphy, Jeffrie and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988). Hampton initially defended but then rejected the idea that the victim's value can *only* be reasserted through punishment, eventually holding that there are non-punitive forms of retribution that can serve the same function See pp 1685-1698 of Hampton's "Correcting Harms Versus Righting Wrongs" (*UCLA Law Review*, vol. 39, no. 6 (1992); 1659-1702).

one kind of response to wrongdoing, namely, retributive punishment. Jean Hampton has made a compelling case for understanding retributive punishment as a fitting response to wrongful acts that cause what she calls "moral injury." Hampton's analysis of moral injury will help identify ways of treating claims that wrong the claim-holders but do not involve violation and are also (I will show in the next chapter) ways of treating immunities that wrong the immunity-holders.

Retributive punishment is punishment justified by its retributive function. There is some disagreement about whether punishment can be justified by other functions or even if it has other functions. To put the idea of retributive punishment in context, however, I will name a few other functions that have been attributed to punishment, rightly or wrongly. Punishment's function is often described with reference to wrongdoers or would-be wrongdoers: punishment can serve to rehabilitate actual wrongdoers[17] and can have a deterrent effect on would-be wrongdoers.[18] At other times, the function of punishment is described with reference to the victims of wrongdoing. Corrective punishment is said to have this sort of function when it imposes upon a wrongdoer a duty to compensate her victim for material damage. Corrective punishment imposes such a duty on a wrongdoer with the goal of repairing material damage done to the victim, restoring the victim to the material state she would have been in had the wrong not been done.[19]

Hampton argues that at least part of the function of retributive punishment, like corrective punishment, is repairing damage done to the victim of a wrong (Hampton 1992, 1698). However, whereas corrective punishment aims at repairing material damage (Hampton 1992, 1663), retributive punishment aims at repairing what Hampton calls moral injury (Hampton 1992, 1666). Moral injury, in contrast to material damage, is damage to the victim's value caused by certain expressive acts (Hampton 1992, 1679). Retributive punishment repairs moral injury by vindicating the value of the victim (Hampton 1992,

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[17] For an analysis of such a concept of punishment's function, see Jean-Christophe Merle's *German Idealism and the Concept of Punishment* (Cambridge: Cambridge University Press, 2009).
[18] Jeremy Bentham famously emphasized punishment's function as a deterrent. See Volume 4 of *The Works of Jeremy Bentham* (ed. John Bowring, London, 1838-1843, Reprinted by the University of Michigan Library, 2009).
[19] Hampton 1992, 1661, citing Coleman's *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992).

1686). In developing this argument, Hampton can be seen to follow G. W. F. Hegel, who famously claimed that punishment "annuls the crime."[20]

Hampton's analysis of the fit between retribution and moral injury is fascinating and important. I set this analysis aside, however, because I am not concerned with arguing for or against any particular response to wrongful acts. I introduce Hampton's analysis in order to extract from it the analysis of the sort of wrongful acts to which Hampton argues retributive punishment is an appropriate response, viz., wrongful acts that cause moral injury. I will suggest that a number of acts can cause moral injury. The violation of claims can cause moral injury; so can what I will call the "contradiction" of claims. Immunity-contradiction is a way of treating an immunity that causes moral injury to the immunity-holder and is, in that sense, analogous to claim-violation.

2.2: The Concept of Moral Injury Introduced

I will first more thoroughly set out Hampton's concept of moral injury and then turn to the problem of identifying the acts that cause moral injury. Hampton's concept of moral injury is built on two fundamental theoretical endorsements. First, she endorses a Kantian conception of human value according to which all humans have equal value in virtue of their humanity (Hampton 1992, 1667). Second, she endorses a Gricean understanding of human behavior as expressive (Hampton 1992, 1669, 1670).[21] Some expressive acts, Hampton writes, *diminish* a person's value. Moral injury is caused by these expressive acts.[22] To diminish a person's value, for Hampton, is not to degrade (reduce the value of) the person—a

[20] See Hegel's *Philosophy of right* (S. W. Dyde trans. Amherst: Prometheus Books, 1996). Cited and quoted in Hampton 1988 on pages 114 and 131. For an analysis of the Hegelian elements of Hampton's theory, see Farnham's "A Hegelian Theory of Retribution" (*Journal of Social Philosophy*, 39 (4), Dec. 2008).

[21] Hampton references Grice's "Logic and Conversation" and "Meaning", Chapters 2 and 14 in his *Studies in the Way of Words* (Cambridge, MA: Harvard University Press, 1989).

[22] At some points Hampton claims that diminishment causes moral injury: "it is diminishment that causes moral injury, in one of two ways" (Hampton, 1992, 1676). At other points she claims that diminishment constitutes moral injury: "I will argue that diminishment is the normal result of an immoral act and that which constitutes moral injury inflicted by a wrongdoing. It is therefore the damage or 'loss of value' that wrongdoing inflicts" (Hampton 1992, 1673). I take this apparent inconsistency to be the result of the ambiguous nature of the term "diminishment", which can refer either to a state of being diminished or to a process of becoming (or making become) diminished. In the first quote Hampton seems to have in mind diminishment as process; in the second quote she seems to have in mind diminishment as state. In this essay, I will use "diminishment" to refer to diminishment-as-process. To refer to diminishment-as-state, I use Hampton's phrase "appearance of degradation." I will argue in 2.3.3 below that Hampton would do best to understand diminishment-as-state (appearance of degradation) as causing rather than constituting moral injury.

Kantian conception of human value would not allow such a result—but rather to create the *appearance* of her degradation (Hampton 1992, 1673). The appearance of a person's degradation, on Hampton's account, seems to be the appearance that the person is worth less than she is actually worth.[23] For Hampton, the following are different ways of saying the same thing: to diminish a person, to create the appearance of a person's degradation, and to cause a person moral injury.[24]

To help explicate the concept of diminishment Hampton offers the following analogy. Consider a valuable artistic object like the Book of Kells. That the Book of Kells has a certain value "implies that only certain kinds of treatment are appropriate for it" (Hampton, 1992, 1674). In other words, the value of the object "generates certain entitlements" for the object—that it not be burned, for example, or torn to pieces (Hampton, 1992, 1674, original emphasized).[25] Someone who intentionally disregards these entitlements and treats the object in an inappropriate way—by burning it, say—is "denying that the object really has [the] value [that it has], because he is denying the entitlements which that value generates" (Hampton, 1992, 1674). Denying that the Book of Kells has the value that it has is what creates the appearance of the Book's degradation—it is what diminishes the Book's value. Acts that diminish a *person*'s value, on Hampton's account, follow a similar pattern. They disregard the entitlements of the person and thereby deny that the person has the value that generates the entitlements. This denial diminishes the person, causing her moral injury.

Hampton argues that there are two kinds of moral injury: 1) damage to the realization of the victim's value and 2) damage to the acknowledgement of the victim's value (Hampton 1992, 1678 and 1679). Put simply, a person sustains the first kind of moral injury when she is prevented from doing, having or being what she is entitled to do, have or be. This kind of damage, for Hampton, is done through

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[23] At least on my reading, Hampton does *not* understand appearance of someone's degradation to mean the appearance that someone has *become* less valuable.

[24] I understand Hampton to hold that all moral injury is caused by diminishment—i.e. that there are no other causes of moral injury other than diminishment. I will not defend any particular view of this issue, but I am inclined to think that there are ways of causing moral injury that do not involve diminishment. Moreover, Hampton appears to hold that all wrongful acts are wrongful because they cause moral injury. Here too, I will not defend any particular view. It is enough, for my purposes, that *some* wrongful acts are wrongful because they cause moral injury. I am only looking for one way of treating immunities that wrongs immunity-holders.

[25] Many find it odd, or worse, to say that an object has entitlements. In using Hampton's example I do not mean to take a stand on the problem of objects' capacity to have rights; I use Hampton's example simply for its (not inconsiderable) explanatory power.

harm that results from a wrongful act, where harm is defined as "a disruption of or interference in a person's well-being, including damage to that person's body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement" (Hampton 1992, 1662). A first approximation understanding of the second kind of moral injury is relatively self-evident. Damage to the acknowledgement of a person's value can be done by an act that has no harmful effects (where harm is defined as above). I will have more to say about this second kind of moral injury in a moment.

I reproduce the gruesome example Hampton uses to illustrate the application of her analysis. The example is of a white farmer who causes moral injury to a black farmhand and his four sons.

> When one day the farmhand did something that enraged the farmer, the farmer apprehended him and his four sons, put them in large burlap bags, hung the bags holding the men to a tree, and began burning them. Before he was burned, one of the men asked for a cigar. The farmer answered him by using a knife to slit the bag holding him, cutting off the man's penis, and then sticking it in his mouth, saying "Here, smoke that." (Hampton 1992, 1675)

The farmhand and his sons had entitlements to not be burned and to not be mutilated. The farmer disregarded these entitlements. Because of the meaning relevant social rules assign to the acts of burning a person in a bag, cutting off a man's penis and treating the penis as if it were not a sexual organ, the farmer's acts amounted to denial of the value of the farmhand and his sons (as persons) that generated their entitlements. In denying the value of the farmhand and his sons, the farmer diminished them (created the appearance of their degradation) and caused them moral injury. The farmhand and his sons sustained both kinds of moral injury named above. The farmhand and his sons sustained damage to the realization of their value (the first kind of moral injury) when they were prevented from securing what their value as persons entitled them to secure—their autonomy, their bodily integrity, their possession of property and their lives. The farmhand and his sons also sustained damage to the acknowledgement of their value (the second kind of moral injury). The farmer's acts encouraged other people—other white farmers, other black farmhands and even the victims themselves—to believe that the farmhand and his sons lacked the value of persons that generates entitlements to autonomy, bodily integrity and so forth. Notice that this moral injury could have been inflicted even if the farmer had not harmed the farmhand and his sons. Suppose, for example, that the farmer had not burned the farmhand and his sons but instead had spat on

them in full view of other farmers and farmhands. The farmer's act, though minimally harmful, would have resulted in significant damage to the acknowledgement of the victims' value.

In what follows, I focus solely on moral injury as damage to the acknowledgement of a person's value. I will continue to use Hampton's example of the farmer's burning and mutilating the farmhands. The farmer's actions caused both kinds of moral injury; I will focus on the way in which the actions caused the first kind of moral injury—damage to the acknowledgement of the farmhands' value. I will identify a way of treating claims and immunities that causes this kind of moral injury without violation. It may be possible to show how this way of treating claims and immunities causes the first kind of moral injury—damage to the realization of a person's value—but the more limited demonstration is sufficient for my purposes. From now on I will use the term "moral injury" to refer only to damage to the acknowledgement of a person's value.[26]

2.3: The Concept of Moral Injury Further Elaborated

Several points of clarification are overdue. More must be said about how acts can constitute denial. We must also ask how denial can create the appearance of degradation and, importantly, *to whom* denial causes the victim to appear degraded. The third point I will address is more difficult and concerns the relationship between the appearance of degradation and moral injury. I will argue that Hampton would do best to understand the relationship to be a causal and not a constitutive relationship.

2.3.1: Acts that constitute denial

In the examples above Hampton maintained that acting in a certain way *constitutes* denial of something. Burning the Book of Kells *would be* to deny its value; burning and mutilating the farmhand and his sons *was* to deny their value as persons. This is the idea of expressive non-linguistic acts. I have already mentioned briefly that Hampton deploys a Gricean analysis of the expressive meaning of acts.

[26] I am also somewhat dubious of the fit between the first kind of moral injury (damage to the realization of a person's value) and Hampton's larger system. It is not clear to me, for instance, whether diminishment could cause or constitute this kind of moral injury. It seems more likely that this kind of injury would cause diminishment. What this would mean for Hampton's analysis is a subject I cannot pursue here.

The details of Grice's theory (and Hampton's appropriation of it) are not crucial here.[27] What is important is the idea that social rules can make it the case that certain acts, in certain contexts, have certain expressive meanings.[28] Indeed, it is generally agreed that social rules determine the "meaning" of more than acts. John Searle, for example, writes of social rules of the form "*X* counts as *Y* in context *C*", arguing that rules of this form can be seen to determine what counts as a courthouse, what a religious sanctuary, and so forth (see Searle, 43-51).[29] I will say an act *communicates* or *expresses M* when *M* is an expressive meaning of the act as determined by relevant social rules.[30]

So, for example, in most parts of the United States one can usually beckon without giving offense by waving one's fingers up and down, palm up, while in China such a gesture conveys disrespect—to beckon without giving offense, one's palm should face down. Social rules likewise determine which acts have the expressive meaning of greeting, thanking, ignoring, respecting, paying a bill, incurring a debt, voting, obtaining a degree, becoming an adult, getting married or divorced, attending a religious service, committing a crime, and so on.[31] Most directly to the point (for our case), rules determine which acts count as denial. In many parts of the world (I have in mind southern and eastern Africa in particular), a person who looks an elder in the eyes when being spoken to communicates the view that the elder does

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[27] Hampton cites four ways Grice argues conduct can be meaningful: Natural meaning, word meaning, speaker meaning and conversational implicature (Hampton 1992, 1675-1678, citing Grice 1989).

[28] I do not intend to make much more explicit what I have in mind when I use the word "meaning." On Grice's account, "*x* meant something" is roughly equivalent to "Somebody meant something by *x*", and "*A* meant something by *x*" is roughly equivalent to "*A* in tended the utterance of *x* to produce some effect in an audience by means of the recognition of this intention" (Grice, 220). Searle (1969) attempts to amend this overly intention-centric account by acknowledging the role of social rules. For Searle, (in the case of illocutionary acts, which I discuss further below) a speaker means *x* when "the speaker intends to produce a certain effect by means of getting the hearer to recognize his intention to produce that effect; *and furthermore*, if he is using words literally, he intends this recognition to be achieved *in virtue of the fact that* the rules for using the expressions he utters associate the expression with the production of that effect" (Searle, 45).

[29] Andrew Altman discusses Searle in these terms (and uses the courthouse example) on page 78 of Altman's "Expressive Meaning, Race, and the Law" (*Legal Theory*, 5 (1999), 75-99). The meanings of acts or spaces that are determined by such social rules can be distinguished from meanings determined by physical properties or "natural" meanings. Thus, while what counts as a courthouse is determined by social rules, what counts as a physical shelter is not (Altman, 78). Some, like Grice, argue that just as physical spaces, like shelters, can have natural meanings, so acts can have natural meanings. Hampton follows Grice on this point. Whether or not acts have a natural meaning is not crucial to the argument I present here, although the existence of natural meaning would be relevant if I were to work out the implications of my argument in more detail.

[30] What an act communicates or expresses could be contrasted with the natural meaning of an act, which we might call *evidence* given by the act. This is the term Hampton uses when employing Grice's analysis of natural meaning.

[31] Most of the items on this list come from Altman, 78 and page 1506 of Anderson and Pildes' "Expressive Theories of Law: A General Restatement" (*University of Pennsylvania Law Review*, vol. 148 (May 2000); 1503-1575).

not hold the social and moral stature that the elder holds.[32] In most parts of the United States, by contrast, the expressive meanings of looking an elder in the eyes and failing to look an elder in the eyes are nearly reversed.

Importantly, the idea that social rules determine the meaning of acts has implications for *linguistic* as well as non-linguistic acts. J. L. Austin famously made the case for understanding some speech as a kind of act.[33] One of his speech-act examples should illustrate the point.[34] Two men stand beside a woman. One of the men turns to the other and says, "Shoot her." The other man is shocked, but pulls out a gun and shoots the woman. The first man can be said to have performed several different speech-acts. First, he performed what Austin calls a locutionary act: he made sounds that have a certain sense and reference as determined by English language conventions.[35] Second, the man performed what Austin calls a perlocutionary act: *by* saying, "Shoot her," he *shocked* the second man and *persuaded* him to shoot the woman. This second kind of speech-act is defined in reference to the effects of the act. Third, the man performed what Austin calls an illocutionary act: *in* saying "shoot her", he *urged* the second man to shoot the woman. Notice that, depending on the context, the first man might have used different locutionary acts to perform that same illocutionary act of urging the second man to shoot the woman.[36] Moreover, performing the same locutionary act, in a different context—in the context of a joke, for example—the man might not have performed the illocutionary act of urging the second to shoot the woman.

Of the three kinds of speech-acts just enumerated, it is illocutionary acts that are of greatest importance for understanding what kinds of acts can constitute denial. I will say *Y* performs the illocutionary act of denying *X*'s *F* (where *F* is some feature of *X*) if the relevant social rules give *Y*'s act the expressive meaning, "*X* does not have *F*." Part of what it means for the relevant social rules to give *Y*'s act the expressive meaning "*X* does not have *F*" is for it to appear to competent navigators of the

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[32] This is an example taken from Tsitsi Dangarembga's *The Book of Not* (Banbury, UK: Ayebia Clarke Pub., 2006).
[33] See Austin's *How to Do Things with Words* (Cambridge, MA: Harvard University Press, 1962).
[34] This is Rae Langton adaptation of Austin's own example (Austin, 121), used on pages 27 and 28 in her essay, "Speech Acts and Unspeakable Acts," Chapter 1 in her *Sexual Solipsism* (Oxford: Oxford University Press, 2009).
[35] See Austin, 108.
[36] He might has said, "This woman deserves to be shot." Or, if they were members of a band of thugs looking to revenge a recent police tip-off, he might have said, "This is the woman who spoke to the police."

relevant social rules that *Y* intends that others understand her to express "*X* does not have *F*" by her act.[37] A simple example might be where the man who said, "Shoot her," in the example above, first said, of the woman, "She is not innocent." Assuming the context does not give the utterance an ironic or otherwise "non-standard" meaning, the man performs the illocutionary act of denying the woman's innocence because relevant social rules give the act the expressive meaning, "The woman does not have the feature of innocence." All linguistic acts that are illocutionary acts with the expressive meaning, "*X* does not have *F*" constitute denial of *X*'s *F*.

Similarly, when Hampton holds that *Y*'s non-linguistic act of intentionally disregarding *X*'s entitlement *E* is for *Y* to deny *X*'s value *V*, I take Hampton to mean that *Y*'s intentionally disregarding *X*'s *E* has the expressive meaning "*X* does not have *V*." In a moment I will turn to the evaluation of Hampton's specific claims about the expressive meaning of intentionally disregarding an entitlement. The foregoing is offered in an attempt to explain Hampton's general idea about acts' constituting denial. Later, I will return to the role of linguistic acts in causing moral injury. The main idea, for now, is that the expressive meaning of many acts (linguistic and non-linguistic) is determined by social rules.

2.3.2: Denial that creates the appearance of degradation

Denial of a person's value can create the appearance of her degradation.[38] The relation between denial of value and the appearance of degradation is therefore different from the relation between the act of burning, for example, and denial of value. The farmer's act of burning *counted* as denial of the farmhand's and his sons' value because of certain social rules. In part, this is to say that it appeared to competent navigators of the relevant rules *that the farmer meant*, by the act of burning, "the farmhand and his sons do not have the value of full personhood." Once this denial was performed, it was a further question whether it would appear to anyone *that* the farmhand and his sons did not have the value of full

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[37] See Grice, 220 and Searle, 45.

[38] I understand the creative relation to be a causal one. But by "causal," here and throughout the rest of the essay, I mean to refer to a very loose sense of causality. For the most part, when I write of *A*'s causing *B*, I mean to refer to *A*'s causal contributions to *B*, whatever they are. I try to indicate the loose sense of causality being referred to by using phrases like "*A can* cause *B*." This phrase still does not isolate the weak sense of causality I wish to use. A more adequate phrase might be "*A* can contribute causally to *B*," but I opt to use the shorter phrase for the sake of convenience and insert this note.

personhood. We can say that whereas the farmer's act of burning the farmhand and his sons *constituted* denial of their value, denial of their value *caused* (created) the appearance of their degradation.

Notice that after determining that the farmer's act counted as denial of the value of the farmhand and his sons, the question to ask was whether it would appear to *anyone* that the farmhand and his sons lacked the value the farmer denied. Hampton does not limit her interest to what appears to be the case to competent navigators of social rules. She does not explicitly address this question. To create the appearance of Alex's degradation, on this account, is then to make it the case that it appears to anyone else that Alex is degraded. Obviously, however, when thinking about wrongdoing, it matters to us to whom a person appears degraded and for what reasons. Consider one case where I observe two people interacting in a language and according to social rules that are unfamiliar to me; suppose the actions of one party make it appear to me that the other party is degraded. Contrast this first case with another where I am confident of my understanding of the relevant social rules at play and the actions of one party make it appear to me that the other party is degraded. In the former case, I will probably hold to the appearance of degradation much more lightly, knowing that I may have misread some of the actions of the two people interacting. If, for example, I concluded from one party's actions that she thought the other worthy of contempt, I might agree that the other is worthy of contempt, but tentatively. A number of complicated questions arise when we look at cases in which those to whom a person appears degraded (because of denial of her value) and the person who denies her value are not competent navigators of the same social rules. In the rest of my examples I will focus on relevant actors who are competent navigators of the same social rules. So, for me, to ask if denial of a person's value creates the appearance of her degradation will be to ask if it would appear to competent navigators of the same social rules most relevant to the denial in question that the person is degraded.

I offer a final general comment about denial of value and the appearance of degradation. The efficacy of the denial of a person's value in creating the appearance of degradation depends, of course, on a number of factors. Among the factors is the relation of the people to whom it might appear that the victim is degraded to the person expressing the denial. I will return to this idea in Chapter 3.[39]

[39] See the end of 3.1.3.

2.3.3: Appearance of degradation and moral injury

Finally, there is the question of how the appearance of degradation relates to moral injury (damage to the acknowledgement of a person's value). Does the appearance of degradation *cause* moral injury? Does it *constitute* moral injury? *Damage* to the acknowledgement of a person's value can be understood relatively easily as unfavorable change (or prevention of favorable change) in the acknowledgement of a person's value. Unsurprisingly, then, the answers to the questions just posed turn on the meaning of the terms "acknowledgement" and "appearance." One might suppose that for *X* to appear degraded to *Y* is for *Y* to believe that *X* is less valuable than she really is. One might also suppose that for *Y* to *acknowledge X*'s value is simply for *Y* to believe that *X* has the value she has. Damage to the acknowledgement of *X*'s value would then be unfavorable change (or prevention of favorable change) in *Y*'s beliefs regarding *X*'s value. On these definitions appearance of degradation could constitute moral injury insofar as those to whom the person appears degraded believe that she is less valuable than she really is. Hampton seems to hold that the appearance of degradation constitutes moral injury, although a few of her statements suggest that the appearance of degradation causes moral injury.[40]

There are more plausible definitions of acknowledgement and appearance, however, and on these definitions the appearance of degradation can cause but not constitute moral injury. Appearance might be distinguished from belief—so that it could appear to me that *P* but I could fail to believe that *P*[41]—and acknowledgement might be said to be a kind of expressive act, where acknowledgement of *V* has the same expressive meaning as the assertion that *V* exists (in normal contexts). If either or both of these definitions are accepted, the appearance of degradation cannot constitute moral injury. If to acknowledge a person's value is simply to believe that she has the value she has *but* appearance is distinguished from belief as above, then the appearance of a person's degradation need not be damage to the acknowledgement of the person's value. If, on the other hand, acknowledgement of a person's value is an expressive act meaning the same as the assertion that her value exists, then the appearance of her

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[40] See footnote for the beginning of 2.2 above.
[41] The Stoics forwarded a view of this sort, commonly referred to as their "doctrine of assent." See, for example, the citation from Diogenes Laertius (*DL* 7.46-7.49) on logic and theory of knowledge in Inwood and Gerson, page 111.

degradation (on either definition of appearance) need not be damage to the acknowledgement of a person's value. This is because it might appear to *Y* that *X* is degraded while *Y*'s actions do not express the idea that *X* is degraded (so that there is the appearance of degradation but no moral injury), or *vice versa* (so that there is moral injury but no appearance of degradation). Knowing and regretting, for example, that I have been raised so that the homeless appear to me to be of little worth (and, to that extent, appear degraded), I might decide to serve food in a soup kitchen (so that my actions are actively acknowledging the value of the homeless and are not causing them moral injury). Or, to use an example just offered above, an elder might appear to me to be deserving of respect (and to that extent not appear degraded) and yet I might fail to show respect for the elder because my way of showing respect (avoiding her gaze) is taken by the elder herself and by other relevant social actors to mean that I do not respect the elder (so that my actions cause the elder moral injury). On plausible definitions of acknowledgement and appearance, then, diminishment cannot constitute moral injury.

Quite clearly though—and on any of the definitions put forward above—the appearance of degradation can *cause* moral injury. When fellow pedestrians mistreat a homeless person—say, by mockingly imitating the way she talks—it might appear to me that the homeless person is worth less than she actually is, and this appearance of degradation could have several effects on me. It might play a role in causing me to join the mockers in mistreating the homeless person. If acknowledgement of a person's value is defined as an expressive act, then the appearance of degradation here has caused damage to the acknowledgement of the homeless person's value because I have joined in an activity which expresses the view that the homeless person does not have the value she has. This is a case where the appearance of degradation helps to cause mistreatment, and the mistreatment constitutes moral injury because it is unfavorable change in acknowledgement of the victim's value. If acknowledgement is solely a matter of belief, it is still clear that the appearance of the homeless person's degradation could cause her moral injury—for, as a result of the appearance of her degradation (caused by the mockers' mistreatment of her), I could come to believe that the homeless person has less value than she has. It is worth pointing out that moral injury could itself cause further appearance of degradation, and thereby, further moral injury. When

I join the mockers of the homeless person I begin to participate in creating the appearance of her degradation, which can then further damage the acknowledgement of her value.[42]

2.4: Causing Moral Injury: Claim-Violation and Claim-Contradiction

Before turning to Hampton's argument about what kinds of acts cause moral injury, it is worth setting out, in broad strokes, my position on what we have seen of Hampton's analysis. I accept Hampton's general framework. I endorse the Kantian conception of human value. I agree that at least one important kind of expressive wrongdoing is that which causes moral injury. In what follows, I will only concern myself with the second type of moral injury, damage to the acknowledgement of the victim's value. I accept the idea that denying a person's value can create the appearance of her degradation. I have argued that Hampton should understand the appearance of degradation to sometimes cause but not constitute moral injury.

I will first offer Hampton's account of moral injury as caused by claim-violation and then complicate the account with a number of distinctions that will become useful in the third chapter. The basic aim is to loosen claim-violation from other elements Hampton recognizes in the causal chain leading to moral injury; once loosened, it will be easier to see, in the third chapter, how acts that are not claim-violation can still cause moral injury. Finally, I will suggest that Hampton's account is overly consequentialist, ignoring the fact that some acts can constitute wrongdoing directly, without first causing the appearance of the victim's degradation or even moral injury. In the next chapter I will show how claim-contradiction (one element in moral injury's causal chain) can cause moral injury without involving claim-violation, how the analysis of claim-contradiction can translate into an analysis of immunity-contradiction. I will also identify one last way of wronging immunity- and claim-holders that bypasses violation.

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[42] It should be possible to bring into the causal narrative Hampton's idea of damage to the realization of a person's value. I will not do that here.

2.4.1: Hampton's Account

When drawing the Book of Kells analogy to illustrate diminishment, Hampton claimed that someone who intentionally disregards the entitlements of the Book of Kells is "denying that the object really has [the] value [that it has], because he is denying the entitlements which that value generates" (Hampton, 1992, 1674). As we saw earlier, the value that generates the entitlement is part of the value of the entitlement-holder. If the entitlement-holder is a person, we can understand Hampton to be suggesting that intentional disregard of an entitlement is the sort of act that can cause moral injury. Intentional disregard of an entitlement constitutes denial of the value that generates the entitlement; denial of the value that generates the entitlement can create the appearance of degradation of the entitlement-holder (because the value that generates the entitlement is part of the value of the entitlement-holder); the appearance of degradation of the entitlement-holder can cause moral injury to the entitlement-holder. We must also account, however, for the denial of the entitlement itself. Hampton writes that intentional disregard of an entitlement constitutes denial of the value that generates the entitlement *because* it also constitutes denial of the entitlement itself. This implies that Hampton holds denial of the entitlement itself to constitute denial of the value that generates the entitlement. With all this said, the passage quoted above seems to imply the following set of axioms.

*A*1: Intentional disregard of an entitlement *constitutes* denial of the entitlement.
*A*2: Denial of an entitlement *constitutes* denial of the value that generates the entitlement.
*A*3: Denial of the value that generates an entitlement *can cause* the appearance of the entitlement-holder's degradation.
*A*4: The appearance of the entitlement-holder's degradation *can cause* moral injury to the entitlement-holder.

Taking into account the transitivity of the constitutive relation, *A*1 and *A*2 imply that intentional disregard of an entitlement constitutes denial of the value that generates the entitlement. Moreover, *A*3 and *A*4 imply that denial of the value that generates an entitlement can contribute to causing moral injury to the entitlement-holder since, loosely speaking, if E_1 can cause E_2 and E_2 can cause E_3 then E_1 can "help" cause E_3. Putting these two implications together we arrive at the following:

*A*5: Intentional disregard of an entitlement *can help cause* moral injury to the entitlement-holder.

In Hampton's farmhand example, the farmer's intentional disregard of the farmhands' entitlements to not be burned or mutilated helped cause damage to the acknowledgement of the farmhands' value (one kind of moral injury). In a moment, I will offer a schematic that should provide a helpful summary of the relations just discussed. I will then turn to an evaluation of each of the four axioms. However, there are several terminological issues that must be addressed before moving forward.

First, I think it is fair to substitute in "claim" (by which I mean "Hohfeldian claim") where Hampton uses "entitlement."[43] When sketching the Book of Kells analogy Hampton writes that "we take the object's value to preclude many kinds of treatment with respect to this object" (Hampton, 1992, 1674); and when talking of moral injury to persons, she writes, "[a] person behaves wrongfully in a way that effects a moral injury to another when she treats the person in a way that is precluded by that person's value" (Hampton, 1992, 1677). She seems to have in mind, here, acts that disregard the sort of normative limits imposed by Hohfeldian claims, which make it the case that one *ought not* perform certain acts.[44] Second, when Hampton writes of the disregard of these claims she seems to have in mind what is expressed by the term "violation" (at least on its strict definition, given above)—namely, doing what the claim makes it the case one ought not do or failing to discharge a duty correlative to the claim. Third, notice that the word "denial" appears in two contexts in the above list of axioms: the denial of a claim and the denial of the value that generates the claim. It will be easier to give a clear argument if I introduce the term "contradiction" and use it in place of "denial" in the first context. To contradict a claim, in my sense, is simply to deny that the claim-holder has the claim. I translate *A*1 through *A*5 as follows.

*A*1': Intentional violation of a claim *constitutes* contradiction of the claim.

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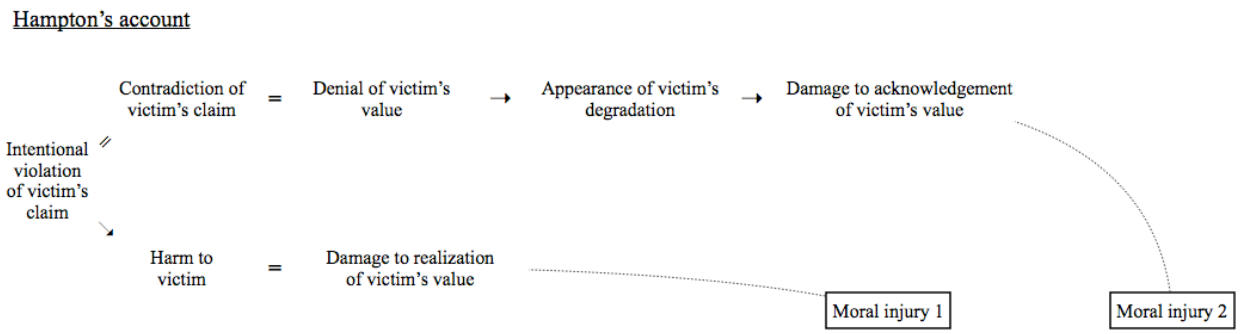
[43] It might be safest to replace "entitlement" with "*prima facie* claim." I will not be considering how my analysis would account for rights-conflict, however, so an interest in simplicity leads me to replace "entitlement" with "claim."

[44] I continue to ignore the problem of determining whether or not non-person objects can have entitlements, rights or claims. If Hampton accepts that to have a claim is to have a right, and if she further accepts that non-person objects cannot have rights, then she cannot hold that entitlements are claims (because she says the Book of Kells has entitlements). My guess is that Hampton would hold that non-person objects *can* have rights, though they might not be exactly like the rights that persons can have; and I would guess that she would hold that the entitlements objects can have are also somewhat dissimilar from the entitlements persons can have. If Hampton would hold these two things, then she could very well have claims in mind when she writes of entitlements—she could just say the claims non-person objects have are not the same as the claims person's have. Hampton makes statements about the entitlements of non-person objects that I think she means to apply to persons (she uses the Book of Kells example as an illustration, after all); I reference her statements about non-person objects because I find them to be some of the clearest articulations of her views, which, as I say, I think also apply to persons.

*A*2': Contradiction of a claim *constitutes* denial of the value that generates the claim.
*A*3': Denial of the value that generates a claim *can cause* the appearance of the claim-holder's degradation.
*A*4': The appearance of the claim-holder's degradation *can cause* moral injury to the claim-holder.
*A*5': Violation of a claim *can help cause* moral injury to the claim-holder.

I accept *A*5', but I will show that *A*1' and *A*2' are false. I will agree with *A*3', but identify another cause of diminishment of a claim-holder. I agree with *A*4'. Axioms *A*1' through *A*4' can be represented schematically as follows.

Figure 2.1: Hampton's account



The key for the Figure 2.1 is the following.

A = B	A constitutes B
A → B	A can cause B

I have deliberately left out mention of appearance of degradation in the damage to realization of value track, because it is unclear to me where Hampton would want to fit it in. The main purpose of the figure is to help illustrate the meaning of *A*1' through *A*4'.

Finally, in the evaluation below, I will represent the idea that a certain value generates a certain claim as follows, where P_1 is a certain person, C_1 a certain claim and V_1 a certain value.[45]

P_1 has C_1 because P_1 has V_1

[45] Here I rely on Hampton's notion of value generating claims (or, as Hampton calls them, entitlements). Recall that Hampton says that it is part of what it means for someone or something to have value for it to be the case that there are certain ways of treating the person or thing that are inappropriate. We might understand Hampton to hold that value *entails* claims. In the next chapter I will use Rainbolt's "key argument form" to give a more nuanced picture of the relationship between value and the claims it generates.

In the argument below, Afonso is P_1 and has C_1 because he has V_1. Manuel will be his adversary.[46]

2.4.2: Evaluation of *A*1' (Intentional violation of a claim constitutes contradiction of the claim)

According to *A*1', if Afonso has C_1, then for Manuel to intentionally violate Afonso's C_1 is for Manuel to contradict Afonso's C_1. Suppose that Afonso's C_1 makes it the case that Manuel should not break into Afonso's house and steal Afonso's KitchenAid mixer. It is actually quite conceivable that Manuel could break into Afonso's house, steal Afonso's mixer and still acknowledge that Afonso had C_1. In fact, it is quite likely that Manuel's acts would not be understood as denying that Afonso had C_1; we know that many criminals are perfectly aware that their victims had claims against their committing whatever crime the criminals committed. It is still possible for the intentional violation of a claim to constitute contradiction of that claim, of course. To know whether or not and when it does we should look to the social rules that determine the expressive meaning of the act of intentional violation. Since there are at least *some* instances of intentional violation that do not constitute contradiction, however, *A*1' is false.[47] Of course, it may well be that every violation of C_1 will express the view that C_1 is less weighty than it actually is, and this, in turn, might create the appearance of the victim's degradation, causing the victim moral injury. I will not pursue this question, however. What I aim to do is unhinge the contradiction of claims from the violation of claims. Here I have shown that the violation of a claim does not always contradict the claim. It is also easy to see that one can contradict a claim—deny that it exists when it does exist—without violating it, linguistically perhaps. Grice, Searle and others have helped us see how non-linguistic acts can have meaning and constitute claim-contradiction. There are also straightforwardly linguistic ways of contradicting claims, however. Manuel might simply declare that Afonso has no claim against his taking the KitchenAid mixer.

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[46] "Afonso" is the name of a prominent Mwene Kongo (ruler of the African Kingdom of Kongo) who reigned from 1506 to the early 1540s. "Manuel I" (which I shorten to "Manuel") is the name of the king of Portugal whose reign coincided with Afonso's. Afonso wrote numerous, eloquent letters to Manuel and his successor, João III, informing them of the ways in which the Portuguese were mistreating the Kongo people. See Hochschild, pages 11 through 15.

[47] Another example: General Fonda is angry about the war. She sees Donald, a noncombatant, standing nearby. The General is so angry that she pulls out her pistol, says, "Donald, I know you have a legal claim that I not shoot you, but I'm so angry I don't care," and then shoots him in the head. In this case, the General has clearly violated Donald's noncombatant claim against being targeted with weapons of war, and yet she does not appear to have contradicted his claim—indeed, she explicitly acknowledged its existence.

2.4.3: Evaluation of *A*2' (Contradiction of a claim *constitutes* denial of the value that generates the claim)

Suppose that, according to the relevant social rules, Manuel's stealing Afonso's KitchenAid mixer did (in this particular instance) count as contradiction of Afonso's C_1 against Manuel's taking his mixer. Suppose further that Afonso has C_1 because he has some value V_1. It does *not* follow from Manuel's contradiction of C_1 that Manuel has denied Afonso's V_1. Manuel could acknowledge that Afonso has V_1 and simply deny that V_1 *generates* C_1. For Manuel to deny that Afonso's value generates a claim that it does generate can be a grave sort of mistake (and I will say more about this in a moment), but committing this mistake is not equivalent to denying that Afonso has V_1. *A*2' is false.

Consider two Christians, Mary and Simon, who endorse what Hampton calls the Christian conception of value, holding that humans are "intrinsically, equally, and permanently valuable insofar as each… is the child of God, made in His image" (Hampton 1992, 1673). Suppose Mary and Simon express agreement that humans' equal value as children of God amounts to V_2. It is possible for Mary to believe that V_2 generates C_2, a claim against being capitally punished that cannot be outweighed by other considerations, and for Simon to disagree. Let us suppose that Mary is right. Suppose now that Simon contradicts humans' C_2 by declaring loudly in city parks that some people have no claim against being capitally punished and by publicly donating large sums of money to groups that pressure the government to capitally punish certain classes of criminals. The question is this: By contradicting humans' C_2 is Simon *denying* that humans have V_2? That is, would Simon's contradiction of C_2 be assigned the expressive meaning of denial of V_2 by the relevant social rules? Although his contradiction of C_2 *might* be assigned this meaning, it need not be. Indeed, many people who disagree with each other about capital punishment have the sense that they share an understanding of the value of humans; they feel that they simply disagree about what the value of humans implies about how we should treat them.

I have tried to show, *contra* Hampton's assumption, that it is possible to contradict a claim without denying the value that generates the claim. It is also possible to deny a value that generates a claim without contradicting the claim generated. One could believe that the claim is generated by some

other value that, in fact, does not generate the claim. I will not pursue this idea any further; I offer it only to further loosen the putative connection between the contradiction of a claim and the denial of the value that generates the claim.

2.4.4: Evaluation of *A*3' (Denial of the value that generates a claim *can cause* the appearance of the claim-holder's degradation) and *A*4' (The appearance of the claim-holder's degradation *can cause* moral injury to the claim-holder)

Accepting *A*3' we get an important result. Since (as we have seen) contradicting a claim can, but need not, constitute the denial of the claim-holder's value, contradicting a claim can, but need not, cause the appearance of the claim-holder's degradation.

Let us return, now, to the observation that even if Simon's contradiction of C_2 does not count as denial of V_2, it seems his mistake—proclaiming that humans' value has does not generate a claim against being capitally punished that cannot be outweighed by other considerations—is a morally significant one. (We are still assuming, for the sake of argument, that Simon is wrong about this.) Simon's mistake seems morally significant not only because it could have deleterious consequences. Rather, his mistake seems, in its own way, disrespectful of humans and therefore wrongful. I want to suggest that we distinguish between the existence of a person's value and the importance of a person's value. While Simon's contradiction of C_2 (in the example above) does not constitute denial of the *existence* of humans' V_2, it does seem to constitute denial of the *importance* of humans' V_2. Just as denial of the existence of a person's value can cause the appearance that she lacks value that she has (that she is degraded), so it is easy to see that denial of the importance of a person's value can cause the appearance that her value is not as important as it is.

I propose that the latter appearance is also appearance of the person's degradation and that this kind of appearance of degradation also causes moral injury. The nature of humans' value—including its importance or weight—determines what sort of moral standing or status humans have. It is for someone to appear to lack the moral status she has for her value to appear less important than it is. Moral status, moreover, can be thought of as part of moral value. To cause the appearance that a person's value is less

important than it is, therefore, is to cause the appearance that her value is less than it is—that is, to cause the appearance of her degradation. Thus, Simon's contradiction of C_2, because it constitutes denial of the importance of humans' V_2, might create one kind of the appearance of our degradation.

The final step links these two kinds of appearance of degradation to two kinds of damage to the acknowledgement of a person's value. In my view, proper Kantian respect of a person demands not only that one acknowledge the existence of her value, but also that one acknowledge the moral status her value gives her. Proper Kantian respect of a person demands, in other words, that we acknowledge the *implications* of the person's value. This, again, is because a person's moral status—the implications or importance of the person's value—is *part of* her moral value. If Simon's contradiction of humans' C_2 constitutes denial that humans' V_2 generates humans' C_2 when it does (by supposition), Simon might create the appearance that humans' value is not as important as it really is and, in turn, might cause damage to the acknowledgement of the importance of humans' V_2, which is a kind of damage to the acknowledgement of humans' value. If Simon's contradiction of humans' C_2 constitutes denial of the existence of humans' V_2, Simon might create the appearance that humans' lack value they have and, in turn, might cause damage to the acknowledgement of the existence of humans V_2, which is another kind of damage to the acknowledgement of humans' value.

It seems to me that this move—distinguishing between the existence and importance of a certain value—or something like it, is one Hampton would accept. Its current formulation is problematic, however. Given the range of theories philosophers have put forward and will continue to put forward in their attempts to figure out what kind of status our value as humans gives us, it seems likely that every philosopher is wrong on at least some points, and most of us mostly wrong. Many philosophers, therefore, have and will put forward theories that create the appearance—to competent navigators of social rules that the philosophers share—that humans' value is not as important as it actually is. This, in turn, causes damage to the acknowledgement of the importance of humans' value. Have philosophers been wronging humankind in doing so, just as Simon did when he denied that humans' value gives them a claim against being capitally punished? The analysis given above seems to suggest that they have. This is counterintuitive (to say the least) because most philosophers' efforts, while perhaps misguided, hardly

seem wrongful. Indeed, philosophers' persistent attempts to understand the status humans have because of their value seem to evince a powerful respect for that value.

Suppose something like the following philosophical argument regarding global philanthropy is right: the value of the global poor is such that they have a claim against those of us who have more than we need that we give of what we have until giving more would make us needy ourselves. Let us call this argument Singer's argument.[48] Those philosophers who write essays explaining why the value of the global poor does not in fact generate such a claim would then be denying the importance of the value of the global poor. As these philosophers' essays are circulated (at the very least among other philosophers), their arguments might cause the appearance that the value of the global poor is not as important as it is—that it does not generate the claim it generates. Suppose the appearance philosophers had a hand in creating then helped a number of people decide against giving more support to efforts to reduce global poverty. We might understand this as prevention of favorable change in the acknowledgement—through the expressive act of devoting resources to a problem—of the importance of the value of the global poor. In such a scenario, on the analysis I have given, the philosophers who wrote essays attempting to debunk Singer's argument—though written in good faith—caused the global poor moral injury.

One might sensibly conclude that partly as a result of the philosophical efforts of the essay-writers mentioned above, many people were treated as if their value was less important than it actually was. But to say the essay-writers thereby *wronged* the global poor seems, to many, to stretch the meaning of the word "wrong." Even someone who agreed that essays written in support of extreme miserliness would wrong the global poor could point out that a number of the alternatives to Singer's demanding theory are, as far as we can tell, quite reasonable, even if, in the end, Singer turns out to be right. This idea is promising, I think, and offers a way to distinguish between denials of the importance of a person's value that do cause moral injury and those that do not.

What we need is a qualified definition of moral injury. We can say that damage to the acknowledgement of a person's value only constitutes moral injury if it is caused by someone *who should*

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[48] This argument resembles, at least vaguely, the argument Peter Singer notoriously defends in his "Famine, Affluence and Morality" (*Philosophy and Public Affairs*, No. 1 (1972)).

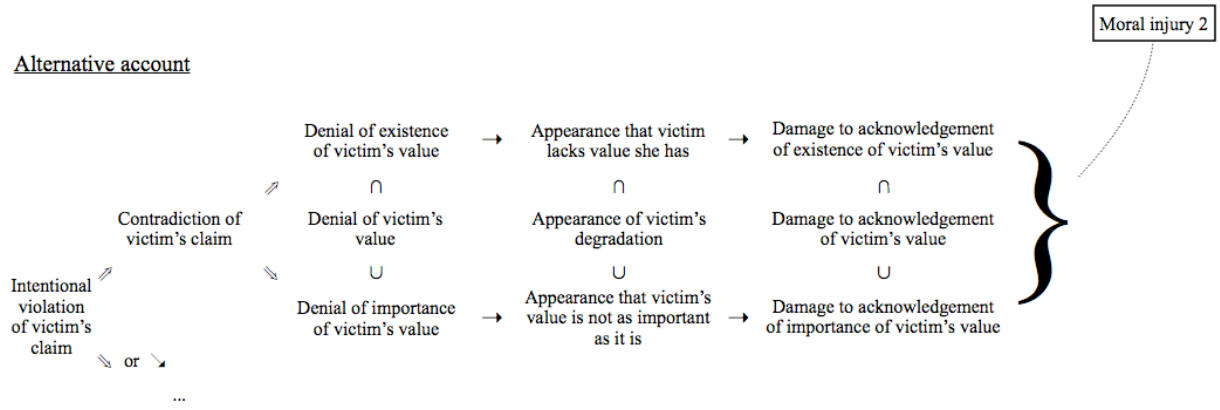
know better. This idea is perhaps difficult to pin down theoretically, but it has intuitive explanatory power. Philosophers have not been wronging humans as they have elaborated their theories of human value (many flawed, by supposition) to the extent that they are earnestly and responsibly tackling the questions they try to answer. It seems quite possible that a person might develop and propagate ideas in a reckless manner. In such a case, it does not seem far-fetched at all to say that the person is wronging at least a large number of humans. The Singer case, in particular, seems to be a borderline case. If Singer could come up with his theory, could we not say that his contemporaries should have known better, just as Singer did? This would help explain, I think, any split in opinions about whether Singer's theoretical adversaries *wronged* the global poor in the example given above (where we assume Singer is right).[49]

2.4.5: Figure 2.2

Another schematic representation is in order, now that I have suggested various emendations to Hampton's understanding of the relationships between violation, contradiction, denial of value, appearance of degradation and moral injury. I have made a similar suggestion at each point. Violation need not constitute contradiction; contradiction need not constitute denial of the existence of value but could, instead, constitute denial of the importance of value; denial of value can create two kinds of appearance of degradation, each of which can cause a kind of moral injury.

[49] For a recent discussion of the role of the epistemic requirement in determining responsibility for the consequences of actions, see Sher 2009.

Figure 2.2: Alternative account



The key for the Figure 2.2 is the following.

A ⇒ B	A can constitute B
A → B	A can cause B
A ∩ B	A is a kind of B

I have left out any representation of that which intentional violation of a claim could cause or constitute other than contradiction of the claim.

2.4.4: Summary

I have tried to show that the violation of a claim does not always constitute contradiction of the claim. I have also tried to show that the contradiction of a claim does not always constitute denial *of* the value that generates the claim; sometimes contradiction of a claim can constitute denial *that* the value generates the claim. While this might be taken to mean that contradiction of the second kind does not create the appearance of degradation, I have proposed that the notions of appearance of degradation and moral injury be expanded. One kind of appearance of degradation, I have suggested, is the appearance of the non-existence of the value in question; this kind of appearance of degradation can cause damage to the acknowledgement of the existence of the value. The second kind of appearance of degradation is the appearance that the value is less important than it really is; this kind of appearance of degradation can cause damage to the acknowledgement of the importance of the value.

2.5: Beyond Moral Injury

Until now, I have followed Hampton in limiting my inquiry into expressive wrongdoing to the sort of acts that cause moral injury. Although I do not claim to be offering a complete catalogue of methods of expressive wrongdoing, it is worth explicitly rejecting the consequentialist bent of Hampton's account of expressive wrongdoing, according to which an act's being wrongful has *only* to do with what it causes, namely, moral injury (damage to a person's value). One trouble with such a consequentialist account is that once moral injury is defined, a skeptic can always reach for an example of an act that causes moral injury but is clearly not wrongful. The Singer case, above, might be such an example. The skeptic can also reach for examples of acts that are clearly wrongful though they cause no moral injury. Suppose, for example, a certain Sid shouts racial epithets at a certain Venus, creating the appearance of degradation, at least on certain definitions, but causing no damage to the acknowledgement of Venus' value because those within hearing utterly reject the Sid's suggestion that Venus is less valuable than she is. This example is a problem for Hampton's analysis because although the victim's value has not been damaged, she has clearly been wronged.[50]

The less consequentialist expressivist theory of Elizabeth Anderson and Richard Pildes does a better job of accounting for the Singer and Venus cases (and others like them). According to Anderson and Pildes, "what makes an action morally right depends on whether it expresses the appropriate valuations of

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[50] Hampton writes that "actual harm is not necessary for a wrong to exist; for example an attempt at murder that fails and does no harm to the intended victim is still a (highly) wrongful act" (Hampton 1992, 1661) and "[s]ome immoral actions are immoral only because of what they express, and not because of any concrete damage they inflict" (Hampton 1992, 1681), but she understands immoral actions (immoral only because of what they express, as in the failed attempted murder case) to be immoral *because of* the moral injury they cause (distinguished from "concrete damage" and regular "harm"). She thus has no way of explaining why some acts that cause no moral injury (such as Sid's shouting racial epithets at Venus) nevertheless wrong the intended victim. Another sort of example that Hampton's account has trouble with concerns actions that constitute wrongdoing but cause neither moral injury nor even the appearance of degradation. Suppose that a certain James secretly works out a plan to murder a certain Simone but that when James attempts to execute his plans, he fails to murder Simone in such a way that no one, not even Simone, suspects James of making his attempt. It seems quite plausible to say that James has wronged Simone in attempting to murder her; and yet, James has caused Simone neither moral injury, on Hampton's definition, nor even the appearance of Simone's degradation, because no one has learned of James' attempt. At a stretch, one might say that James damaged the acknowledgement of Simone's value *via* the perpetuation of his own beliefs regarding Simone's value; but one would then still have no way of explaining why the attempted murder was *worse* than some other course of action he might have taken that would have done just as much to perpetuate his beliefs regarding Simone's value—such as meditating every day on how much he hates her.

(that is, attitudes toward) persons" (Anderson/Pildes, 1504), where "to express" means to make manifest in speech or action (Anderson/Pildes, 1508). On this account, it is of little importance that those who heard Sid's epithets were not thereby made to disacknowledge Venus' value; it was enough for Sid's actions to manifest an inappropriate attitude toward Venus for his actions to constitute wrongdoing. The Singer case is more complex—and I do not intend to go into it in depth—but the Anderson/Pildes account at least gives us the tools for constructing a more plausible explanation than the one given above. In particular, their account allows us to turn our focus away from the effects of the works of philosophy in question and toward the attitudes these works of philosophy expressed at their writing. This allows us to differentiate between two pieces of philosophical writing that have the same effect in terms of the acknowledgement of the value of humans but that express different attitudes at their writing. Determining which attitudes are appropriate—and, thus, which works of philosophy wrong humankind—is clearly a difficult task, and it may not yield results that cohere perfectly with our intuitions. But this analysis allows us to be more flexible in our evaluation of philosophers' work so that we can more easily avoid the preposterous conclusion that all (or at least most) moral philosophers are wronging humankind in developing what must be flawed accounts of human value. It is not clear to me how Hampton's more consequentialist account of expressive wrongdoing should be combined with the less consequentialist account put forward by Anderson and Pildes. The latter account seems to do a better job of identifying cases of wrongdoing. On the other hand, it seems right that at least with some cases of wrongdoing, the fact that the act in question causes moral injury is a crucial part of our evaluation of the act.

What I aim to have done here is simply to have identified *another* way of treating claims that wrong the claim-holders. Here, as in Hampton's account, we are concerned with acts that have certain expressive meanings. We can focus on acts that constitute contradiction of a claim, denial of the existence of the value that generates the claim or denial of the importance of the value that generates the claim. Claim-violation can be such an act, but it need not be (as shown above). In the next chapter I will argue that one way to wrong a claim-holder is to cause her moral injury by contradicting her claim—suggesting, through word or action, that it does not exist—without necessarily violating the claim (relying on the Hampton account). I will also argue that contradicting a claim can constitute wrongdoing without causing

the claim-holder moral injury, simply by expressing inappropriate attitudes about the claim-holder's value (relying on the Anderson/Pildes account). Next, I will argue that an immunity-holder can also be wronged through the contradiction of her immunity in these two ways. Finally, I will point to a third way in which *legal* immunities (and claims) can be treated that constitutes wrongdoing.

CHAPTER 3: Immunity-Contradiction

3.1: Contradiction

I have tried to show that the contradiction of a claim can cause two types of moral injury: damage to the acknowledgement of the *existence* the victim's value and damage to the acknowledgement of the *importance* of the victim's value. I have tried to show that contradiction of a claim causes these two types of moral injury by denying the victim's value and denying the importance of the victim's value, respectively. I have also tried to show that it is possible to violate a claim without contradicting it. The question naturally arises: Is it possible to contradict a claim without violating it, while still causing the kinds of moral injury just named? Hampton, for one, agrees that the answer is affirmative. As we saw before, she holds that "[a] person behaves wrongfully in a way that effects a moral injury to another when [1] she treats that person in a way that is precluded by that person's value," but she continues: "*and/or* by [2] representing him as worth far less than his actual value" (Hampton, 1992, 1677, emphasis added). I interpret this last method of effecting moral injury as equivalent to denying the existence of the victim's value and denying the importance of the victim's value. In other words, I think Hampton's statement supports the idea that moral injury can be inflicted through the contradiction of a claim directly—non-linguistically or linguistically—without violation.

We have already seen how this might work. Humans might have a claim against being capitally punished; but Simon need not violate that claim in order to contradict it. Given the right social rules, of course, violating the claim *could* count as contradicting the claim. As we saw in the last chapter, however,[51] Simon could contradict the claim through the non-linguistic act of giving financial support to organizations that pressure the government to use capital punishment. Though obvious, it is worth stating explicitly that claims can be contradicted linguistically as well as non-linguistically. Suppose Manuel's friend, João, owes Afonso a great deal of money. Manuel might say to João, "You don't really have to give Afonso the money." In certain contexts (under certain social rules), this linguistic contradiction—along with other forms of contradiction—could constitute denial of Afonso's possessing the sort of value

[51] See section 2.4.3.

that would give weight to promises made to him. This implication could create the appearance of Afonso's degradation, which could cause damage to the acknowledgement of Afonso's value. Notice that Manuel would not, thereby, have *violated* the claim in question, for it is not Manuel who owes Afonso the money.

Once we acknowledge that one can cause moral injury to a claim-holder through contradicting her claim, without violating that claim, the Anderson/Pildes account helps us see that one can wrong a claim-holder through the contradiction of her claim without violating that claim *and without causing her moral injury*. The contradiction of a claim, if it expresses the wrong attitudes about the value of the claim-holder, constitutes wrongdoing, whether or not it causes moral injury.

Like violation, contradiction of a claim is a way of treating the claim that wrongs the claim-holder. I am in search of a way of treating an immunity that wrongs the immunity-holder. I propose that just as it is possible to cause wrong a person by contradicting a claim that she has, so it is possible to wrong a person by contradicting an immunity that she has. Immunity-contradiction is a form of wrongdoing that is analogous to claim-violation. Immunity-contradiction, of course, operates at a different level. Violating a claim, for instance, can be a way of contradicting it. I will re-summarize Hampton's analysis, as I suggest it be amended for application to the cases I am interested in. Kant shows us that all humans share a certain intrinsic value. Grice shows us that many acts have an expressive function. Hampton shows us that, of the expressive acts, some create the appearance of the victim's degradation. I argue that the *contradiction* of the victim's claim or immunity creates the appearance of the victim's degradation either when it constitutes *denial of the existence of the value* that generates the victim's claim or immunity, or when it constitutes *denial of the importance of that value*. Respectively, these denials can create the *appearance that the victim's value does not exist* or the *appearance that the victim's value is not as important as it is*. These two kinds of appearance of degradation can cause, respectively, the following two forms of *moral injury*: 1) damage to the acknowledgment of the *existence* of the victim's value and 2) damage to the acknowledgement of the *importance* of the victim's value. Finally, the contradiction of a victim's claim or immunity can *constitute* wrongdoing directly, whether or not it causes moral injury, so long as it denies the existence or importance of the victim's value.

In the next section, I will introduce a kind of formal analysis that will help clarify *how* contradiction of a claim or an immunity can constitute denial of either the existence of the value that generates the claim or immunity or the importance of that value. I will then move to the problem of extending this analysis to legal claims and immunities. Finally, I will introduce a third way of treating a claim or immunity that wrongs the claim- or immunity-holder without violation.

3.1.1: The Key Argument Form and Claim-Contradiction

I will use a modified version of what George Rainbolt calls in his book on rights the "key argument form."[52] Rainbolt argues that the key argument form captures at least some of the ways we conceive of the relationship between a person's possessing a claim or immunity and whatever it is that gives that person the claim or immunity. We begin by thinking of the fact that a person possesses a claim or immunity as following from two other facts. This situation can be represented with a formal argument. The conclusion states that some person *P* has some claim *C*. The first premise states that *P* has some value *V*. The second premise states that if *P* has *V*, then *P* has *C*. The second premise can be thought of as a moral rule that tracks the fact that *V generates C*. The modified key argument form can be symbolized as follows.

1) *P* has *V*.
2) If *P* has *V*, then *P* has *C*.
Therefore,
3) *P* has *C*.

To demonstrate how the key argument form can represent situations of interest, I return to Hampton's farmhand case. I will simplify exposition by referring to the farmhand and his sons simply as Farmhand and to the farmer as Farmer. Farmhand has a claim against Farmer that Farmer not burn Farmhand in a burlap bag because Farmhand has the value which all humans have in virtue of their full

[52] Rainbolt first introduces the key argument form on page 120. The final form is given on page 221. I have modified the key argument form by replacing "feature" in the premises with "value." I do this in order to make it easier to use the key argument form to clarify the Hamptonian analysis given in the second chapter. I will return to Rainbolt's version of the key argument form when I try to extend the analysis to the contradiction of legal claims and immunities.

personhood. This situation can be expressed in the key argument form as follows. Call this argument "Burn."

1) Farmhand has the value which all persons have in virtue of their full personhood (V_1).
2) If Farmhand has the value which all persons have in virtue of their full personhood (V_1), then Farmhand has a claim against Farmer that Farmer not burn Farmhand in a burlap bag (C_1).

Therefore,

3) Farmhand has a claim against Farmer that Farmer not burn Farmhand in a burlap bag (C_1).

According to the expanded definition of moral injury, Farmer can cause Farmhand moral injury if he creates the appearance that Farmhand lacks the value he has (by denying the existence of his value) or if he creates the appearance that Farmhand's value is less important than it is (by denying the importance of his value). The key argument form makes it easy to see *how* Farmer can do this.[53]

Contradiction of Farmhand's C_1—any act, linguistic or non-linguistic, that has the expressive meaning of "Farmhand does not have C_1" and therefore denies the conclusion of Burn—is one way to cause Farmhand these kinds of moral injury. Burn above is a valid argument. If Farmer contradicts Farmhand's C_1—saying, "I have no duty not to burn Farmhand in a burlap bag"—then many listeners will infer (according to the relevant social rules) that Farmer believes Burn to be unsound. That is, depending on the circumstances, they might infer that Farmer believes that Premise 2 is true but Premise 1 is false (i.e. that Farmhand does not have V_1, but if he did, he would have C_1), that Premise 1 is true but Premise 2 is false (i.e. that Farmhand has has V_1, but his having V_1 is not sufficient for him to have C_1), or that Premise 1 and Premise 2 are both false (i.e. that Farmhand does not have V_1, and even if he did, he would not have C_1). In many circumstances, under many social rules, listeners would believe that Farmer agrees that full personhood guarantees one a claim against being burned in a burlap bag, and so they would most likely conclude that Farmer thinks he has no duty to Farmhand because Farmhand does not have full personhood. In such a case, Farmer's contradiction of C_1 would express the view that Premise 1 is false and so deny that Farmhand has value that he has, thereby creating the appearance of his degradation, which could cause him moral injury.

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[53] If Burn above is sound, then one way Farmer can cause Farmhand moral injury is to straightforwardly, and without reference to Farmhand's claim to not be burned in a burlap bag (C_1), deny that Farmhand has the value which all persons have in virtue of their personhood (V_1). Similarly, Farmer might, without reference to Farmhand's C_1, deny that if Farmhand had V_1 then he would have C_1.

This is the most likely interpretation of Hampton's example, given plausible assumptions about the social rules that were relevant in the example. It shows how Farmer's actions can be thought of as denying Farmhand's value. In the Simon case above, however, we saw that he might contradict humans' claim against being capitally punished because he thinks humans' value does not generate such a claim. Simon's contradiction, in this case, could be understood as a denial of the second premise of the appropriate argument in the key form. To contradict a claim in such a way that denies the second premise of the key argument form is to create the appearance of the victim's degradation by denying the importance of the value that generates the contradicted claim. I have appropriated the Anderson/Pildes account in order to argue that the contradiction of a claim that denies either premise in the key argument form will constitute wrongdoing, whether or not such denial creates the appearance of the victim's degradation or causes the victim moral injury.

The key argument form can be used to clarify the relationship between violation and contradiction. Suppose we put into the key argument form Afonso's claim against Manuel's breaking into Afonso's house and stealing Afonso's KitchenAid mixer (calling the argument "Break In"). To put what I tried to show above (at 2.4.2) in other words, Manuel could violate Afonso's claim while coherently acknowledging Break In to be a sound argument. There are various ways Manuel's violation of Afonso's claim, in such a case, could still be said to cause Afonso moral injury; but I will not go into this here. Violation *can*, of course, express the view that the violated claim does not exist. When violation does this, it wrongs the victim partly because it constitutes contradiction of the claim. Simon might express his view that humans do not have a claim against being capitally punished by capitally punishing a human. It is then a further question whether the violation is also a contradiction that denies Premise 1 (expressing the view that humans lacks the value of children of God, to continue with the example) and whether it is a contradiction that denies Premise 2 (expressing the view that humans' value as children of God does not

or would not give them a claim against being capitally punished). Not all forms of contradiction are violation, however. As already shown above, it is possible to contradict a claim without violating it.[54]

3.1.2: The Key Argument Form and the Contradiction of Moral Immunities

This analysis is easy to extend to the case of immunities since immunities, like claims, can be the subject of the conclusion of an argument in the key form. I will illustrate the application of contradiction-analysis to immunities by modifying Burn above. Suppose that the farmer does not kill the farmhands but that his son does instead. Suppose further that the farmer and his son believe the son has no duty to refrain from brutally killing the farmhands because the farmer *removed* that duty by granting the son permission to brutally kill the farmhands. The father "removed" the farmhand's claim against being brutally killed by proclaiming that the farmhand no longer had a claim against the farmer's son that the farmer's son not kill the farmhand. The wrong the farmer has done the farmhands can be explained as contradiction of an immunity possessed by the farmhands. Call the following argument "Permission to Burn."

1) Farmhand has the value which all humans have in virtue of their full personhood (V_1).
2) If Farmhand has the value which all humans have in virtue of their full personhood (V_1), then Farmhand has an immunity against Farmer that Farmer not turn "Farmhand has a claim against Farmer's Son that Farmer's Son not burn Farmhand in a burlap bag" into "Farmhand has a no-claim on Farmer's Son that Farmer's Son not burn Farmhand in a burlap bag" by saying, "Farmhand, I've decided you no longer have a claim against my son that he not burn you in a burlap bag" (I_1).

Therefore,

3) Farmhand has an immunity against Farmer that Farmer not turn "Farmhand has a claim against Farmer's Son that Farmer's Son not burn Farmhand in a burlap bag" into "Farmhand has a no-claim on Farmer's Son that Farmer's Son not burn Farmhand in a burlap bag" by saying, "Farmhand, I've decided you no longer have a claim against my son that he not burn you in a burlap bag" (I_1).

Since both premises are true (and the argument is valid), Permission to Burn is a sound argument. If Permission to Burn is sound, then the Farmer is *disabled* from changing the original relation (Farmhand's claim against Farmer's Son) into the resulting relation (Farmhand's no-claim on Farmer's Son). By proclaiming that he has changed the original relation into the resulting relation, the Farmer contradicts the

[54] A complication that would take me too far afield if I tried to unravel it fully arises when we consider claims that are generated by conjunctions of values. Suppose one has to have both V_1 and V_2 in order to have C_1. What expressive meaning does the contradiction of C_1 have? The answer, of course, can only be found by looking at the relevant social rules. It might be that the contradiction of C_1 implies the denial of both values, of one or the other or of neither, depending on what the contradiction implies regarding the importance of the values.

conclusion of Permission to Burn. Farmer's proclamation will most likely, in the circumstances, imply that he does not accept Premise 1. Farmer's contradiction of the conclusion of Permission to Burn therefore probably counts as denial that Farmhand has value that he has. This denial constitutes wrongdoing directly; it probably also creates the appearance of Farmhand's degradation, which in turn almost certainly causes damage to the acknowledgement of the Farmhand's value so that the Farmhand suffers moral injury.

The following objection may be raised. The value that generates both Farmhand's claim against Farmer's Son and Farmhand's immunity against Farmer is the value Farmhand has in virtue of his full humanity. If Farmer's contradiction of Farmhand's immunity counts as denial of Farmhand's value in virtue of his humanity, then Farmer is, at once, denying the value that generates Farmhand's immunity and the value that generates Farmhand's claim. But if the Farmer denies the value that generates Farmhand's claim, then we might suppose that Farmer does not believe Farmhand has the claim (although he could think Farmhand has the claim for some other reason). If Farmer does not believe Farmhand has the claim, however, it would never occur to him to form an opinion about Farmhand's having an immunity to protect that claim—from his point of view, there would be nothing to protect. This seems to mean that contradiction of an immunity that counts as denial of the value that generates the immunity will also be denial of the value that generates the relation the immunity is about. (This assumes that the immunity and the relation the immunity is about are always generated by the same value; I will not challenge this assumption here.) The objection then is this: any case of immunity-contradiction will reduce to contradiction of the relation the immunity is about. This ultimately amounts to the assertion that any contradiction of a second-order relation will reduce to contradiction of a first order relation.

There are a few problems with this objection, but the main one is the following. Humans are not consistent in their recognition or disregard of important normative facts do not expect other humans to be any different. That is, the mere fact that Farmer's actions constitute denial of the value Farmhand has that generates a certain claim does not mean that Farmer could not, through other actions, acknowledge that same value as it related to some other claim.

3.1.3: The Key Argument Form and the Contradiction of Legal Immunities

I wish to return to the problem raised in Chapter 1, where we started looking for a way to explain why Congress' passing the Anti-Sedition Act would treat U.S. citizens' right to free speech in such a way that it would wrong them. We only have the tools for analyzing Congress' contradiction of U.S. citizens' *moral* immunities. Such an analysis would be useful, but the puzzle we started with—drawn from Edmundson's discussion of claims and immunities—concerned the wrong Congress would do U.S. citizens by treating their *legal* immunities in a certain way. I want to stay away from the problem of relating moral immunities to legal immunities. So far, I have looked only at moral claims and immunities that are generated by some moral value. The second premise in the key argument form has been treated as a moral rule that tracks the fact that some value generates some moral claim or immunity. The conclusions of the arguments I have looked at have all been about moral claims or immunities. The wrong done (through contradiction or violation) to the claim- or immunity-holder, moreover, has been a moral wrong. I have relied to a large extent on Hampton's concept of moral injury, which I have argued should include not only damage to the acknowledgement of the existence of the victim's value but also damage to the acknowledgement of the importance of the victim's value.

The simplest way to extend the foregoing analysis of immunity-contradiction to legal immunities will be to articulate a concept of *legal injury* that can parallel moral injury. Once again, I want to avoid making any particular claims about how the two are related. In the case of moral claims and immunities, we began with the idea that certain kinds of value generate certain moral claims and immunities. In the case of legal claims and immunities, I will say that legal systems are such that certain *legally significant features* (all relative to a given legal system) of persons generate certain legal claims and immunities. Just as moral injury is damage done to the acknowledgement of a person's moral value, so I will say that legal injury is damage done to the acknowledgement of a person's legally significant features. At least some of these features, like moral value, are immutable facts. My membership in the human species, for instance, is considered by most legal systems to be a legally significant feature; and like Kantian moral value, there is nothing anyone can do (at least for now) to change a person's membership in the species. Some legally significant features are not immutable but are rather determined by the legal system—marital status is an

example, as is citizenship. I will have more to say about this particular kind of feature below. For now I will say that the kind of legal injury I am interested in is damage to the acknowledgement of the existence of the victim's legally significant features and damage to the acknowledgement of the importance of the victim's legally significant features. Finally, I will be concerned with legal injury that is done by contradicting legal claims and immunities, thereby denying premises in the key argument form and creating the appearance of degradation. Creating the appearance of a person's degradation, in the legal case, will be creating the appearance that one of her legally significant features does not exist or is not as important as it is (in the legal system in question). Contradiction that counts as denial of the first premise will cause damage to the acknowledgement of the existence of the victim's legally significant features; and contradiction that counts as denial of the second premise will cause damage to the acknowledgement of the importance of the victim's legally significant features. In parallel with moral injury, the two kinds of damage can be considered forms of damage to the acknowledgement of the legal status of the victim.

It should now be possible to return to the case of the Anti-Sedition Act. Call the following argument "Sedition." I will consider the status of one U.S. citizen, who I will call Wilbur.

1) Wilbur has the legally significant feature of being a U.S. citizen (F_1).
2) If Wilbur has the legally significant feature of being a U.S. citizen (F_1), then Wilbur has a legal immunity with respect to the U.S. Congress that the U.S. Congress not turn "Wilbur has a legal liberty to speak critically of the U.S. government" into "Wilbur has a legal duty to refrain from speaking critically of the U.S. government" by passing any law (I_2).

Therefore,

3) Wilbur has a legal immunity with respect to the U.S. Congress that the U.S. Congress not turn "Wilbur has a legal liberty to speak critically of the U.S. government" into "Wilbur has a legal duty to refrain from speaking critically of the U.S. government" by passing any law (I_2).

Congress wrongs Wilbur, and all U.S. citizens, if it passes an Anti-Sedition Act that makes illegal any U.S. citizen's speaking critically of the U.S. government. One aspect of this wrong can be understood as immunity-contradiction. By passing the Act, Congress appears to acknowledge that U.S. citizens once had a legal liberty to speak critically of the U.S. government. What Congress denies, when it claims to have created a legal duty to refrain from speaking critically against the U.S. government, is the *legal disability* imposed on Congress by the U.S. Constitution with respect to creating such a legal duty. At the other end of the disability, so to speak, are the U.S. citizens' immunities. Each U.S. citizen holds a legal immunity with respect to Congress that Congress not create such a legal duty. Congress contradicts each of those

immunities when it passes the Anti-Sedition Act. In the Wilbur's case, Congress denies the conclusion of Sedition above. By contradicting Wilbur's immunity (I_2), Congress might cause Wilbur legal injury in three ways. Congress' act might count as denial of Premise 1 of Sedition and therefore as denial of Wilbur's legally significant feature; Congress' act might count as denial of Premise 2 of Sedition and therefore as denial of the importance of Wilbur's legally significant feature; or Congress' act might count as denial of both Premise 1 and Premise 2. Since it appears the Anti-Sedition Act is to apply to all U.S. citizens, it is unlikely that Congress' passing the Act would be taken as denial of Premise 1 of Sedition. It would be preposterous to understand Congress to believe that no U.S. citizens are actually U.S. citizens.[55] Rather, Congress' passing the Act will most likely be understood as denying that Wilbur's U.S. citizenship is sufficient to generate I_2. In other words, it will be understood to be rejecting the notion that U.S. citizenship makes it impossible for Congress to create the duty to refrain from criticizing the government. To deny that Wilbur's citizenship is sufficient to generate I_2 causes Wilbur legal injury because it causes damage to the acknowledgement of the importance of one of his legally significant features—one form of damage to Wilbur's legal status.

The application of this analysis to the example given in the Introduction is similar. Recall that the City of Birmingham passed, appealed to and tried to enforce an unconstitutional ordinance that restrained free speech. Appealing to this ordinance, treating it as if it were law, was a way for the City of Birmingham to contradict Dr. King's immunity against having his liberty to enjoy freedom of speech turned into a duty to refrain from enjoying that freedom. The City's contradiction of Dr. King's immunity could count as denial of either premise in the relevant key argument form. The City's contradiction might have constituted denial that Dr. King was the sort of individual that was afforded the protections of the Constitution; the contradiction might also have constituted denial that being a U.S. citizen is sufficient to enjoy the protection of the First Amendment—perhaps the City thought one had to be a citizen and of a certain race. Whatever the City's actions communicated, it seems clear that they created the appearance of

[55] It is of course possible that the expressive meaning of Congress' passing the Act could be different as it relates to different people. That is, with relation to Wilbur it might imply that he is not a U.S. citizen while with relation to a another citizen (with a different skin color, perhaps) it might imply that her citizenship does not secure her the immunity in question. In this particular case, however, it seems most likely that the relevant social rules would make Congress' passing the Act count as denial of Premise 2 of Sedition for all citizens.

Dr. King's degradation—either that he lacked certain important legal features that he had or that certain of his legal features were less important than they actually were—which, in turn, likely caused damage to the acknowledgement of Dr. King's value—either its existence or its importance.

It will be remarked that passing the Anti-Sedition Act or passing and appealing to the unconstitutional City of Birmingham ordinance seem to do less to create the appearance of Wilbur's degradation than did the farmer's burning the farmhands. It seems clear, then, that the expressive power of different acts depends on what sort of acts they are and who commits them. The farmer's burning the farmhands had great expressive power—and therefore probably caused great injury—partly because of the nature of his act.[56] Passing the Anti-Sedition Act, though perhaps doing less to create the appearance of degradation of each individual affected, would still be very powerful and very injurious; and this seems to be a function of who performed the expressive act (the U.S. government) and the nature of the act (legislation).

A good example of different individuals' being able to inflict different amounts of moral or legal injury—an example that, regretfully, I cannot give a full exposition here—can be found in the literature on the laws of war regarding noncombatant immunity.[57] The Geneva Convention makes it the case that each noncombatant is an illegitimate target of weapons of war (that each noncombatant has a claim against being targeted with weapons of war) and that no noncombatant can be turned into a legitimate target of weapons of war unless he chooses to become a combatant (that each noncombatant has an immunity against all others that those others not get rid of his claim against being targeted with weapons of war). In this case, it is easy to see that different individuals, because of their different statuses, could inflict drastically different amounts of moral and/or legal injury on noncombatants through contradiction of their immunity against being made legitimate targets. A military General who declares that a group of

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[56] It is worth emphasizing that no act I have discussed so far is guaranteed to cause damage to the acknowledgement of the victim's value. It might have been that the only people who knew about the farmer's mistreatment of the farmhands were people who absolutely refused to believe that the farmhands did not have a claim against such treatment. It could well be, in certain circumstances, that a horrendous act does no damage to the acknowledgement of the victim's value. In such cases, we must turn to alternative analyses of wrongdoing—like Hampton's analysis of damage to the realization of the victim's value—in order to explain how the act wronged the victim.

[57] Some important works on noncombatant immunity include: Thomas Nagel's essay "War and Massacre" (which can be found in his *Mortal Questions*), Michael Walzer's *Just and Unjust Wars*, Igor Primoratz's essay "Civilian Immunity in War" and, more recently, Jeff McMahan's *Killing in War*.

noncombatants have become legitimate targets (saying that she has judged the group in question to be corrupt and unclean and therefore deserving of extermination) could cause the group much greater moral and/or legal injury than could a regular foot soldier.

3.2: Atrophying Rights and the Need for Vindication

Hampton aimed to show that retributive punishment can be an appropriate response to acts that cause moral injury because it has the power to repair the damage done to the victim's value. Retributive punishment repairs this damage by, as Hampton put it, *vindicating the victim's value* (Hampton 1992, 1686). Hampton was not the first to point out that punishment can vindicate. Joel Feinberg, in his landmark essay, "The Expressive Function of Punishment," put forward the idea that punishment can be distinguished from penalty in part because punishment can have the expressive function of *vindicating the law* (Feinberg, 104). Indeed, Hampton's expressive theory of retributive punishment can be understood as working from Feinberg's central idea about the expressive nature of punishment.[58] What does Feinberg mean by the expressive function of vindicating the law, and how does it relate to Hampton's vindication of moral value?

Feinberg gives the following example of a law that was in need of his sort of vindication. There was a time in Mississippi (as there has been in many other places), when grand juries routinely failed to indict and trial juries routinely failed to convict white people who murdered black people (Feinberg, 104). Though the law against murder stayed on the books in Mississippi, Feinberg argues that a law of this kind "honored mainly in the breach" as it is, "begins to lose its character as law" (Feinberg, 104). Punishment of white murderers in Mississippi, at that time, would have served to *reaffirm* the law and thereby help it retain its character as law (Feinberg, 104). For Feinberg, punishment can vindicate the law by reaffirming it in this way. Hampton, too, of course, was concerned with reaffirmation, but she was concerned with reaffirmation of victims' *value*.

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[58] Heather J. Gert, Linda Radzik, and Michael Hand write that Hampton "builds on Joel Feinberg's work on the expressive function of punishment" (Gert et. al., 79).

Hampton and Feinberg seem to have keyed in on different implications of wrongdoing. Hampton focused mainly on the idea that wrongdoing could deny the value that generates claims; Feinberg was concerned with the idea that wrongdoing could deny the existence of legal rules that generate claims. Rainbolt gives us a way to see how moral claims and immunities as well as legal claims and immunities are generated by rules, together with *features* of the claim- or immunity-holder. The feature of persons that we have looked at in the case of moral claims and immunities has been their moral value. In the case of legal claims and immunities, the features of persons we have looked at have been what I called legally significant features. The rules, of course, have been moral in the case of moral claims and immunities and legal in the case of legal claims and immunities. It should now be easier to ask how Feinberg's and Hampton's analyses vindication can be fitted together.

We begin by trying to apply Feinberg's idea of rule-vindication to moral rules. On a cognitivist, objectivist view of morality—one which I assume, here—Feinberg's idea does not apply to moral rules.[59] Recall that for Feinberg failure to vindicate a law like the law against murder in Mississippi can allow the law to "lose its character as law" (Feinberg, 104). A moral rule, on the view I take, is not the sort of thing that can lose its character as a moral rule. The existence or nature of that moral rule does not depend on the mental states of people. Interestingly, the fact that laws can lose their character as laws shows us another application of the concept of contradiction. It appears that contradiction can cause a kind of harm, insofar as laws' losing their character as laws can constitute "a disruption of or interference in a person's well-being, including damage to that person's body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement" (Hampton's definition of harm, on 1992, 1662).[60]

Hampton's idea about the vindication of moral value, however, can be applied to legally significant features. We have already seen that contradiction of legal claims and immunities can count as denial of the existence of or the importance of legally significant features and can cause damage to the

[59] I will not defend this view. I take this view because it makes exposition of the analysis easier at this point. For a helpful discussion of cognitivism, non-cognitivism, relativism, objectivism and subjectivism in relation to rights-theory, see Rainbolt, pages 80 and 81).

[60] We must be careful, of course, to distinguish this type of harmful "threat" to the character of laws from "threats" posed by legislators, who often quite rightly work to repeal laws. We must also distinguish this type of harmful "threat" from "threats" of very similar character—threats to jim crow laws in the U.S. South, for example.

acknowledgement of either the existence or the importance of the legally significant features. Vindication —especially official reaffirmation—can quite effectively undo damage to the acknowledgement of legally significant features, just as it can in the moral case. In at least one way, however, Hampton's idea about vindication applies slightly differently in the case of legal claims and immunities. Whereas moral value (of the sort under consideration here) can never actually be reduced,[61] *some* legally significant features actually can disappear if enough of the right people think they have. So although my being a member of the human species cannot be changed by opinion, my U.S. citizenship can. This is because the criteria for citizenship are matters of law and can be changed by legislators. Doing away with legally significant features, like making laws lose their character as laws, can constitute a kind of harm quite separate from the legal injury done through contradiction of the claims or immunities in question. Causing this kind of harm is the last way of wronging a claim- or immunity-holder without engaging in violation.

[61] There are, of course, questions the Kantian finds rather irksome having to do with the moral value of the mentally disabled (or the person who becomes mentally disabled); but I leave them aside.

CONCLUSION

We began with what I called the puzzle of immunity-violation. If claim-violation is to be the paradigm case of violation, then we define violation as acting in a way a claim makes it the case one should not act. Or, violation is failing to discharge a duty correlative to a claim. The idea, we saw, was that violation was an act of overstepping normative limits imposed by some normative relation between people. Immunities, however, like the laws of nature, impose limits that cannot be overstepped. What it is for an immunity-relation to exist is for it to be impossible for some specified person to change another specified relation between people. If this normative limit *can* be overstepped, then it seems the limit cannot be one imposed by an immunity. When violation occupies a central place in our thinking about wrongdoing, it then becomes tempting to conclude that immunities are just not the sort of thing that can be treated in a way that wrongs the immunity-holders. This conclusion too, however, is impossible to hold on to once one looks to any of the numerous examples of wrongs done through the treatment of immunities. I began the essay with the example of Dr. King and an attempt by the City of Birmingham to give Dr. King a duty he had an immunity against being given. The concept of immunity, as Edmundson shows us, is indispensable when attempting to make sense of free-speech cases. One is forced, then, to undertake the search for a way of treating immunities that is not violation but that wrongs the immunity-holders.

Jean Hampton provides another angle on wrongdoing, one that allows us to see how immunity-holders could be wronged through the contradiction of their immunities. For Hampton, the defining feature of wrongful acts is their capacity to cause moral injury. Moral injury she defines as damage to a person's value, caused by first creating the appearance of the person's degradation. Wrongful acts create this appearance of degradation in part by denying the value generating the person's entitlements. At this point, I tried to show, among others, Hampton's analysis is unduly narrow. Hampton seems to assume that the denial of the value generating an entitlement and violation of that entitlement are inter-entailing. Rather, I argued, not all violation constitutes denial of the value generating a person's entitlements, and acts other than violation can constitute denial of the value generating a person's entitlements. In particular, denial of the existence of the entitlement itself (contradiction of the entitlement) can constitute

denial of the value generating the entitlement; and one can contradict an entitlement both linguistically and non-linguistically without ever violating the entitlement. I also introduced an alternative analysis of expressive wrongdoing developed by Anderson and Pildes, according to which acts that express wrong attitudes about persons' value constitute wrongdoing directly; acts that deny the existence of or the importance of the value of a person (as do acts of claim-contradiction) are acts that express wrong attitudes about persons' value. The next step was to show that immunities, like entitlements, could be contradicted, and that immunity-contradiction, like entitlement-contradiction, could constitute denial of the value generating the immunity. If immunity-contradiction could constitute denial of the value generating the immunity, then immunity-contradiction could constitute wrongdoing (according to the Anderson/Pildes analysis) and could cause the appearance of the immunity-holder's degradation, which in turn could cause the immunity-holder moral injury (according to the Hampton analysis).

The application of the analysis to legal rules revealed two interesting ideas. First, contradiction of a legal immunity that (because of relevant social rules) counts as denying the legally significant feature rooting the immunity (the corollary to the value generating the moral immunity) can, in some circumstances, cause the feature to cease to exist. Thus, if the U.S. Government treats a certain class of people as if that class of people lacks the immunities and claims guaranteed them as citizens, they eventually lose their citizenship status under the law. Likewise, contradiction of a legal immunity that (because of relevant social rules) counts as denying the legal rule that secures the immunity to the immunity-holder because of the immunity-holder's legally significant features can, in some circumstances, cause the rule in question to atrophy and, eventually, to cease to exist. Judges and juries in the American South who refused to indict or convict white murderers of black people undermined the status of murder laws insofar as they applied to black people.

If we return, again to the comparison between immunities and natural laws, we see that they differ on this point. The character of the laws of nature as laws of nature is never undermined by human action or belief. Similarly, the character of moral immunities as moral immunities is never undermined by human action or belief. Legal immunities, however, are possible to undermine. One might characterize legal immunities, then, as social images of certain moral and natural laws. The parallel between them is

not perfect, but wrongful ways of treating moral and legal immunities, at least, can be fruitfully analyzed together.

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