A Life of One’s Own:
Freedom and Obligation in the Novels of Henry James

by

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Abstract 

This dissertation argues that the novels of Henry James offer a conception of personhood and of human freedom better able to explain and unify private law than the conceptions currently dominant in private law theory. I begin by laying out the two conceptual frameworks that now dominate private law theory: Kantian right and the feminist ethic of care. I argue that Kantian right’s exclusive focus on respect for freedom of choice makes it unable to explain private law doctrines founded upon concern for human well-being, including unjust enrichment, unconscionability, and liability for negligence. However, feminism’s ethic of care, which can be understood as a response to the Kantian abstraction from considerations of well-being and need, is also incomplete, because its understanding of the person as essentially connected to others fails to respect human separateness. I then offer readings of James’ novels—The Portrait of a Lady, What Maisie Knew, and The Ambassadors—that show how vindicating individual worth requires both respect for abstract agency’s separateness and freedom to choose, on the one hand, and concern for the dependent individual’s well-being and autonomous flourishing, on the other. I argue that these two ideas are complementary parts of a complete understanding of human dignity and freedom. Finally, I argue that this understanding illuminates doctrines of private law that remain mysterious on the Kantian account while avoiding feminism’s tendency to immerse private law in public law.
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Introduction

In this thesis, I present the novels of Henry James as exhibiting a conception of personhood and human freedom that is suitable for private law and yet that is importantly different from those that dominate contemporary legal theory and private law scholarship. Accordingly, this work belongs to the field of study called “Law and Literature.” It is, however, different from much of the other work in that field. In this introduction, I would like to highlight that difference.

The Law and Literature Movement arose in response to the dominance of Law and Economics in classrooms and courtrooms in the United States. Drawing on insights gathered from works of literature, literary legal scholars argue that the view of human nature underlying Law and Economics is incorrect. Economists, the literary legal scholars say, treat human beings as rational and infallible maximizers of their own self-interest, their choices reflecting their preferences, and their preferences reflecting their conception of well-being. But whereas economists assume that human beings always know and then act upon what is best for them, readers of literature know that our inner lives are not so neat. Characters in literature often lack self-understanding and readers of literature recognize this kind of blindness in themselves. The character bewildered, frustrated and frequently mistaken in her attempt to shape a fulfilling life

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1 Of course, the Law and Literature Movement is much more diverse than this description suggests. The movement, in fact, has at least three dominant strands. The first is the humanist approach to law and literature, whose core idea is that works of literature are relevant to the study of law. The second is the hermeneutic approach, which treats law as literature and so argues that lawyers should read literary theory. The third is the story-telling approach, which is not interested in literary works, but in stories told within the law by litigants, lawyers, and judges. For this understanding of Law and Literature’s strands see Jane Baron, “Law, Literature and the Problems of Interdisciplinary,” (1998-1999) 108 Yale Law Journal 1059 and Julie Stone Peters, “Law, Literature, and the Vanishing Real,” (2005) 120 PMLA 442. Here I focus on the humanist approach, because it is a version—although I think an importantly different version—of this approach that I will defend.

seems a truer picture of human life than the infallible maximizer of satisfactions described by the economic analysis of law. Moreover, in literature we see the conflict human beings experience, the difficulty and painfulness of the choices they must sometimes make. This suggests that economists are wrong to assume that all the valuable things in life are reducible to a single value—say, utility—and thus exhibit only quantitative differences, contributing more or less to well-being, and not qualitative differences, that is, contributing to well-being in incommensurate ways. This is to say that even if we know what our well-being requires, we may able to realize it only imperfectly. Finally, the complexity of literary characters suggests the multiplicity of our motivations and goals, showing that our interests are not all at bottom interests in the self. Literature thus teaches that the economic analysis of law relies on a distorted conception of the person, for in literature we learn that individuals are not always self-interested, not always rational, and never infallible in their efforts to shape a fulfilling human life.

The Law and Literature Movement is not only a critique of Law and Economics; it has a transformative program of its own. That program is to bring abstract, formalist, rule-bound law into contact with “fully experienced life,” to reunite law with humanistic understandings of justice. The study of literature, particularly the study of novels, is thought to be transformative of law for at least two reasons. The first is that the novel takes as its special concern the detailed

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exploration of a particular and ordinary human life, usually over an extended period of time, in its confrontation with circumstance and in its relationships with other human beings. When we read a novel, we are invited to wonder “about human nature, human passions, human hopes and fears, the struggles, triumphs and defeats, the cares and joys and sorrows, the lives and deaths, of common men and women.” It is suggested that law, by contrast, is dispassionate in its formality and unsympathetic in its generality. In its fetishistic attachment to rules, it is divorced from the concrete human problems that underlie particular cases. But the judge who is the reader of novels will care about, and will have the moral perceptivity to grasp, the law’s human meaning, how laws and judicial decisions figure in the actual lives of human beings, contributing to their dreams and disappointments, their flourishing or suffering.

The second reason that novels are thought to have transformative power is that they require a certain kind of activity on the part of the reader. Whereas law tends toward impersonal and strictly reason-guided decision-making, the novel, in its form and style, encourages identification with its characters and emotional response to how they are faring in their lives. The novel’s style, and not merely its substance, asks its readers to imagine what it would be like to live the life of another particular person, and so invites them to consider the world from the point of view of another. Novels therefore do not simply teach empathy; they enact it. Whereas economists deny the possibility of “intersubjective comparisons of utility,” that one person can know the

7 This quotation is from Charles Dickens’ Hard Times and it is cited in this context in Nussbaum, Poetic Justice, 32.
10 Nussbaum, Poetic Justice, 5.
pleasure or pain of another,\textsuperscript{11} literature insists that this is a possibility for human beings and brings that possibility into being. The judge who is a reader of novels will therefore have the imagination to respond to the human beings before her with empathic understanding. She will be able to empathize even in the hard case, in the case of the person whose experience is completely different from her own, and so to deliver a judgment that is compassionate and merciful as well as just.\textsuperscript{12}

In an article entitled “Can Law Survive Legal Education?”\textsuperscript{13} Ernest Weinrib suggests that despite their differences, ‘Law and Literature’ and ‘Law and Economics’ are linked as instances of the law school’s “interdisciplinary turn” and that they therefore have something important in common. Interdisciplinary approaches to private law, Weinrib argues, share the following feature: they think that the law is not to be understood on its own terms.\textsuperscript{14} Despite the diversity of interdisciplinary approaches, they all agree that private law must be viewed through the lens of a goal provided by the other discipline. Moreover, they agree that law is instrumental to the achievement of the favoured goal.\textsuperscript{15} In the cases of Law and Literature and Law and Economics, for example, each begins with a conception of human welfare. The preferred conception of human welfare is meant to give law purpose and to allow for law’s transformation in light of this purpose. Law and Literature and Law and Economics have different conceptions of human

\textsuperscript{11} West, “Economic Man and Literary Woman,” 869.


\textsuperscript{14} Others have made this point as well. See, for example, Marc Galanter and Mark Edwards, “Introduction: The Path of the Law Ands,” (1997) 1997 Wisconsin Law Review 375 at 376.

\textsuperscript{15} Weinrib, “Can Law Survive Legal Education?,” 411.
welfare and they thus disagree about law’s goals. Law and Literature argues that law should care for the suffering and promote the flourishing of concrete individuals; Law and Economics argues that law should maximize wealth. The debate between Law and Literature and Law and Economics is thus a debate about whether law should be understood through the lens of its humanist tradition or through the lens of economic science, but the debate takes place on the basis of an agreement that law requires another discipline for its illumination. It is a debate about which goals ought to be realized through law on the shared assumption that law is goal-driven.

Weinrib’s argument is a challenge to the idea that law is to be illuminated and shaped by a goal external to it. Instrumental approaches to private law, Weinrib argues, distort the practice they purport to understand in three ways: they import outside goals in order to explain the immanent concepts of private law, they ignore the relationship between plaintiff and defendant, and they efface the difference between private law and public law. Thus, instead of trying to understand the meaning of private law’s concepts from a perspective internal to private law, an instrumentalist account either transforms or abolishes those concepts as required by the goal. Further, if we are pursuing a social goal, it makes no sense to single out an isolated interaction between two parties for our attention. Rather, we will draw together all those citizens who are similarly situated with regard to the goal in question. For example, if our goal is the amelioration of human suffering, we would not single out a plaintiff for compensation from a defendant just because the defendant has breached a contract with the plaintiff or damaged the plaintiff’s property. We would rather consider the relative positions of all the citizens of the political

community and distinguish those who are in need, and therefore candidates for redistribution, from those who are well-off. Finally, if private law is understood as furthering a social goal, it is no different from public law. Private law is just one more mechanism whereby the state fulfills its duty to realize the goals of the citizens; private law is public law in disguise. But these features—private law’s concepts, its linking of plaintiff and defendant, and its distinctiveness from public law—are the salient features of private law. The effort to understand private law through the lens of a goal provided by an external discipline thus fails to yield an understanding of private law. Law, Weinrib argues, cannot be illuminated with the borrowed light of an external goal. Private law has its own normativity. It is illuminated from within and therefore must be understood on its own terms.

There is good reason for Weinrib’s objections to the interdisciplinary turn in law schools. Here I will focus only on the validity of his objections in the context of the Law and Literature movement. The fact that the interdisciplinary study of law and literature has been labelled a “movement” itself suggests that Weinrib is right, for the word instantly suggests that the law will be used as instrument of political and social change. And the word “movement” is not misleading; most law and literature scholarship is frankly instrumentalist. It frequently treats the law as an instrument for purposes that are given by the study of literature, as the authoritative cloak in which the insights of literature can be dressed. We see this happening in two different ways. Sometimes, law is treated as an empty but powerful vocabulary or method, without any

17 Weinrib, “Can Law Survive Legal Education?,” 412.
19 See especially Robin West, Caring for Justice (New York: NYU Press, 1997) 173-177, 191-200. J. Allen Smith assumes that law is the product of “goal-thinking” and that goal-thinking is where literature will be most helpful to law because of its ability to clarify our thoughts about values. See J. Allen Smith, “Law and the Humanities: Preface,” (1975-76) 29 Rutgers Law Review 223 at 224.
distinctive substance or normative idea of its own. Richard Weisberg, for example, argues that law is “no more than a relativistic method of ordering reality through language,” that legal thought and practice exist in an ethical void and that literature is needed to fill it. J. Allen Smith argues that law must seek its values in great literary works. Alternatively, law’s normativity is crudely drawn as a cold and mean abstraction that is easily criticized and obviously in need of outside help. In Dimock’s *Residues of Justice*, for example, legal normativity is characterized as the idea of commensurability—the idea that punishment really can equal crime, that payment can equal suffering, that benefit can equal desert—so that law’s justice is not only abstract but reductive. Dimock’s book argues that the “descriptive thinness and experiential harshness” that result from the reification of commensurability call out for a supplement from literature. Thus, law either has no normative perspective of its own or has a normative perspective that can make no serious claim to our respect. In either case, there is no problem with treating the law as a vessel into which the insights of literature can be poured and made politically effective. The result, however, is that we end up, not with “Law and Literature,” but just with “Literature,” for in the merger of disciplines there remains nothing of law that a lawyer could recognize.

20 Baron also argues that in law and literature, “law tends to be depicted as a more or less empty domain composed mainly of rules.” See Baron, “Law, Literature and the Problems of Interdisciplinarity,” 1061.
In contrast to instrumental approaches to legal study, which begin outside the law with a goal that is independently desirable, Weinrib’s approach begins with immersion in the practice of private law, in the study of its institutional structure, doctrines, concepts, and mode of reasoning. For Weinrib, this immersion in the specificity of private law is the first stage in elucidating its character. In the second stage, we work out the most general description of private law’s inner structure, which Weinrib understands as correlativity, the institutional nexus between the plaintiff and the defendant. The idea of correlativity explains private law’s specific concepts, such as causation, proximate cause, and duty of care, and its system of rights.²⁶ In the third stage of elucidating private law’s character, we inquire into the normative presupposition of correlativity. The normative presupposition of private law’s structural linkage of plaintiff and defendant is, Weinrib argues, abstract personality.²⁷ Abstract personality is the idea that normativity resides in the agent’s abstract capacity for free purposive activity, that is, in the bare capacity for choice.²⁸ Respect for abstract personality—for its free purposiveness—generates the plaintiff’s rights of non-interference and the defendant’s correlative duties. We thus arrive at an internally justified and coherent private law—its structural correlativity making sense of its concepts and mode of reasoning, the assumption of personality making sense of its correlative structure.

For Weinrib, private law is to be understood on its own terms. Throughout his discussion of the way we elucidate private law’s character, Weinrib emphasizes the autonomy of this mode of ordering and the corresponding internal orientation of legal study. He refers to private law as “a

specific kind of normative order,” with its “own distinctive yet coherent conceptions of fairness and rationality.” He speaks of analyzing law’s concepts “on their own terms,” and of private law’s “distinctive mode of reasoning.” Private law’s morality is to be understood as “categorically different from that of either personal ethics or political action.” Most importantly, in his discussion of the idea of abstract personality, Weinrib argues that “[t]he issue is not whether these conceptions are appealing but whether they are immanent in private law.”

Elsewhere Weinrib writes, “…the significance of personality…is not that it is a philosophical truth about rational agency (though it may be), but that it is implicit in liability as a normative practice.” We should thus not mistake Weinrib’s discussion of abstract personality for a claim that respect for personality justifies the structure and content of private law to a philosophical point of view that transcends private law. Weinrib’s claim is that private law presupposes this conception of personhood; whether anyone finds that notion normatively appealing is a contingent matter and beside the point. Thus for Weinrib, the alternative to instrumentality is autonomy; we seek understanding without distortion by remaining immersed in private law’s internal perspective.

Weinrib’s discussion of law’s distinctive concepts, structure, and mode of reasoning focuses particularly on the distinctiveness of private law in contrast to public law. He does not focus on

33 Weinrib, “Can Law Survive Legal Education?,” 424.
the distinctive features of law in general, that is, on what distinguishes law from other ways of guiding human behaviour. Attention to this distinction, however, suggests an aspect of law’s character that Weinrib does not address in his elucidation of the character of private law. Law claims that it is different from the bare exercise of power; it makes a claim to legitimate authority. But the validation of the law’s claim to legitimate authority cannot be found in the law itself. Without external validation, the claim to authority is nothing more than a unilateral assertion. The idea of validation implies deference to an external point of view and the law must therefore seek the validation of its claim to authority in an independent standpoint. Moreover, it must seek that validation in the subjects for whom it purports to be authoritative, since only they can validate law’s claim to be authoritative for them. But this means that law cannot be an autonomous, isolated system of thought. Its claim to authority requires the law to concern itself with its subjects and the conditions under which they will recognize its authority as legitimate.

Weinrib is of course attuned to the fact that the law claims to be justified. But he thinks that law finds its justification in its own coherence. Law, for Weinrib, finds its justification, not in the justification of its concepts to some external standpoint, but in its internal coherence:

“Coherence implies a self-contained circle of mutual reference and support among the elements of what coheres. It validates what is within the circle by pointing not outward to some transcendent ideal, but inward to the harmonious interrelationship of its constituents.”

Why does Weinrib place so much emphasis on the value of coherence? Coherence, Weinrib argues, is an aspiration of private law itself. If coherence is justificatory, law can justify itself without appeal to goals that are not its own. The emphasis on coherence is thus a way of accounting for


law’s need to justify its authority without compromising its autonomy. But this strategy does not succeed.

What justificatory power has the idea of coherence? Couldn’t a legal practice be coherently wrong? Coherence is no doubt an aspect of law’s justification. Where law is coherent, it can be sensibly understood as the unfolding of one idea—such as reciprocal respect for abstract freedom—rather than merely reflecting the changeable whims of legislators or the political ideology of judges. This is an important aspect of law’s justification because free and equal persons could consistently submit to the rule of a universal idea, though they could not, consistently with their freedom and equality, submit to the rule of the whim or ideology of another human being. Thus, coherence appears to have justificatory power because it is a condition of law’s self-imposability, a condition of the legal subject’s ability to view the law as something she could impose on herself. But if this explains why coherence has any justificatory power, it also suggests that law’s justification cannot rest with its coherence alone. The ability to view law as self-imposable requires, not only internal coherence, but also the justification of the coherently structured order, that is, the justification of the idea that gives the order its coherence. Thus, the question of whether abstract personality can be justified to an external point of view is not beside the point; it is the point, for law’s legitimacy depends on our answer.

Thus, Weinrib, in my view, persuasively demonstrates that instrumental understandings of private law are forced to alter and mischaracterize the very practice they purport to explain. Yet


39 Leslie Green points out that we need to attend to law’s justification, not only to distinguish between law and despotism, but also to make sense of the rule of law as an ideal. He argues, “nothing can be a form of justice unless there is something that can be said in its favour.” Leslie Green, “Law’s Rule,” (1986) 24 Osgoode Hall Law Journal 1023 at 1031.
the conception of law that emerges from Weinrib’s immersion in the perspective of private law practice appears equally problematic. While instrumental approaches to law efface law’s distinctive structure, concepts, and mode of reasoning, a theory of law that is purely internal in its orientation fails to justify law’s authority to an independent standpoint. As I have tried to suggest, however, Weinrib’s discussion of law’s coherence points to the possibility of a third approach, one that elucidates the law’s distinctive internal character but that treats the law’s need for external validation of its authority-claim as an aspect of that character. This approach also has implications for understanding the interdisciplinary study of law.

By incorporating the idea that coherence has justificatory power, Weinrib implicitly moves beyond the purely internal orientation of his theory. The idea of justification already points to the fact that there are subjects to whom law’s authority must be justified. And once we see that law must justify its authority to someone, we are confronted with the following questions. Who are the subjects to whom law must be justified? What is their character? And what are the conditions under which they can recognize law as legitimate? Can law defer to the point of view of concrete persons without undermining its authority? What conditions would make this possible? And once we have a picture of the external point of view to which law must defer, we might ask further questions: Why should private law’s conception of fairness be different from that of public law? Can the dichotomy between a non-instrumental private law and a public law ordered to social goals be justified?

40 Peter Brooks also wonders if law and literature or ‘law and the interpretive humanities’ is a challenge to law’s claim to “institutional and educational autonomy.” He writes: “To challenge that autonomy and the apparent security it brings with it is to hold the law accountable to the other interpretive disciplines. It is to challenge the implicit claim that legal terms of art—for instance, the language of “intent” or of “the will”—are self-definitional and off-limits to non-legal questioners. Is the notion of human agency implicit in much legal language true to contemporary understandings of how people behave? Does it matter?” See Peter Brooks, “Law and Literature in Dialogue,” (2005) 120 PMLA 1645.
For a full investigation of these questions, we cannot omit the phase of immersion in private law’s internal perspective—in its structures, doctrines, normative presuppositions, and mode of reasoning. But we cannot even raise these questions—questions that ask about private law’s normative justification—unless we step outside private law’s own system of thought. And we cannot answer these questions unless we turn to the insights of those who have thought about what it means to be a human being and about what it means to treat a human being as a human being. Legal scholars have thus turned to philosophers, to Kant and Hegel, for example, for the illumination of these problems. In this thesis, I suggest that we turn to literature and to the novels of Henry James in particular.

Why turn to literature? We can begin to answer this question by saying that in trying to elucidate the point of view of the human subject whose assent law’s authority requires, we are seeking knowledge and understanding of the nature of human beings; and so we turn to literature—to thoughtful, imaginative interpretations of “unnarrated life”—as a source of such an understanding. But if this were all we could say about the matter, it might be asked whether literature contributes anything distinctively literary to our understanding or whether the ideas we claim to find in literary works might just as easily be expressed in the form of a philosophical treatise. We cannot answer this question without making some general claims about the connection between form and substance in works of literature, claims which cannot be defended by reference to the few novels this thesis explores and which will of course not be true of all literary works. But the first part of our answer to the question, why turn to literature?, gives us a

41 That judgment requires a perspective external to the viewpoint under consideration is an idea I take up in the discussion of James’ *The Ambassadors*.

reason for restricting our attention to certain literary works; it at least allows us to distinguish between those works that reflect a thoughtful effort to understand and illuminate the lives of human beings from those whose sole purpose is to entertain, or shock, or sell copies. In novels that exhibit the thoughtfulness about human beings that we are looking for, I think we will find that the literary form embodies a sense of, and therefore implicitly makes claims about, the subjects to whom it speaks; in these works, form is a part of substance.\(^{43}\) Let me elaborate.

To write a novel is to take up a certain view of the world and of the human beings that are in it. Most obviously, it is to see human beings as characters rather than as abstractions such as agents, utility maximizers, or citizens. There is therefore a conception of the person that is implicit in the novel’s form. The first aspect of that conception that is important for us is the idea of human separateness. The Kantian conception of the person, as we will see in the next chapter, also insists upon human separateness. It does so because it regards all attachments and needs, the features of our existence that draw us together and make us dependent on one another, as contingencies that the free agent could in principle disown. This means that the Kantian claim of human separateness is at the same time a claim of human sameness. We are separate because our only essential feature is our capacity for free choice. But as agents stripped of everything but the bare capacity for choice, human beings are also all the same, there being nothing left that could differentiate them.\(^{44}\)

\(^{43}\) Martha Nussbaum makes this claim about the literary form as well. She points out that in the Preface to The Golden Bowl, James explicitly thinks of writing as the author’s effort to find the “terms that honourably expressed” his idea. Martha C. Nussbaum, Love’s Knowledge: Essays on Philosophy and Literature (Oxford: Oxford University Press, 1992) 3-4.

\(^{44}\) Thus Weinrib refers to the subjects of private law as “units of freedom.” See “Right and Advantage in Private Law,” 1289.
The novel’s claim of human separateness is different. In the novel’s form, the sense of human separateness emerges out of attention to individuality, to the distinctiveness of each concrete character and the distinctness of his or her life, to the differences in physical and psychological makeup, history, and circumstance, the differences in the way people think, react, feel, suffer, and speak.\textsuperscript{45} The novel’s interest in a particular character’s story is an interest in difference—in the way this concrete person responds to this circumstance or this moral choice—and an insistence upon the distinctions between persons. Thus, the novel’s characters never appear to its readers as indistinguishable units of a collectivity or as mere instantiations of a generic capacity shared by all; if they did appear this way, they could not be characters in a story, for they would have no stories to tell.

The novel form insists, not only upon human separateness, but also upon the moral significance of particularity. Far from treating individuals as abstract choosers or generic wealth-maximizers, the novel’s attention is wholly particular. It is interested in individuals considered as characters—as determinate and dependent human beings with concrete commitments and attachments, immersed in particular situations, with histories and identities that unfold and develop over the course of their lives. The novel’s descriptiveness suggests that essential to an understanding of particular human beings are their physical and moral characteristics, their circumstances, the way they think, speak, feel, and dress, and that we cannot hope to understand any human being unless we understand that person as a fully constituted subject. The novel bestows upon its characters and invites in its readers particularized interest and concern, suggesting in its form that this is what is required if we are really to see others and understand

\textsuperscript{45} Martha Nussbaum makes this point as well in \textit{Poetic Justice}, 22.
the moral claims they make upon us. The novel form suggests further that the significance the individual human being attributes to the shape of his or her own life is not an error or an idiosyncrasy, that the shape of each individual life has the objective importance the individual thinks it has. The novel’s careful and sympathetic attention to the individual’s particular life is thus normative. It teaches that the concrete individual with determinate needs and attachments is worthy of our attention. Indeed, it suggests that this sort of attention is required if we are to treat a human being as a human being.

The novel’s interest in the particular, moreover, is an interest of an important kind. It encourages us to see the way particularity might be distinguished from subjective preferences and desires, things explainable only in terms of individual psychology. For if the human interests, needs, fears, and aspirations displayed for us in novels were only a matter of characters’ subjective preferences and idiosyncrasies, explainable only by reference to the particular character’s non-repeatable psychological makeup, it would be hard to understand why novels are generally thought to offer something more than entertainment, why they are studied as part of an educational program and thought to have something to say about our own lives.46 We think they do have something important to say, in my view, because novels encourage us to see the way the human interests they portray are universal human interests, realized or frustrated in concrete and particular lives. As Nussbaum argues, literature “speaks about us, about our lives and choices and emotions, about our social existence and the totality of our connections...it does not simply (as history does) record that this or that event happened; it searches for patterns of possibility—of choice, and circumstance, and the interaction between choice and circumstance—that turn up

in human lives with such a persistence that they must be regarded as our possibilities.” The novel thus suggests to us the possibility that human beings have something in common as determinate human beings, and not only as “wealth-maximizers” or “units of freedom.”

In addition to the significance of its conception of the person, I want to suggest another reason for turning to the novel form when we are seeking an understanding of human beings.

Impersonal philosophical argument is one way to proceed if we wish to persuade another about the proper approach to a moral question. But it may be that there are certain truths that cannot be established by way of standard philosophical argument because we cannot reason our way into their authority beginning from a point of critical doubt and detachment. It may be that the truth about the kind of human beings we are and the kind of respect and concern that is owed us is a truth of this kind. Perhaps the acknowledgment of this truth just demands an enlargement of the moral imagination, an expanded ability to think about others and how their lives might be affected by circumstance and other human beings, a sense of how these external factors might affect their sense of worth or their ability to recognize their lives as their own. If this is what is required for an understanding of human beings, we will have to begin our investigation with an act of assent, with an exploration of concrete human lives that already assumes that they matter,

47 Nussbaum, *Love’s Knowledge*, 171. Here Nussbaum is drawing on a passage from Aristotle’s *Poetics* chapter 9: “poetry is something more philosophical and of graver import than history, since its statements are of the nature of universals, whereas those of history are singular.”


49 Cora Diamond writes: “Novelists and other writers can put before us and develop our concept of a human being by giving us scenes of such recognition or denial of recognition, by showing us, reminding us, that this is what it is like to recognize a human being, and that this is what it is like to fail to accord such recognition, to refuse it.” See Cora Diamond, “Losing Your Concepts,” (1988) 98 Ethics 255 at 264. Richard Eldridge writes that the demands upon us arising from our autonomy and connectedness are “known to us through our responses to their acknowledgment and refusal in particular lives,” that is, through our responses to literature. See Richard Eldridge, *On Moral Personhood: Philosophy, Literature, Criticism, and Self-Understanding* (Chicago: University of Chicago Press, 1989) 15.
not with a philosophical probing for that which cannot be doubted. This means, not that we cannot raise doubts about, or stand back from, our initial intuitions and convictions and question them, but rather that we must begin with assent rather than doubt, immersion rather than detachment. And we engage in an act of assent, temporarily leaving behind doubt and detachment, when we take up a novel and become the kind of reader I have suggested the novel asks us to be.

These claims for novels insist that this kind of literature has something to do with our lives and that it therefore refers to a reality outside itself. This raises the possibility that Weinrib’s criticisms of interdisciplinarity might be raised from the other side—from the side of literature. It might be said that to suggest that literature can contribute to law’s justification is to treat literature as an instrument, imposing upon literature external purposes that are foreign to it. But the charge of instrumentality will be correct only if we think that the contribution to moral understanding, to the understanding of human beings as they live in the world, is not a part of literature’s own purpose. Some have thought this. They have thought that literature is, in fact, purposeless, that it is autonomous, making no reference to anything beyond itself, and that its value is its aesthetic value and nothing more. Perhaps this is true of some works of literature. Perhaps it is true of some works of literature that interpreting them for what they mean for the lives of human beings will distort them. But I think it is clear that there are many literary works, many of which are considered exemplars of the literary form, that have as part of their own

50 Booth, *The Company We Keep*, 32.

purpose the exploration of certain moral questions. Reading Henry James’ *The Portrait of a Lady* without wondering about the completeness of Isabel’s conception of freedom or without asking, at the end, what has gone wrong in this character’s life?, would be a reading that missed the whole point of the novel. It would be a reading that missed the idea that the novel was written to be read by an ordinary reader with ordinary human concerns, not simply to be studied in a university as a textual artifact. But the naturalness and persuasiveness of the moral reading will be the only way to judge this claim.

I have argued that law must defer to an external point of view for the validation of its authority and that the external point of view must be that of the human subject. This means that legal study must emerge from its immersion in legal practice and investigate the subject to whom it must defer and the conditions under which that subject will find its authority acceptable. But although this is a denial of law’s autonomy, although it requires us to step outside the point of view that is internal to legal practice, it does not subject law to a purpose foreign to it. Since the claim to legitimate authority is a part of law’s own character, since it is that which distinguishes law from purely coercive orders, the validation of that claim is properly understood as part of law’s own purpose.

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52 Many others have also thought that moral problems are central to James’ novels. See, for example, Martha Nussbaum, *Love’s Knowledge*; Frederick A. Olafson, “Moral Relationships in the Fiction of Henry James,” (1998) 98 Ethics 294; Cora Diamond, “Henry James, Moral Philosophers, Moralism,” (1997) 18 The Henry James Review 243; Robert Pippin, *Henry James and Modern Moral Life* (Cambridge: Cambridge University Press, 2000). James also thought that the contribution to moral understanding was a part of literature’s own purpose. He wrote: “The great question as to a poet or novelist is, How does he feel about life? What, in the last analysis, is his philosophy? When vigorous writers have reached maturity we are at liberty to look in their works for some expression of a total view of the world they have been so actively observing. This is the most interesting thing their works offer us.” Henry James, *French Poets and Novelists* (London, 1878) 97 cited in Alwyn Berland, *Culture and Conduct in the Novels of Henry James* (Cambridge: Cambridge University Press, 1981) 16.
In this thesis, I try to make explicit Henry James’ views about human dignity and freedom and their consequences for obligation and judgment as they appear in *The Portrait of a Lady*, *What Maisie Knew*, and *The Ambassadors*. I contrast these with two different views about these matters that are prominent in contemporary legal theory, namely Kantianism and feminism. But no effort is made to transform the law in light of a purpose that is foreign to it or to treat the law as an instrument of a goal externally given. Rather, I try to show, that James’ work embodies an understanding of human beings and their entitlements and obligations that is not only worthy of law’s attention, but that is embedded in private law itself. This means that the novels are presented as contributing to the realization of private law’s own purpose—its justification to the concrete human subjects it claims to bind.
Chapter 1
Conceptions of Freedom in Private Law

Live all you can; it’s a mistake not to. It doesn’t so much matter what you do in particular, so long as you have your life. If you haven’t had that what have you had? This place and these impressions—mild as you may find them to wind a man up so; all my impressions of Chad and of people I’ve seen at his place—well, have had their abundant message for me, have just dropped that into my mind. I see it now. I haven’t done so enough before—and now I’m old; too old at any rate for what I see. Oh I do see, at least; and more than you’d believe or I can express. It’s too late. And it’s as if the train had fairly waited at the station for me without my having had the gumption to know it was there. Now I hear its faint receding whistle miles and miles down the line. What one loses one loses; make no mistake about that. The affair—I mean the affair of life—couldn’t, no doubt, have been different for me; for it’s at the best a tin mould, either fluted and embossed, with ornamental excrescences, or else smooth and dreadfully plain, into which, a helpless jelly, one’s consciousness is poured—so that one ‘takes’ the form, as the great cook says, and is more or less compactly held by it: one lives in fine as one can. Still, one has the illusion of freedom; therefore don’t, like me, without the memory of that illusion. ...Do what you like so long as you don’t make my mistake. For it was mistake. Live!¹

This, Lambert Strether’s famous speech to his friend Little Bilham in Henry James’ The Ambassadors, is a struggle to understand what it means to live a life of one’s own. That it is a struggle is evidenced first by its delivery with, the narrator tells us, “full pauses and straight dashes,”² and second, by the fact that it is full of contradiction. We begin with Strether’s exuberant outburst: “Live all you can; it’s a mistake not to. It doesn’t so much matter what you do in particular, so long as you have your life.” Here we have the sense that it is possible for Little Bilham to avoid Strether’s mistake, that one can live a life of one’s own rather than a life as the ambassador of another. But then Strether, rather than offering advice as to how one might achieve this kind of freedom, suddenly doubts its possibility. Human consciousness is not self-determining; it is wholly determined, a helpless jelly poured into a tin mould. And yet far from

² James, The Ambassadors, 132.
acknowledging how this view of human nature undermines his initial advice—for how can one actively shape a life whose shape is already given?—Strether returns to his plea for freedom and enjoins Little Bilham to “Live!,” as though a life of one’s own remains a possibility after all. But if human beings are helpless and determined, needy and dependent, what can it mean to live a life of one’s own?

The idea that our lives are our own, that we are not to be governed by any external power, gives point to the most important questions in legal philosophy; for it is this background assumption about human freedom that shapes discussions about what rights we have and how we can be wronged, about the legitimacy of coercion and the value of the rule of law, about law’s justification and the significance of moral disagreement.3 These questions thus require an answer to a prior question, the one posed by Strether’s outburst, of what it means for a human being to be free. For it is only once we have a conception of human freedom that we can begin to ask what that freedom requires of other human beings and of government.4 The claim I make in this thesis is that the novels of Henry James offer a conception of personhood and human freedom that is importantly different from those that dominate contemporary legal thought and yet that is suitable for law. In this chapter I present two conceptions of freedom and personhood that we find in the liberal theory of private law and that I take to be James’ philosophical rivals. In following chapters I present James’ work as exhibiting an alternative conception of human

3 Arthur Ripstein makes this point as well: “The nature and justification of authority, the authorization to coerce, the significance of disagreement, political obedience, democracy and the rule of law arguably acquire their interest against some version of the assumption that each person is entitled to be his or her own master.” Arthur Ripstein, Force and Freedom (Cambridge: Harvard University Press, 2009) 4.

4 In “Private Law and Public Right,” Weinrib writes: “we first identify the concept of freedom that pertains to law, then work out the various rights expressive of this freedom.” (2011) 61 University of Toronto Law Journal 191 at 201.
personhood and freedom and what this means for our understandings of obligation and judgment.

1 The Kantian Conception of Freedom

In much of right-based private law scholarship, we find a conception of human freedom that we can describe as Kantian. For private law theorists in the Kantian legal tradition, the core meaning of freedom is best expressed in terms of the distinction between persons and things. A person is capable of determining his or her own purposes, whereas a thing is something that is used for the purposes of others. Someone is treated as a person when she is left to make her own choices; someone is treated as a thing when another person’s choices determine her action. Freedom is thus conceived as independence, as not being subject to the choice of another, and domination is just the coercion of another’s will. Freedom is not a good to be fostered or a goal to be realized; it is simply a boundary, a limit on the actions of others.


7 Ripstein, Force and Freedom, 29.

8 Ripstein, Force and Freedom, 15.
On the Kantian view, freedom so conceived is the sole ground of private law. This is so for the following reason. Since human beings are treated as persons when they are left to be governed by their own choices, they can be legitimately coerced only by a law that they could accept as consistent with their own freedom. This means that they cannot be coerced by a law that embodies a need, interest, or end that they may or may not share, for this would make them a means to the pursuit of another’s subjective ends. In order to arrive at a legitimate ground of law, therefore, we must abstract from all particular choices and subjective ends to that which is non-contingently shared by all. Through this process of abstraction, we arrive at the pure capacity for free choice—the capacity presupposed by all particular choices and that is thus prior to the setting of subjective ends. The freedom to choose is universally shared by human beings however much they may differ in other respects, for it is the capacity implicit in action itself.\(^9\) Moreover, in contrast to need, whose level may differ from person to person, the capacity for choice is identical in all human beings. Accordingly, in respecting each other’s pure agency, human beings can defer to one another without being subject to another’s choice and so without becoming a means to the pursuit of another’s subjective ends. As a capacity universally and identically present in all human beings, the freedom to choose appears as the shared ground upon which we can build a system of duties consistent with human freedom.

This, however, shows only that the capacity for choice is capable of commanding respect consistently with human freedom. We need to know, however, why this shared capacity is worthy of respect. Those who articulate the Kantian conception of freedom give the following answer.

Freedom understood as independence means, not only that I am not subject to the choice of any other person, but also that I decide what I will do. Interests, purposes, and ends are not simply given to me by God or nature, leaving me a passive receptacle with nothing to decide except how best to pursue them. Rather, the capacity for free choice is the capacity to abstract from and reflect upon immediate inclination and subjective desire, to determine whether or not I will follow this or that impulse, whether or not I will act upon this or that desire. “Free choice,” Weinrib writes, “is the possibility of substituting one object of desire for another, so that whatever content the will has for the moment does not necessarily determine what a person does.”

The capacity to abstract from its particular content reveals a self that is distinct from its ends, a chooser prior to all the particular things that might be chosen. This capacity thus reveals a source of value—the choosing self—that is distinguishable from its empirical circumstances and prior to all the things that are instrumentally and contingently valued. Dignity, understood as that which distinguishes the realm of instrumental value from the realm of ultimate value, resides in this capacity for choice.

On the Kantian view, then, it is the abstract capacity for choice that endows human beings with ultimate worth and that commands respect. But ultimate worth here refers not to any perfection or flourishing, not to anything that may or may not be achieved, but just to the finality of human beings as determinants of worth. This conception of worth as inhering in the capacity for free choice means that human worth is innate and unconditional, present just in virtue of my being a

human being.\textsuperscript{11} Individuals are thus morally self-sufficient, for their worth depends on nothing external to them and requires nothing external for its validation. Human beings thus make claims to respect on their own, as abstract and independent bearers of inviolable worth.

Whereas the abstract capacity for choice is understood as a locus of moral worth, all particular choices are regarded as morally arbitrary. Particular choices reflect nothing that I could not have in principle rejected, and all valued ends reflect nothing but my contingent valuation.\textsuperscript{12} This is true not only of desires and interests, but also of needs, for there is no need that so governs me that I could not choose whether or not to fulfill it.\textsuperscript{13} It is true also of my relationships to other human beings. There is no relationship that I could not in principle disown, for the ability to distance myself from others and choose my commitments from a position of detachment is just a part of what it means (on this view) to be free. There is no dignity in my concrete commitments, needs, interests, and ends, for these are given by nature and circumstance, and so my attachment to them can only be regarded as contingent and subjective. The capacity for choice is thus not simply \textit{a} locus of dignity; it is, on the view we are considering, the sole locus of dignity.

\textsuperscript{11} Kant writes: “Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.” Immanuel Kant, \textit{The Metaphysics of Morals} trans. Mary Gregor (Cambridge: Cambridge University Press, 1991) 30.

\textsuperscript{12} So, for example, Weinrib writes: “From the standpoint of the will in abstract right, particular acts, as well as the material circumstances and the subjective aims and interests that occasion those acts, have no standing of their own. ...Because freedom presupposes the possibility of choosing to do this or that or something else, any of which would instantiate free activity, the particular content of the agent’s choice has no specific significance.” Weinrib, “Right and Advantage in Private Law,” 1288.

When the capacity for free choice is understood as the sole locus of worth and regarded as alone universally and identically shared by human beings, we arrive at the following conception of right:

The concept of Right, insofar as it is related to an obligation corresponding to it...has to do, first, only with the external and indeed practical relation of one person to another, insofar as their actions, as facts, can have (direct or indirect) influence on each other. But second, it does not signify the relation of one’s choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other’s choice. Third, in this reciprocal relation of choice no account at all is taken of the matter of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the form in the relation of choice on the part of both, insofar as choice is regarded merely as free, and whether the action of one can be united with the freedom of the other in accordance with a universal law.¹⁴

Needs, interests, goals, and well-being all concern the matter of choice. Thus, no one has a right that another minister to his or her needs, desires, or purposes. These are subjective and contingent and form no part of the concept of right.¹⁵ The concept of right is thus singular; it contains nothing but the requirements of mutual independence, understood as mutual respect for free choice.

On its Kantian account, therefore, law regards human beings, not as individual characters with subjective values and life-goals, but as abstract agents stripped of everything but their capacity to act from freely chosen ends. Agents have equal rights to act from self-chosen ends and coercive duties not to interfere with the capacity for free action of others but no coercive duties to benefit others; for their equal worth means that none may be compelled to serve the particular ends of

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¹⁵ Benson thus writes that in private law, “needs, desires, considerations of well-being, and so forth of any kind are not, as such, the basis of claims against others and play no role in determining their content.” See Benson, “Philosophy of Property Law,” 812. Ripstein writes that need is “invisible to private law” in Arthur Ripstein, “Three Duties to Rescue: Moral, Civil and Criminal,” (2000) 19 Law and Philosophy 751 at 772.
Private law is therefore indifferent as to whether the free choice of one agent is compatible with the realization of another’s concrete goals; it is concerned only with whether the free choice of one agent is compatible with the free choice of another. If it is, the choice is permitted; otherwise, it is not.

From this perspective, the doctrines of private law—property, contract, tort, and unjust enrichment—delineate the various ways in which one person’s choice can be consistent with the free choice of another. The laws of property recognize the fact that being independent means that I am entitled to the greatest liberty compatible with a like liberty in everyone else; and this implies a right to possess and use external things in pursuing my goals. What I have acquired either through first possession or voluntary transfer is subject to my choice alone, and I am therefore wronged whenever somebody uses my property without my permission or prevents me from using my property. Contract law reflects the idea that individuals, being equally free and owing one another only negative duties of non-interference, can bind one another to confer a benefit only voluntarily and only in a relationship of mutual self-restriction. Tort law’s doctrine of trespass embodies the idea that the individual is sovereign over her body and property and is thus wronged by any voluntary crossing of these boundaries without permission. The principle behind its doctrine of negligence is that the creation of an unreasonable risk that materializes in harm to the person or property of others constitutes a failure to respect the equal

16 Weinrib, “Right and Advantage in Private Law,” 1291.
17 Benson writes, “[t]he sole relevant question is whether the defendant’s choice (act or omission), as exercised in relation to the plaintiff, can count as a voluntary interference with the latter’s protected external interest, irrespectively of the impact that the choice may have on the plaintiff’s needs, wishes, or advantage.” Benson, “Philosophy of Property Law,” 755-756.
worth of the human beings that are within the scope of the effects of one’s action. Unjust
enrichment is an extension of the rule that no person can be forced to serve another. It thus
requires that effective transfers of property be either reciprocal or intentionally unilateral.
Private law’s doctrines are thus the elaboration of a single theme: reciprocal non-interference
with abstract agency’s freedom to choose.

There is no doubt that the Kantian conception of human freedom together with the basic duty of
non-interference with others’ liberty that it generates seems to account for many of the most
important doctrines of private law. It explains, for example, the familiar doctrine that there is no
duty to rescue another, for such a duty would one-sidedly subordinate the rescuer’s freedom to
the subjective welfare of the person in need. The idea that there is no coercive duty to serve a
stranger also accounts for the doctrine of consideration. Requiring a bargain for a valid contract,
that doctrine embodies the idea that a court will not enforce a contract of unilateral service. The
same idea underlies tort law’s objective standard of care, which ensures that all are entitled to
equal liberty and security in pursuing their goals, not to a level of liberty and security tailored to
the idiosyncratic needs or capabilities of a particular plaintiff or defendant. Similarly, contract
law’s doctrine of objective intention ensures that a contract’s meaning is not hostage to the
subjective wish or desire of either contracting party.

20 Weinrib, “Right and Advantage in Private Law,” 1306.
22 Weinrib, “Right and Advantage in Private Law,” 1292; Peter Benson, “The Problem with Pure Economic Loss,”
(2009) 60 South Carolina Law Review 824 at 872.
The Kantian account also makes sense of private law’s apparent indifference to welfare—its distinction between wronging and harming. Consider the example of trespass. According to the law of trespass, a person wrongs me—and must pay me at least nominal damages—if he or she voluntarily steps on my land or touches me without my permission, whether or not I am harmed, and even if I am positively benefitted. Private law recognizes no wrong, however, when the action of another makes my property less useful in satisfying my needs or desires but poses no challenge to my proprietary sovereignty. So I am not wronged, for example, if the neighbouring hotel owner builds an addition that casts a shadow over my hotel’s sunbathing area, or if my neighbour cuts down the trees on his property that provided me with a beautiful view and a shady spot to read, or if my competitor attracts customers away from my shop in the normal course of business. Harm, the Kantian account explains, is relative to need and desire and has, on its own, no consequences for the bare capacity to choose. Harms are setbacks to the determinate individual’s pursuit of her concrete purposes, but they do not by themselves challenge the capacity for purposiveness. Thus harming alone cannot be a reason for liability. Neither does a benefit have objective status. Because a benefit is seen as contingently contributing to an individual’s subjective welfare, the law must generally be indifferent to whether a contract is advantageous to the parties. We see this in contract law’s general rule that a court will not inquire into the adequacy of consideration. Rather than compare the benefits each party receives, the court looks only to the voluntariness of the exchange. It does so because measuring the equality of the bargain by the benefits received would hold each party hostage to

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23 See Weinrib, “Right and Advantage in Private Law,” 1297-1301, where he elaborates this distinction in relation to the law of negligence.

24 This point is famously illustrated in *Fontainbleau Hotel Corp. V. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. C.A., 1959).
the other’s subjective values. Accordingly, if welfare is denied normative significance, courts cannot inquire into the substantive fairness of a bargain, for nothing remains for an objective standard of fairness beyond voluntariness.\(^{25}\)

Finally, the Kantian account’s indifference to welfare makes sense of private law’s bipolar and correlative structure. Two salient features of private law are that litigation draws together a particular plaintiff and a particular defendant and that the compensatory damages that the defendant is obligated to pay are identical to the damages that the plaintiff is owed. But the idea of welfare links all needy persons and contrasts them with all persons who are well-off. Considerations of welfare give us no reason to isolate a particular plaintiff for compensation for any particular amount from any particular defendant; they provide reasons for public schemes of redistribution. On the other hand, the idea of wrong abstracted from need brings to light the nexus between a particular defendant and a particular plaintiff as the doer and sufferer of the same injustice; and so that idea justifies singling out this particular plaintiff for compensation in an amount that repairs the injustice from this particular defendant.\(^{26}\)

### 2 Problems with Kantian Freedom

In sum, the Kantian account of freedom seems to offer a powerful theory of private law’s dominant theme and distinctive structure, one that is “lean, minimal, and self-contained.”\(^{27}\)

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However, private law tells a more complicated story than the foregoing discussion suggests. Consider now the following landmark cases in the history of private law’s development.

Herbert Bundy mortgaged the full value of his farm, his only asset, to the bank in order to borrow money for his son’s failing business.\(^{28}\) He did so without independent advice and after the bank informed him that his son’s business was in trouble. The mortgage on Bundy’s farm bought his son a short respite, for business quickly worsened. The bank stopped extending money and insisted upon the sale of Bundy’s house. In his judgment, Lord Denning began by noting contract law’s general rule: “...in the vast majority of cases a customer who signs a bank guarantee or charge cannot get out of it.”\(^{29}\) He went on, however, to find an exception here, created by the presence of an “unconscionable transaction.” “One who is in extreme need,” he wrote, “may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself.”\(^{30}\) In Lord Denning’s judgment two features of an unconscionable transaction are identified: unequal bargaining power due to extreme need (and no independent advice to offset it) and an extremely disadvantageous or “improvident” bargain for the weaker party.

What can a Kantian theory of private law say about the doctrine of unconscionability? As we noted in our discussion of contract law’s general rule that a court will not inquire into the adequacy of consideration, the only possible measure of a bargain’s fairness on the Kantian account is voluntariness. All other measures of fairness involve considerations of welfare, and yet welfare is, on this view, relative to subjective preferences, which no free and equal agent can


\(^{29}\) *Lloyds Bank v. Bundy*, 763.

be forced to satisfy. Yet there is no problem of voluntariness in this case. There is no question about whether Mr. Bundy consented to the contract with the bank. A theory of consent is a theory of how I can be held responsible for action in a way that is consistent with my freedom. A theory of consent must therefore follow from a conception of human freedom. Where freedom is understood as the bare capacity for purposive action, the consent requirement is satisfied if the choice the individual made was the product of his or her free will. As there is no fraud or duress in this case, there is no doubt that Mr. Bundy freely chose to enter the contract. The problem, rather, is that Mr. Bundy, in a position of unequal bargaining power due to his limited resources and his concern for his son’s well-being, entered a contract mortgaging his only property and means of subsistence for his son’s limited respite in the absence of independent advice. From the perspective of Kantian theory, however, the fact that Mr. Bundy’s farm was his only means of subsistence is nothing but circumstance; his concern for his son is subjective preference; and his failure to obtain independent advice is nothing but his own foolish choice. In setting the contract aside because of its unconscionability, the court appears to assert a ground of private law that the Kantian account cannot explain.

Wisner argues that unconscionability is unintelligible from a Kantian perspective only at first blush. He argues that the abstractness of Kantian right requires us to ignore the particular desires and needs of the parties to the transaction, but does not preclude a comparison of the bargain made with the market price. Market price, Wisner argues, constitutes “an objective

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standard based on the preferences of the entire community of participants in the market.”

Similarly, Benson argues that Kantian right permits a comparison of the actual bargain with the normal market price because market price is “independent of the particular purposes or needs of the parties to a given transaction.” But this argument is unpersuasive. Kantian right does preclude a comparison of the actual bargain with market price, because market price is nothing but an aggregation of subjective preferences. There is nothing about aggregation that can transform subjective preferences into an objective standard that free agents can recognize as binding. If particular preferences have no standing to coerce another, how can an aggregate of particular preferences legitimately coerce?

Let us also consider *Pettkus v. Becker*. Mr. Pettkus and Ms. Becker lived in a common-law relationship for almost twenty years. Over the course of these years, the two worked and sacrificed and eventually developed a successful bee-keeping business. The farms at which the bee-keeping businesses were run were registered in Pettkus’s name alone. The money to buy the bee hives and the equipment came from Pettkus’s account, while Becker’s money went towards household expenses. When their relationship ended, the trial judge awarded Becker forty bee hives without bees and fifteen hundred dollars. What Becker wanted, however, was an interest in the land owned by Pettkus and in the bee-keeping business. Yet property law was against her, because it gives rights of ownership to the title-holder alone, and title is not acquired by work and sacrifice. Nevertheless, Becker succeeded at the Supreme Court. There, Dickson J. found

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33 Wisner, “Understanding Unconsionability,” 419.


35 For this criticism see Brudner, *The Unity of the Common Law*, 132.

that “the compelling inference from the facts is that [Becker] believed she had some interest in
the farm and that that expectation was reasonable in the circumstances.” He argued, “…where
one person in a relationship tantamount to spousal prejudices herself in the reasonable
expectation of receiving an interest in property and the other person in the relationship freely
accepts benefits conferred by the first person in circumstances where he knows or ought to have
known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to
retain it.” Finding that Pettkus was unjustly enriched at Becker’s expense, the court awarded
Becker a one-half interest in the land and the bee-keeping business.

What can a Kantian theory of private law say about Pettkus v. Becker? Some theorists, drawing
on Kant, have argued that unjust enrichment protects the plaintiff’s freedom of choice, that
unjust enrichment is constituted by a transfer of services or property to which the plaintiff did not
consent. But as I argued above, the understanding of consent suitable to the Kantian
conception of freedom is necessarily thin, marking only a distinction between voluntariness and
coercion. On the Kantian view, the requirement of consent cannot mean that the individual’s
choice must be actualized as planned, because this understanding of freedom treats the content of
choice—the particular goal the agent is trying to accomplish—as a matter of indifference.
Rather, someone consents, on this view, if she acts free of coercion. But there is, of course, no

at 424, McInnes argues that unjust enrichment responds to the plaintiff’s ‘lack of free will.’ Drassinower argues that
the principle underlying unjust enrichment is “a person is entitled to what is his until he freely parts with it,” in
Journal of Legal Studies 33 at 37, McBride and McGrath argue that an enrichment is unjust “where it resulted from
the disposition of my property in a way which I did not consent to.” In “Free Acceptance and the Law of
Restitution,” (1988) 104 The Law Quarterly Review 576 at 581, Burrows writes that the factors which make an
enrichment unjust are those that establish the involuntariness of the transfer from plaintiff to defendant.
question that Becker provided the services she did freely. Her complaint is that she provided those services in the reasonable belief that she was acquiring an interest in the land and business, and, indeed, Justice Dickson made Becker’s reasonable expectation central to his judgment. To complain that one’s reasonable expectations have been defeated is not to complain about an interference with one’s freedom to choose; it is to complain that one’s life plan has been shattered by the unreasonable choice of another. It is to complain that one’s life, rather than reflecting one’s own goals and commitments, now reflects the projects of someone else. But security in a life plan one has conceived on one’s own is an aspect of human well-being; it is a welfare interest unknown to Kantian right.

Weinrib explains unjust enrichment in the following way.

The ultimate basis of this recovery [for unjust enrichment] is that corrective justice, being in Aristotle’s words, “towards another,” assumes the mutual externality of the parties and the consequent separateness of their interests. Accordingly, corrective justice recognizes no obligation to enrich another. The conferral of a benefit is literally within the free gift of the donor as a self-determining agent. Consequently, only if the donor acts in execution of a donative intent is the transfer of the benefit an expression of right. Unilateral transfers, such as mistaken payments, that are not the product of a donative intent are juridically ineffective, regardless of the absence of wrongdoing by the donee. Their restitution can therefore be demanded as a matter of corrective justice.40

Weinrib’s argument is that since no one is under a duty to serve another, we cannot assume that the plaintiff intended to make a gift to the defendant unless there is evidence of such an intention. In the case of Pettkus v. Becker, therefore, we cannot assume that Becker intended to make a gift of her services, and so her unilateral transfer of those services is “juridically ineffective.” If Weinrib is correct in thinking that, absent donative intent, the equality of the parties entails that only bilateral transfers are juridically effective, the question is: what is Becker entitled to receive

40 Weinrib, The Idea of Private Law, 141.
in return for her services? For a Kantian theorist, the answer must be that she is entitled to payment for those services, for payment is sufficient to negate a unilateral transfer. But in *Pettkus v. Becker*, the court awarded, not payment for service, but a one-half interest in the land and the business. In other words, the court fulfilled her expectation. The court thus concerned itself with the security of Becker’s life plan; it concerned itself with her particular goals and their realization. But this the Kantian account cannot explain. As Weinrib argues, “[w]hat matters for the concept of right is not the specific object that free choice is attempting to achieve, but only that it is a free choice that attempts to achieve it.”41 The theory of right grounded in free agency, which requires respect for the agent’s capacity to set goals but indifference to the agent’s realization of her goals, cannot explain the result in this case. Nor can it explain the general idea that we can distil from Justice Dickson’s ruling—that unjust enrichment protects the plaintiff’s reasonable expectations, her security in a life she can view as expressive of her own goals, projects, and ends.

Finally, let us consider *Donoghue v. Stevenson*.42 Donoghue sought to recover damages from Stevenson, who had manufactured a bottle of ginger beer that Donoghue consumed and that contained the decomposed remains of a snail. Donoghue claimed damages for suffering severe gastro-enteritis and shock after seeing the snail float out of the bottle. The court awarded the plaintiff damages, overruling the general common law principle that there are no positive duties apart from contract and recognizing negligence as a cause of action distinct from, and independent of, trespass. In recognizing the tort of negligence, the court found that there are positive duties of reasonable care for the person and property of individuals who are within the


scope of the effects of one’s actions. Individuals are wronged and entitled to compensation when they suffer injury or property damage as a result of a failure to take due care.

This, perhaps the most famous case in tort law, is a problematic one for the Kantian account; indeed, negligence in general is a problem for it. Kantian right, we have seen, generates the negative duty of non-interference with the right of free beings to act in the world. Wrong is an interference with liberty or a challenge to proprietary sovereignty. But as Donoghue v. Stevenson shows, negligence does not depend on an interference with liberty or on a violation of the plaintiff’s proprietary right. The defendant in Donoghue was the manufacturer of a bottle of ginger beer who was careless in his inspection of the bottle’s contents; the plaintiff got sick as a result. The defendant’s actions harmed the plaintiff’s bodily and mental well-being, but there is no sense in which they infringed the plaintiff’s proprietary or bodily sovereignty or interfered with her liberty. The plaintiff was not, after all, compelled to drink; she remained in control of her own body. How then can Kantian right understand the law of negligence?

Perhaps theorists in the Kantian tradition will say that in acting carelessly, the tortfeasor treats the victim as a means at her disposal in the pursuit of her own ends. But there are two problems here. The first is that the Kantian account said that a person is treated as an end when her capacity for choice is respected. Ripstein, as we have seen, argues that Kantian right “does not aspire to isolate people from the effects of other people’s choices” and that independence is to be understood as “my right that you not choose for me.” 43 But carelessness with regard to the existing condition of another’s person or property cannot be construed as a failure to respect the other’s capacity for choice. Thus, to say that carelessness with regard to the material condition

43 Ripstein, Force and Freedom, 38.
of another’s person or property fails to respect the other’s status as an end is an equivocation; it is a refusal to follow through on the implications of the theory’s abstract foundation. Even if we put this difficulty aside, however, we come upon another. If it is the carelessness of others that constitutes the wrong, why require the carelessness to materialize in harm? Two drivers who look down to check their email while driving are equally careless, and may equally be said to treat pedestrians as a means at their disposal. Why hold only the driver whose carelessness causes an accident liable when the disrespect for persons is equally present in both? Disrespect for abstract personhood can’t distinguish between the case where harm materializes and the case where it does not, yet this distinction is central to the law of negligence. Accordingly, negligence cannot be about respect for abstract personhood.

Weinrib argues that negligence law protects the embodiments of abstract personhood.\(^4\) The individual’s body and property are protected by private law, not as aspects of well-being, but as the embodiments of abstract agency. The body, he argues, “houses the free will and is the organ of its purposes.”\(^5\) By taking hold of property, the abstractly free will expresses itself in the external world and is thus recognizable by others. Negligence law thus protects us against wrongful harms to our person and property, which have normative significance as the external manifestations of our capacity for choice.

However, this cannot be an adequate explanation for the wrong of negligence. The embodiments of agency are not identical with agency, for abstract agency precisely distinguishes the self from any particular embodiment, even from the particular body in which it finds itself. This means

\(^4\) Weinrib, “Right and Advantage in Private Law,” 1292.

\(^5\) Weinrib, “Right and Advantage in Private Law,” 1289.
that there may be cases where the embodiments of agency are harmed even though the abstract capacity for agency remains unchallenged. This is just the possibility that *Donoghue* recognized when it acknowledged the independence of negligence from trespass—that is, the independence of negligence from violations of bodily or proprietary sovereignty. *Donoghue* presents a case where the individual’s health suffers due to another’s carelessness, but there is no violation of her bodily sovereignty, no disrespect for her capacity for agency. But if, as Weinrib argues, respect for free agency is the reason for protecting the embodiment of free agency, why protect the embodiment when agency itself is not disrespected? Damages for harm resulting from a battery are perhaps explicable on Weinrib’s account, but why damages for harm in the absence of a battery? The same puzzle arises in relation to harms to property. If I drive my car onto your lawn in a moment of distraction, I damage your property, but I don’t do anything to deny that you are its rightful owner, anything that could count as usurping or disrespecting your proprietary sovereignty.\(^46\) Again, if the embodiment is significant only as an embodiment of the capacity for agency, why protect the embodiment when the capacity itself is not threatened?\(^47\)

All this suggests that negligence law cannot be understood as protecting abstract agency. It is thus not at all clear how a Kantian theory of private law can regard as wrongful the kinds of conduct that tort law regards as wrongful.\(^48\) Negligence law’s concern for harms to the body and property independent of violations of bodily or proprietary sovereignty suggests that negligence

\(^{46}\) As Weinrib himself has argued, it is an “obvious truth that a particular owed thing remains the property of its owner whatever its condition or value.” “Right and Advantage in Private Law,” 1302.

\(^{47}\) Martin Stone makes a similar point: “For as realizations of abstract agency, a person’s rightful possessions comprise only so many generic instances of his formally equal will; the concrete quality of these possessions, their ‘more’ or ‘less’ has no significance as such. But why, then, in responding to the wrong, does justice require reparation of the loss?” See Martin Stone, “On the Idea of Private Law,” (1996) 9 Canadian Journal of Law and Jurisprudence 235 at 267.

law protects the individual’s security in the present condition of his or her body and possessions. But the present condition of one’s body and possessions is an aspect of human well-being, and its protection means that negligence law protects a right of welfare.49 Such a right cannot, however, be generated from the requirements of mutual respect for the freedom to choose.

These cases, and the doctrines of unconscionability, unjust enrichment, and negligence that they elucidate, highlight the fact that the Kantian account faces explanatory difficulties as a theory of private law. They show that private law tells a more complicated story than the Kantian account allows. But they do more than that. They point to the inadequacy of the Kantian account as a theory of human freedom. Moreover, they show the inadequacy of that account even on its own understanding of what human freedom means. The Kantian account said that the human individual is fundamentally different from a thing; a human being is an end and is therefore not to be treated as a mere means to the ends of another. But the Kantian account treats the human individual’s end-status as adequately respected simply when she is free to choose. Now consider again Lloyds Bank v. Bundy and Pettkus v. Becker.

As we saw in Lloyds Bank, Herbert Bundy mortgaged his sole means of subsistence in exchange for his son’s brief respite from creditors. We can say more about the nature of this contract’s unfairness than Lord Denning does in his judgment. In this case, the bank has exploited a dependency—created by its power over Mr. Bundy’s son and Mr. Bundy’s concern for his son’s

49 For this point see Brudner, The Unity of the Common Law, 176 and Stephen Perry, “The Moral Foundations of Tort Law,” 483. See also Goldberg and Zipursky: “Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person’s well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition” in “Torts as Wrongs,” (2010) 88 Texas Law Review 917 at 937. Also significant here is the fact that Ripstein, whose account of property and contract is strictly Kantian, nevertheless regards tort law as protecting interests important for leading an autonomous life. See Arthur Ripstein, Equality, Responsibility and the Law (Cambridge: Cambridge University Press, 2001) 50.
well-being—in order to achieve its own ends. Moreover, the significance of the fact that the contract bought only a brief respite from creditors in exchange for Mr. Bundy’s only asset and sole means of subsistence is that the contract cannot be said to embody any reasonable conception of Mr. Bundy’s own ends, for a livelihood is just what a person needs in order to actualize his capacity for setting ends.\(^5\) But this means that, because of the bank’s power and his concern for his son, Mr. Bundy freely chose to enter a contract wherein he unilaterally benefitted the bank and so became a unilateral means to the pursuit of its ends. A law that enforced the contract against Mr. Bundy would thus be complicit in the subordination of one agent to the ends of another.

We see something similar in *Pettkus v. Becker*. Becker worked, sacrificed, and paid for joint expenses instead of saving her money in a separate bank account in the reasonable expectation that she was investing in, and securing herself, a livelihood—specifically, an interest in a farm and a successful bee-keeping business. The expectation was reasonable, most importantly, because it was encouraged by Pettkus:

The compelling inference from the facts is that she believed she had some interest in the farm and that that expectation was reasonable in the circumstances. Mr. Pettkus would seem to have recognized in Miss Becker some property interest, through the payment to her of compensation, however modest. There is no evidence to indicate that he ever informed her that all her work performed over the nineteen years was being performed on a gratuitous basis. He freely accepted the benefits conferred upon him through her financial support and her labour.\(^5\)

\(^5\) For this interpretation of *Lloyds Bank v. Bundy* see Brudner, *The Unity of the Common Law*, 140. The idea that the contract serves no plausible conception of Mr. Bundy’s own good seems to be behind Sir Eric Sachs’ opinion: “[W]hat is the use of taking the risk of becoming penniless without benefiting anyone but the bank; is it not better both for you and your son that you, at any rate, should still have some money when the crash comes...?” *Lloyds Bank v. Bundy*, 770.

\(^5\) *Pettkus v. Becker*, 849.
Pettkus, in other words, raised an expectation that encouraged Becker to do things that could only embody a conception of her good if the expectation was fulfilled. Becker’s work and sacrifice, particularly her putting all her money toward household expenses, can reflect a reasonable conception of her good only if she was in fact acquiring an interest in the business and the land on which it was run; for otherwise, her years were spent unilaterally serving Pettkus and failing to secure herself any savings or livelihood should their relationship break down. A law that denied Becker’s title and allowed Pettkus to refuse to honour the expectation he encouraged would, in this instance, be an instrument of Pettkus’ subordination of Becker to his own ends.

These cases show that, in its focus on the bare freedom to choose and so on the presence or absence of coercion, the Kantian account of freedom is blind to certain forms of domination. It is blind, we have seen, to cases where one is unilaterally subordinated to another, not by coercion, but by the exploitation of the other’s dependence. In these cases, respect for the human individual as an end appears to require that the law do more than uphold the boundary of non-interference with the agent’s freedom to choose.

The law of negligence raises a further difficulty with the Kantian account as a full account of human freedom. Above, I suggested that the Kantian account cannot recognize as wrong the kind of wrongdoing that negligence law recognizes. That Weinrib and other theorists in the Kantian tradition acknowledge the legitimacy of protecting the body and its property in these cases is an implicit recognition of the relationship between freedom and well-being. It is a recognition—one that contradicts the theory’s insistence on the sheer capacity for choice as the

52 Brudner, The Unity of the Common Law, 131.
sole ground of law—that a conception of human freedom cannot be indifferent to the conditions of freedom’s realization in a concrete life. Without an able body and useful property, the capacity for choice is just a fact of consciousness having no reality in the world. Our ability to shape lives of our own has material conditions—health, bodily integrity, and property. Without these, my choices will reflect the needs and circumstances presented to me by nature, not a self-authored set of values and commitments. Accordingly, a law whose ground is human freedom cannot be indifferent to human well-being. That is why negligence law says that persons are under a positive duty of care toward those whom their actions might foreseeably harm. That is to say, negligence law says that people must show reasonable affirmative concern for others’ security in the conditions of a self-authored life. But in recognizing the conditions of freedom’s realization as a ground of law, we have abandoned the idea that respect for abstract agency is the sole foundation of right and the only legitimate basis for coercion.

Accordingly, the doctrines of unconscionability, unjust enrichment, and negligence show that the Kantian account of freedom as the freedom to choose cannot vindicate its own starting point—the ultimate worth of the human individual. It cannot protect the individual’s ultimate worth, because it has no resources to criticize cases where the individual, because of her vulnerability to another, freely chooses to enter a relationship where she is a unilateral means to another’s ends. Moreover, it cannot protect the ultimate worth of the individual, because its abstract foundation means that freedom is a fact of consciousness, a capacity for transcendence that has no worldly reality. The freedom of the individual human being must be the realization of one’s freedom in a determinate life; and yet freedom’s realization is just what the Kantian account treats as

53 Brudner, The Unity of the Common Law, 186.
insignificant when it declares the capacity for choice the sole ground of law.

3 Relational Autonomy and the Ethic of Care

From the foregoing discussion it seems that what is missing from the Kantian conception of freedom is an appreciation of the connection between the freedom of the abstract agent and the well-being of the concrete individual. Indeed, many legal theorists have criticized the Kantian elaboration of law, including private law, for its coldness—for its failure to show concern for the suffering of real human beings. This criticism has been central to feminist legal thought. Feminist theorists have argued that the Kantian account is mistaken in at least three senses: in its conception of the person, in its conception of human freedom, and in its conception of what freedom requires of other human beings and of government.

Liberal theory, many feminist thinkers have argued, assumes that human beings are essentially abstract agents, isolated and self-sufficient. But feminist theory takes the lives of real women as its starting point; and, it says, the liberal picture of human beings is not at all true to the experience of women. Women know that identity is importantly tied to the body we have and

54 There are, of course, many different kinds of feminist thought. Here, I focus on the work of those who have been called “relational” or “different voice” feminists because they seem to have the most to say about legal understandings of personhood, freedom, and obligation, as opposed to feminists who have focused exclusively on the problem of women’s equality.


57 Robin West, “Jurisprudence and Gender,” 2;
to the circumstances we face. Women know that we are not essentially isolated and self-sufficient, fully constituted outside of our relationships with other human beings.\textsuperscript{58} Our experience tells us that relationships constitute our identities, that we are essentially connected to others.\textsuperscript{59} Pregnancy and child-rearing, for example, reveal our deep interdependency.\textsuperscript{60} Moreover, women are caregivers, and caring for others who are sick or dying teaches that human beings are needy, profoundly affected by their bodies and touched by circumstance. Liberal theory, feminist scholars argue, thus rests on a misunderstanding of human beings and a distorted conception of what constitutes human personhood. Human beings are not self-sufficient individuals who find that they must live among others; human beings are essentially interrelated and interdependent.\textsuperscript{61} Their nature cannot be comprehended in isolation from relationships, for relationships are constitutive of their nature.\textsuperscript{62}

The feminist critique of Kantian right argues, not only that the Kantian account offers a partial conception of personhood, but also an inadequate conception of human freedom. These two criticisms are of course related. The insistence that we must begin from the experience of real human beings means that law cannot treat freedom as a “static human characteristic” that we

\begin{itemize}
\item \textsuperscript{58} Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities,” (1989) 1 Yale Journal of Law and Feminism 7 at 9.
\item \textsuperscript{59} McClain writes, “the conception of the person at the heart of the feminist paradigm is derived from women’s experience of themselves as fundamentally connected to others” in “Atomistic Man Revisited: Liberalism, Connection and Feminist Jurisprudence,” (1991-1992) 65 Southern California Law Review 1171 at 1183.
\item \textsuperscript{60} Nedelsky, “Reconceiving Autonomy,” 12; Robin West, Caring for Justice (New York: New York University Press, 1999) 1.
\item \textsuperscript{62} There is some disagreement among feminist theorists as to whether the connected conception of the person and the ethic of care is a conception of the person and what persons owe one another or whether it is a conception of women and a women’s morality. I treat feminist theory as offering us a conception of the person and the obligations between persons, because I assume that a plausible candidate for a theory of entitlement and obligation in a liberal state cannot single out one group for special treatment on the basis of sex.
\end{itemize}
simply posit about human beings. Rather, law must attend to the question of how freedom is realized in individual lives, in other words, how the potential for choice is actualized by the finite, concrete, embodied individual who finds herself with a set of circumstances and needs and struggles to shape a life she can view as her own. Robin West argues for this richer understanding of freedom through a discussion of Melville’s *Bartleby the Scrivener*. In Melville’s novella, the narrator is a lawyer who hires a copyist, Bartleby. While Bartleby is initially an excellent worker, copying and re-copying hundreds of pages of legal documents, he soon refuses to co-operate. He begins by refusing to do any jobs other than copying, and then refuses even his copying work. The narrator learns that Bartleby has no home and is living at the office. Eventually, Bartleby does nothing but stand mute in the office, day after day, doing nothing. The narrator cannot bring himself to evict Bartleby, so he moves his law office. He then learns that the next tenant has had Bartleby arrested and placed in the city of “Tombs,” where Bartleby has refused all food and starved himself to death. Bartleby’s suffering, West suggests, reveals the inadequacy of free choice as a conception of freedom. The wage labourer, though no doubt a free agent in the sense that he did choose to enter the labour contract, is not

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64 Seyla Benhabib speaks of freedom and individual identity as the struggle to shape “a coherent narrative that stands as my life’s story.” She argues that moral theory should concern itself with “the struggle of concrete, embodied selves, striving for autonomy,” in “The Generalized and the Concrete Other” in Eva Feder Kittay and Diana T. Meyers (eds), *Women and Moral Theory* (Totawa, N.J.: Rowman & Littlefield, 1987) 166, 159; Jennifer Nedelsky suggests that we focus, not on freedom as boundary, but on human autonomy as a capacity that must be nurtured and developed in relationships with parents, teachers, friends, and community in “Law, Boundaries, and the Bounded Self,” 163, 168-9. Elsewhere she writes that her focus is on what enables the “capacity to engage in the ongoing, interactive creation of our selves,” what “enables this capacity to develop, to thrive, to manifest in autonomous behavior and the experience of autonomy.” See *Law’s Relations*, 45-46.

free in any meaningful sense; for the choice between starvation and mindless work for a subsistence wage is not a choice that can reflect any conception of the labourer’s good.\textsuperscript{66}

We can expand upon West’s interpretation of the novella in the following way. In \textit{Bartleby}, copying is a metaphor for a life that embodies the goals of others but none of one’s own. What, the story seems to ask, is the value of free choice if it is not the choice of something one values, if it is not part of a thought-out scheme of commitments embodying one’s conception of what gives life point and meaning? The freedom that matters, Melville teaches us, is effective autonomy, living a life that reflects a self-endorsed conception of the good—in other words, living a life one can regard as one’s own.

What does effective autonomy mean for the individual who is conceived as essentially connected to other human beings? It means that one must discover a sense of identity and a set of values and meaningful commitments for oneself, but that one must do so always from within and in interaction with the community and relationships that are a part of one’s life.\textsuperscript{67} Values and ends are not imposed on individuals from without, but neither are they selected from a position of detachment.\textsuperscript{68} Identity and commitments, values and ends, are discovered and reflectively

\textsuperscript{66}West elaborates upon this idea elsewhere. She says that free choice is morally neutral and the relevant question is whether or not what was chosen is conducive to the individual’s well-being. See Robin West, “Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner,” (1985-1986) 99 Harvard Law Review 384 at 391.

\textsuperscript{67}Nedelsky, “Reconceiving Autonomy,” 10; in \textit{Law’s Relations}, Nedelsky writes that autonomy is a “capacity to engage in the ongoing, interactive creation of our selves—our relational selves, our selves that are constituted, yet not determined, by the web of nested relations within which we live,” 45. Similarly, Lessard regards liberty “as a process of relationship through which one’s consciousness of one’s own particular history, needs, capacity for agency and identity is clarified, recognized and evolves” in “Relationship, Particularity, and Change” (1991) 36 McGill Law Journal 263 at 284. See also Sherry, “Civic Virtue and the Feminine Voice,” 547.

\textsuperscript{68}Nedelsky, “Reconceiving Autonomy,” 10.
endorsed rather than spun from a free will. They are sifted from, and always shaped by, the norms of the communities of which the individual is an inseparable part.

From the Kantian perspective, the capacity for abstraction constitutes human freedom. We saw that this conception of freedom generated a very circumscribed notion of duty as non-interference. Of course, the Kantian view does not claim that such a thin notion of duty is appropriate in all moral contexts; its claim is that duty as non-interference is the normative perspective appropriate to private law. But if freedom as choice has been shown to be inadequate to human worth, why limit our duties to one another to those generated by the inadequate conception? We need a conception of interpersonal duty adequate to an understanding of freedom as effective autonomy—as success in living a life one can regard as one’s own. Effective autonomy is a goal whose achievement requires affirmative support and not merely cold respect. Moreover, since human beings are regarded as essentially connected to their bodies, their history, and one another, the realization of a life of one’s own must occur in relationship and community, not in isolation.

For many feminist theorists, all this means that freedom requires, not boundaries of non-interference, but an ethic of care for the effective autonomy of those united within law’s moral community. An ethic of care entails a view of rights quite different from the Kantian conception of rights as boundaries. Law’s focus ought to be, not on protecting people from intrusion by others, but on structuring relationships so as to foster human flourishing. Jennifer Nedelsky, for example, argues that effective autonomy requires “social forms, relationships, and personal

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practices that foster that capacity,” and so she proposes that we conceive of rights “as relationship.” Questions about what rights we have, their scope and limits, are questions about what it takes to foster autonomy; and they are to be answered in light of an understanding of rights “as a means of structuring relationships”—relationships of “power, responsibility, trust, obligation, respect, and caretaking.” The debate about rights, Nedelsky argues, should be a conversation about “why we think some patterns of human relationship are better than others and what sort of ‘rights’ will foster them.”

What does this conception of freedom mean for the laws governing private interactions? The norms that govern the conduct of private parties are delegated by the norm-creating institution as part of its general authority over its citizens; in other words, the rights and duties that govern private transactions fall out of the requirements of the common good, understood as the effective autonomy of all. Nedelsky offers the following relational interpretation of private law:

“...as lawyers know, property rights are not primarily about things, but about people’s relation to each other as they affect and are affected by things. The rights that the law enforces stipulate limits on what we can do with things depending on how our action affects others (for example, nuisance), when we can withhold access to things from others and how we can use that power to withhold to get them to do what we want (we are now into the realm of contract), and what responsibilities we have with respect to others’ well-being (for example, tort law and landlord-tenant law)."

Thus, property law is about how ownership of things affects well-being and shapes the relationships between people. In determining whether there is property in a particular thing (for

73 Nedelsky, “Property in Potential Life?” 345.
74 Nedelsky, “Reconceiving Rights as Relationship,” 14.
75 Nedelsky, “Reconceiving Rights as Relationship,” 13-14.
example, in “reproductive material”), the question to ask is how a right of property will affect common needs, shape relationships, and help or hinder the autonomy of the human beings that are a part of those relationships. Thus, the relational account of rights can explain the remedy in *Pettkus v. Becker*, for it has no difficulty with redistributing property where it finds an exploited dependency that can be remedied with a proprietary transfer. Notice, however, that on the feminist account, *Pettkus* cannot be understood as an *exception* to the usual rules of property, which take no account of need. Instead, the rules of property will, on the feminist account, fall out of the requirements of realized autonomy. *Pettkus* is thus an instance of the rule, not the exception.

On the relational view, contract law is state regulation of power relations for the sake of autonomy. Thus, the relational account explains the doctrine of unconscionability as judicial care for the well-being of the complaining party. But it goes further. Whereas the unconscionability doctrine requires an improvident bargain, unequal bargaining power, and the absence of independent advice, Robin West would have judges set contracts aside after engaging in a “sympathetic identification with the subjective anguish and difficulty of the vulnerable party’s post-contractual plight.” Where the judge believes that a contractual agreement threatens the well-being or compromises the autonomy of one or both of the parties, that is enough reason to refuse its enforcement. Unconscionability is thus not an exception to a general rule that a consensual bargain between private parties is sufficient to vary their

76 See, for example, Nedelsky, “Property in Potential Life?” 343-365.


78 Robin West writes: “The morality of any of these consensual transactions depends upon the value of the worlds they create, which in turn depends in part upon the worth of the relationships they contain.” “Authority, Autonomy, and Choice,” 399.
interpersonal rights and obligations. Rather, unconscionability is an instance of the general rule that contracts must cohere with the common good of effective autonomy.

Finally, tort law, on the relational account, is all about our responsibilities for the well-being of others, who are to be conceived, not as strangers with whom we have no connection, but as interdependent members of a moral community. On the Kantian account, a claim in negligence depends upon the plaintiff’s sustaining a loss resulting from the defendant’s interference with something in which the plaintiff has a right of non-interference. The rights of bodily integrity, proprietary sovereignty, and contract exhaust the possible bases of such a right. Whenever the plaintiff lacks such a right, the defendant owes the plaintiff no duty of care and the defendant’s carelessness cannot constitute a wrong against the plaintiff. This means that on the Kantian account, the question of whether the defendant owes the plaintiff a duty of care is prior to any other question and is distinct from, and not reducible to, the question of whether the defendant took reasonable care or whether the defendant ought to have foreseen the harm he caused.

But on the feminist account, human beings are conceived as interconnected members of a moral community. Accordingly, they are all under a general obligation to care for one another’s well-being and to avoid unreasonably harming one another. The question to ask in cases of negligence is thus not whether the defendant owed a duty to this particular plaintiff to avoid this

79 Peter Benson, “The Problem with Pure Economic Loss,” 60 South Carolina Law Review 823 at 865. The example frequently used to illustrate this point is the example of the plaintiff who has a contract with a third party to use a bridge for business purposes which is negligently damaged by the defendant, resulting in financial loss to the plaintiff. In such a case, the defendant is not liable to the plaintiff, even if the loss to the plaintiff was foreseeable, because the loss arises from damage to something in which the plaintiff has neither a right of ownership nor a right of possession.


particular kind of harm, but whether the plaintiff was harmed and whether the defendant
demonstrated adequate neighbourly care for her safety, interests, and well-being.\(^\text{82}\) That the
defendant owes the plaintiff a duty of care is assumed.\(^\text{83}\) Moreover, recovery in tort should not
be limited to cases of harm to one’s physical body and possessions, as is required on the Kantian
view.\(^\text{84}\) We are now concerned with well-being and other interests are surely essential to human
well-being. Tort law’s protections ought to be extended to cover harms to emotional and
economic welfare.\(^\text{85}\) And if we are members of a moral community essential to our full
autonomous flourishing, why limit our duties in tort to the duty that we refrain from
unreasonably harming others? The traditional doctrine that there is “no duty to rescue” one who
is in danger is the product of an atomistic conception of the person and an assumption of the
normative irrelevance of welfare.\(^\text{86}\) Accordingly, the no-duty-to-rescue rule should give way to
a positive requirement of aid and care for the safety of others when their essential interests are
threatened.\(^\text{87}\) The feminist account of tort law thus gives us, not only a positive duty to take care
not to harm others as we pursue our legitimate ends, but also a positive duty to aid them when
their effective autonomy requires it.

\(^{83}\) Bender, “A Lawyer’s Primer on Feminist Theory and Tort,” 30-36; Speaking of Justice Holmes and his famous
argument limiting tort liability to reasonably foreseeable harm, West asks, “What should we make of this noncaring,
duty-bound man of justice?” See West, Caring for Justice, 43.
\(^{84}\) Chapman argues that this limit is required is by abstract right, which “corrects for wrongdoing within the space of
rights, not welfare.” See Bruce Chapman, “Wrongdoing, Welfare, and Damages,” 411. Benson makes a similar
Wisconsin Women’s Law Journal 389 at 391.
\(^{86}\) Bender, “An Overview of Feminist Torts Scholarship,” 580; Bender, “A Lawyer’s Primer on Feminist Theory
and Tort,” 36.
\(^{87}\) Bender, “A Lawyer’s Primer on Feminist Theory and Tort,” 35; see also Judith Areen, “A Need for Caring,”
The foregoing discussion, however, makes our entitlements and obligations sound too fixed by antecedent principle to be an accurate description of the feminist position regarding our rights and duties in the context of private transactions. For most feminist accounts of adjudication are characterized by a thoroughgoing particularism. On most feminist accounts, our entitlements and obligations ought to be finally determined by the judge who attends to the particular circumstances of the case and responds with an ethic of care for the well-being of the parties before her. The judge under Kantian right takes up the impartial point of view and coldly but respectfully enforces the boundary of non-interference between litigants; the Kantian judge does not ask about the parties’ needs or wishes, their subjective intentions or expectations, but only about whether the free choice of one was compatible with the free choice of another. The ethic of care, by contrast, requires the judge to recognize that she and the litigants are part of a moral community and that she must therefore show concern for their well-being. But when we care for well-being, we must care for the well-being of a particular person. We must pay attention to the

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90 The Kantian judge assumes what Benhabib calls “the standpoint of the generalized other”: we “view each and every individual as a rational being entitled to the same rights and duties we would want to ascribe to ourselves. In assuming this standpoint, we abstract from the individuality and concrete identity of the other.” See Seyla Benhabib, “The Generalized and the Concrete Other,” 163.
particular person’s needs and circumstances; we must attend to that person’s particular point of view. We must view the person before us as an individual with a concrete history, a particular identity, and a determinate set of commitments and emotional bonds.\(^{91}\) The ethic of care, Robin West argues, requires the judge to “grant the uniqueness of this litigant, and the moral duty of relational recognition she imposes upon this court and this judge.”\(^{92}\) Judgment thus should not be conceived as subsuming particular facts under universal rules and the judge should not feel that her hands are tied by the authority of abstract principles; for cases, when viewed in all their concrete particularity, are unique human problems and require a case-by-case analysis, that is, attention to context and point of view and a flexible approach to the application of rules.\(^{93}\)

Feminist scholarship has sought to give voice to lived experience, particularly the experience of women, and to show that that experience is worthy of law’s concern. It argues that the Kantian account fails to treat us as the embodied and dependent human beings that we are and that Kantian Right is thus partial rather than universal. Law, the feminist account argues, needs a robust conception of the person resting upon an understanding of human beings as complex characters who care deeply about their concrete circumstances and personal well-being, not as persons who feel untouched by their surroundings; as particular individuals who attribute high worth to, and are dependent upon, other individuals, not as independent loners who need only join with others if they cannot avoid them; as persons whose identities are constituted by certain commitments and who find their worth in validating relationships, not as self-sufficient identities.

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\(^{91}\) Benhabib calls this taking up the perspective of the “concrete other” in “The Generalized and the Concrete Other,” 164.

\(^{92}\) West, *Caring for Justice*, 57.

whose worth requires nothing external to them. The freedom that matters for human beings so conceived is realized freedom, living a life one can regard as one's own.

However, this kind of freedom has material preconditions, and it is achieved, not in isolation, but in community. Thus although feminists often make the idea of care the centrepiece of their theory, it is important to notice that the feminist argument is not simply the vague claim that legislators should care about citizens and that judges should empathize with litigants. The feminist insight, I think, is that human worth is not self-sufficient and independent; its validation requires a moral community that shows positive care for the well-being and realized autonomy of the determinate human being. Moreover, when citizens come before a judge, the inviolable worth of the individual requires particularized concern and not merely abstract respect, for that is the only way to acknowledge the worth of this particular individual and not just the worth of a generic bearer of a capacity shared by all. The question we must now address is whether the feminist conception of personhood, freedom, and obligation can vindicate its foundational idea, that is, the inviolable worth of the determinate and dependent human being.

94 Benhabib argues that it is only if we take up the standpoint of the concrete other that the other is “recognized and confirmed as a concrete, individual being” in “The Generalized and the Concrete Other,” 164. Similarly, Meyers argues that the ethic of care is needed in order to respect people’s individuality, their “whole” unique personalities, and not just their fundamental human dignity which they have in common with all others. See Diana T. Meyers, “The Socialized Individual and Individual Autonomy: An Intersection Between Philosophy and Psychology” in Women and Moral Theory, 146.

95 I think it is clear that this is the starting point for most feminists; indeed, it must be the starting point for any plausible theory of justice for a liberal state. Nedelsky, for example, writes: “...I share with most of Anglo-American liberalism the belief in the infinite and equal worth of every individual... [and] ...the sense that the distinctness of each individual matters, and that the value of each individual should never be subsumed under some aggregate—whether family, community, or nation.” See Law’s Relations, 86. See also Walker and Wall, “Feminist Jurisprudence: Justice and Care,” 285.
4 Problems in the Relational Conception

We should begin by noting that there is a sense in which the feminist critique of abstract agency misses its target. According to that critique, the Kantian understanding of freedom fails as an account of our lived experience. Yet the Kantian conception of freedom is not intended as an account of our ordinary experience of ourselves. That conception does not deny that actual human beings are thick with personal traits and characteristics, are shaped by their circumstances, the determinate features of their makeup, and their relationships. It does not deny that human beings have deep attachments to concrete persons as well as a sense of identity importantly tied to community, to a shared morality, or to a particular way of life. It does not say that human beings are not connected to one another; it says that human beings are ends and not means and so cannot be forced to serve one another. Its conception of the abstract and independent self is normative, not empirical. It says that our freedom entails that our traits, circumstances, attachments, and conceptions of the good are contingent and changeable and thus can form no part of a universal system of coercive duties. Law, if it is to treat human beings as ends, must view them as abstract and independent choosers, though this is not, of course, the view human beings take of themselves.

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96 Robin West, for example, treats the theory of human independence and self-sufficiency as an account of our experiential freedom when she takes liberal theory to be about “the subjective experience of separation.” See West, “Jurisprudence and Gender,” 7; she also does this when she describes the Kantian agent as “pathologically disconnected from all moral entanglements with others” in West, Caring for Justice, 5. Jennifer Nedelsky does this as well when she tries to refute the atomistic conception of the person with examples of the way parental preconceptions, neighbourhoods, and socio-economic status influence boys’ and girls’ perceptions of the life-choices available to them. See Law’s Relations, 19-22.

97 Weinrib writes that personality in the context of private law is “not a psychological but a normative idea” in “Correlativity, Personality and the Emerging Consensus on Corrective Justice,” 5.

98 So Benson, for example, says that the abstract conception of the person is “intended for private law only” in “The Idea of a Public Basis of Justification for Contract,” 316; elsewhere he writes that this is a “juridical conception of the person” and that it contrasts with the moral or ethical view of the person. See Peter Benson, “The Unity of Contract Law” in Peter Benson (ed), The Theory of Contract Law (Cambridge: Cambridge University Press, 2001)
And yet, while feminist thinkers are mistaken when they treat the Kantian account of freedom as an account of our experience, they do draw our attention to something important. In calling our minds to the way concrete human beings view their own lives, they illuminate the gap between the abstract agent of Kantian theory and the determinate human being. The problem with the Kantian conception is not that it rests on a flawed account of our experience; the problem is that it is indifferent to human experience. But this indifference to the actual lives of individual persons compromises its claim to universality, its claim to constitute a public perspective that can legitimately coerce free and equal human beings. Law’s legitimacy, Ripstein writes, depends on its taking up “a public perspective, distinct from the perspective of private persons, but consistent with the integrity of their separate standpoints.” But if this is what constitutes a public perspective, then abstract agency seems to fail as one. Though undoubtedly distinct from the perspective of private persons, it maintains the integrity of their separate standpoints only in the sense that it prevents sacrificing the rights of the individual to the welfare of the collective. It nevertheless obscures human separateness by merging all individual perspectives into a single perspective—the perspective of abstract agency. But as feminist scholarship teaches us, from this perspective, human beings are not just equal but identical. All the features of our determinate separateness fall away: our concrete ends, goals, relationships and commitments,

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131. Weinrib writes that “[a]bstract right features the abstraction from—not the absence of—particular interests” in “Right and Advantage in Private Law,” 1287.

our physical embodiment and empirical circumstance, our individual flourishing or suffering. Abstract agency is a standpoint that excludes the determinate and dependent individual.¹⁰⁰

But it is, after all, the determinate and dependent individual who is subject to law. Law purports to be authoritative for human beings considered as concrete and contingent individuals leading actual lives of commitment and attachment to particulars. And if law cannot be justified to us as determinate individuals because it is indifferent to our point of view, how can we regard law as anything other than despotic, imposed upon us from without? In drawing our attention to the concrete lives of those subject to law, the feminist account reveals the partiality of abstract agency. It reveals that in excluding the perspective of the determinate human being, abstract agency loses its claim to universality.

The feminist conception of the person, by contrast, is supposed to be a conception rooted in the actual lives of human beings. But now we must ask whether the feminist conception of the essential connectedness of human beings is not itself partial, whether it is not an overreaction to the partiality it finds in the Kantian account. Feminists are right, I have tried to show, in thinking that legal theory must begin from the perspective of the determinate human being, since it is the determinate human being who is subject to law. But have feminists properly described this perspective? For a full answer to this question we will need to investigate what it means to be a free human being; and my claim in this thesis is that Henry James’s novels are a rich and valuable source of insights into this question. But for now, I want to suggest that feminists are right to argue that we are not self-sufficient and unconnected beings. They are right that we don’t come to our relationships and communities with fully formed identities, selecting

¹⁰⁰ For this idea see Brudner, The Unity of the Common Law, 37.
commitments from a perspective of detachment, and able to repudiate any commitment without loss to our sense of who we are. But feminists are mistaken, I think, when they deny the fundamental separateness of human beings. We are separate from one another, physically and mentally, however much we may empathize with and care for one another. Empathy and care are ways of building bridges between self and other, but they assume the impossibility of a merger between human beings. Empathy assumes that it requires a fallible act of the imagination to understand what another is feeling and thinking;\textsuperscript{101} care assumes that I must actively \textit{do} something for another person in order to have an impact on his or her well-being.\textsuperscript{102}

Moreover, we should note that despite the explicit denial of essential human separateness, the acknowledgement of that separateness is implicit in all the feminist work on important women’s issues. For feminists do not want women to celebrate a relationship just because they happen to have it;\textsuperscript{103} they want women to find a critical standpoint from which they can ask whether a relationship is supportive of autonomy and well-being.\textsuperscript{104} But how is such a standpoint possible if it is not possible to regard ourselves as separate from the relationship we are considering? Is it not the insistence on women’s separateness from their husbands that grounds the argument

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\textsuperscript{101} I think that this is consistent with the view of empathy Lynne Henderson offers in “Legality and Empathy,” (1986-1987) 85 Michigan Law Review 1574.
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\textsuperscript{102} Tronto writes, “care implies a reaching out to something other than the self.” Joan Tronto, \textit{Moral Boundaries: A Political Argument for an Ethic of Care} (New York: Routledge, 1993) 102.
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\textsuperscript{103} Friedman makes this point in the context of an argument against feminist reliance on communitarian theory. Marilyn Friedman, “Feminism and Modern Friendship: Dislocating the Community,” (1989) 99 Ethics 275 at 282.
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\textsuperscript{104} Even if the critical standpoint is also constituted by relationships (for example, relationships with other women or caring parents), the possibility of a critical standpoint on a relationship means that we are always separate from any \textit{particular} relationship.
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against spousal abuse and against legal indifference to marital rape?\textsuperscript{105} Is it not the insistence on women’s separateness from their foetuses, their partners, and their moral communities that grounds the argument for a woman’s freedom of choice in abortion?\textsuperscript{106} In the novels of Henry James, particularly in the characters of Madame Merle and Mrs. Wix, we will see what it is to deny the fundamental separateness of human beings and the consequences of this denial for the recognition of human worth. We will see that the feminist scholars, like the Kantians, have given us a partial conception of the human being.

The feminist denial of human separateness is not only explicit in its conception of personhood; it is also implicit in the feminist conception of rights. Nedelsky argues that her view of rights as instrumental to autonomy-supporting relationships is not a form of consequentialism and thus does not constitute a failure to respect human beings. Nedelsky writes:

> The division between consequential and deontological theories is premised on the possibility of a useful conception of human beings whose nature can be understood in abstraction from any of the relations of which they are a part. Once one rejects this premise the sharp distinction between rights defined on the basis of human nature versus rights defined in terms of the relationships they foster simply dissolves. Since there is no freestanding human nature, comprehensible in abstraction from all relationships, from which one could derive a theory of rights, the focus on relationship does not constitute a failure to respect the essential claims of humanness. The focus on relationship is a focus on the nature of humanness, not a willingness to sacrifice it to the collective.\textsuperscript{107}

\textsuperscript{105} Linda McClain also argues that the self in light of which Robin West diagnoses gendered harms is the liberal self she criticizes. See “The Liberal Future of Relational Feminism: Robin West’s Caring for Justice,” (1999) 24 Law and Social Inquiry 477 at 484.

\textsuperscript{106} Lessard casts the argument for women’s reproductive control in relational terms. See “Relationship, Particularity, and Change,” 290. It may be true, as Lessard argues, that a woman’s decision to have an abortion is shaped by a consideration of the potential life inside her and of the interests of the other parent and the community. But if a woman’s relationship to others were the whole story about who she is, we would expect that others—foetus, partner, community—would have a say in her decision. It is because she is a separate person, with a separate physical and mental life, that the task of weighing the competing considerations and making a decision is hers alone.

\textsuperscript{107} Nedelsky, “Property in Potential Life?” 345 n.4.
Thus Nedelsky claims that if it is not possible to comprehend a human nature in abstraction from relationships, then there is no failure of respect if we view rights as instrumental to autonomy-enhancing relationships. But as I argued above, even if it is true that human beings live their lives always and necessarily in relationships, even if their identities are essentially constituted by their attachments, it may nevertheless be true that we are also fundamentally separate beings, thinking with our own minds and feeling pain in our own bodies. Moreover, even if realizing our full worth requires relationships, it may be still be true that we have worth as separate individuals and that we thus command respect, and have standing to make claims, just in and of ourselves. It is for an elaboration of the idea that human beings are separate bearers of worth and yet require relationships for the realization of that worth that I turn to the novels of Henry James. But if we are separate bearers of worth, then a conception of rights as instrumental to autonomy-enhancing relationships fails to respect the individual; for on this view, the individual has no standing to make claims either apart from or against the common good, no standing to exert even a limiting force on the government’s pursuit of the goals of the collective.

We can see the implications of the idea that rights fall out of the requirements of the autonomy of all by considering the large scale reforms of private law that the realization of this idea would require. Ownership of property would depend, not on first occupancy or contractual exchange, but exclusively on the requirements of the public welfare, and there is no reason that takings would be accompanied by a presumption of compensation. Moreover, as we saw above, the fact that two parties freely agreed to a contract is no reason not to refuse enforcement if the common good requires that it be set aside. The feminist account moves us to, not simply a doctrine of
unconscionability, but the general permissibility of paternalism in contract;\textsuperscript{108} it permits, in other words, a judge to overrule the free choices of human beings capable of rational deliberation when their choices are unreasonable from the point of view of well-being and autonomous flourishing. It is important to notice that since, on this view, autonomous flourishing has replaced the freedom to choose as the conception of freedom, the individual’s free choice has no constraining or limiting force over the judges’ ability to set the contract aside.

In property and contract law, the relational account of autonomy would allow the unilateral subordination of the individual to the requirements of the common good. In tort law, it could mean the unilateral subordination of those who are doing well to those whose well-being requires particular support. If tort law’s fundamental positive norm is care for well-being, then we have to change our ways of thinking about what constitutes “reasonable care” in the circumstances. If our primary concern is human flourishing, then we would not expect reasonableness to reflect a conception of the equality of the parties to the interaction, say, a conception of their equal interests in freedom and security. From the perspective of human flourishing, the parties to the interaction are very likely to be unequal. Thus a requirement of reasonable care under the circumstances might require that extra precautions be taken to protect the interests of those who are particularly vulnerable or needy, even if this means a significant curtailment of the freedom of those whose flourishing seems to require less in the way of community support.

Moreover, if, as Bender argues, tort law’s duty of care is expanded to require us to care for each other the way neighbours care for each other, we can no longer maintain a distinction between wronging and failing to aid. And the logical limit to care for well-being is not a duty of easy

\textsuperscript{108} Robin West explicitly argues for judicial paternalism in contract in “Taking Preferences Seriously.”
rescue when another’s life is in danger. Care for well-being would also require us to act to preserve another’s property if it is in jeopardy, for property is a material condition of well-being.\textsuperscript{109} And why stop at the preservation of life and property? The requirements of well-being are much more robust than such a limit would imply. Care for well-being would require the individual positively to support the life projects of needy members of her community. Moreover, the failure to do so would not only be morally wrong but legally wrong and this means that the one who failed to aid would be liable and required to pay damages for the consequences of her failure. All this suggests that the organization of tort law around the principle of care for well-being would require one individual unilaterally to serve another, to support another’s goals and projects, and so to become a means to the ends of another human being.

The fact that the feminist account subordinates the individual to the common good is made more problematic by the fact that many feminist accounts reject an objective or universal conception of that good. When we come to feminist understandings of adjudication, we see that the judge is not to view the facts before her through the lens of a general conception of human flourishing.\textsuperscript{110} Human flourishing is wholly particular—a question of the individual’s subjective suffering or subjective well-being\textsuperscript{111}—and the question of what care for flourishing requires can only be answered on a case-by-case basis by the judge who sympathetically engages with the stories of the litigants.\textsuperscript{112} Thus, in her discussion of judicial paternalism in contract law, West argues

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\item \textsuperscript{110} West, “Taking Preferences Seriously,” 677.
\item \textsuperscript{111} West, “Taking Preferences Seriously,” 680; West, “Authority, Autonomy, and Choice,” 391.
\item \textsuperscript{112} West writes: “while the interpreting judge finds himself facing conflicting rules, principles, and theories of interpretation, the idealized feminist or feminine judge finds herself facing interlocking webs of stories which she must somehow weave together and then complete.” See Caring for Justice, 206.
\end{itemize}
In the private law context, the judge discerns the individual’s true interest by sympathetically ‘placing herself in the individual’s shoes’ and seeing how it would feel to live with the choices that person has made, as opposed to some unchosen alternative. The judge imaginatively assumes the party’s life situation as her own and then renders a judgment that reflects that sympathetic knowledge.\footnote{West, “Taking Preferences Seriously,” 676.}

...the knowledge of the other’s welfare required by the moral decision is an inference drawn directly from her knowledge of the subjectivity of the other. That knowledge is gained (in part) by her sympathetic understanding of the subjective intensity, nature, and importance of the pain or pleasure others will feel as a consequence of her decision. She does not have, nor need she have, a rich conception of human flourishing or of the good. She need have only a sensitivity to the interests of the other, the empathic ability to comprehend the nature of that subjectivity, and the moral other-regarding inclination to act on the knowledge sympathetically gained.”\footnote{West, “Taking Preferences Seriously,” 683.}

The judge thus forms an opinion about what the well-being of the parties requires in the particular case—in the case of these litigants and in this context—and imposes it on the parties before her. For West, this is not a problem because she assumes that the judge can have “knowledge of the subjectivity of the other,” can assume “the party’s life situation as her own.” In other words, the judge’s substituting her opinion of the litigant’s best interest for the litigant’s own determination of that interest is not a problem for West because she assumes that it is possible for the judge and the party before her to merge perspectives, that it is possible for the judge to enter the life and mind of the other. I do not, of course, mean to deny the possibility of empathy, or to deny that empathy is a mode of understanding. I only want to say that empathy is fallible, that the separateness of human lives and minds means that others will always be other and so never completely transparent or knowable.\footnote{I take up this problem further in the discussion of The Ambassadors.} And if we question the possibility of the merged perspectives that West imagines, then the judicial intervention she describes looks very much like the coercive subjection of one to the moral opinion of another. But this is surely a
problem for a theory that sought to vindicate the worth of a determinate individual capable of shaping a life she can regard as her own.

There is a final difficulty with the feminist account of personhood and human freedom. Where the only respect-worthy freedom is the kind of freedom that has material conditions for its realization, conditions that may or may not obtain, law must distinguish between those who are successful in realizing the ideal and those who are failures from this perspective. Care for autonomy requires respect for the lives individuals choose for themselves, but only when the self-chosen life instantiates the ideal of autonomy. Law need not, for example, respect the choices of one who has shown himself to be a slave to his moment-to-moment passions, nor to the choices of one whose life has been taken over by an obsession, nor to the choices of one who acts from a desire to turn control over his life over to chance.\(^{116}\) There is thus no grounding for the equality of human beings or the universality of human rights. It is permissible to treat those who are struggling to lead autonomous lives as children,\(^{117}\) as persons entitled to our care but whose choices about their own lives are not entitled to our respect. In its exclusive concern with fostering individual autonomy, the feminist account loses the ground for the individual’s equal and unconditional worth.

Accordingly, the feminist account, like the Kantian one, cannot vindicate its own starting point, that is, the inviolable worth of the determinate individual. It cannot vindicate the \textit{worth} of the individual because it has no grounding for the idea that the individual makes claims to respect unconditionally and because it requires individuals unilaterally to serve those whose life projects

\(^{116}\) Robin West, “Authority, Autonomy, and Choice.”

\(^{117}\) Jennifer Nedelsky, for example, argues that the parent-child relationship is the appropriate metaphor for thinking about human freedom. See \textit{Law’s Relations}, 124.
require special support. It cannot vindicate the worth of the individual, because it subordinates the individual to the requirements of the autonomous flourishing of all and to the subjective opinion of the caring judge.

5 Strether’s Speech Revisited

Let us now return to Lambert Strether’s muddled and contradictory speech in Henry James’ *The Ambassadors*. There is, as I noted at the outset of this chapter, much confusion here. In his advice to Little Bilham, Strether warns him against making the same mistakes he has made. The speech is an injunction to “Live!,” to live a life of one’s own rather than a life as the ambassador of another. Strether’s outburst, “Live all you can; it’s a mistake not to. It doesn’t so much matter what you do in particular, so long as you have your life. If you haven’t had that what have you had?,” has all the excitement of possibility. This is signified also by the image of the train, waiting for its passengers and then speeding away, “miles and miles down the line.” The train suggests spontaneity and endless choice; it implies that we can free ourselves from place and circumstance, from the confines of a particular role or moral code, and choose for ourselves an identity and a set of commitments. We then find a sudden change. We move to the image of life as a tin mould and of consciousness as “the helpless jelly” that is poured in and that takes the mould’s form. Now we are needy and dependent, passively shaped by experience and circumstance. Here “one lives in fine as one can;” freedom is a struggle to shape a sense of self within a mould—a body, a role, a moral community—that is given. Strether’s advice is most striking because it is delivered seamlessly and without a sense of contradiction. And yet there must be a contradiction here, for there seems to be an unbridgeable gulf between the image of the train speeding away and that of the helpless jelly poured into the mould, a gulf between the active exuberance of “Live all you can” and the passive futility of “one lives in fine as one can.”
The muddle we find in Strether’s advice appears in the picture of private law I have presented. We saw that the Kantian account, which understands freedom as abstract agency’s capacity for choice, explains much of the private law that we have. It explains, for example, property law’s general indifference to questions of need, contract law’s indifference to the private wishes or needs of the contracting parties, and tort law’s distinction between wronging and failing to aid another. And yet we have also seen that there are important developments in the common law that the Kantian account is powerless to explain—for example, the doctrines of unconscionability, unjust enrichment, and negligence. On the other hand, the developments of private law that remain mysterious from the perspective of Kantian right are fully intelligible from the perspective of feminism’s emphasis on relational autonomy—on the realization of a life of one’s own in relationship with others and as a member of a moral community. Of course, the feminist account has the same problem in reverse. The doctrines that were intelligible from the Kantian perspective become unintelligible from the perspective of relational autonomy; they appear as the unjustified remnants of a framework that has been shown to be inadequate to freedom. Private law looks like an incoherent mix of doctrines generated from two incompatible understandings of personhood and freedom.

But perhaps Strether can help us here. For in his advice, the chasm between the two conceptions of human life is somehow bridged, as he declares, “[s]till, one has the illusion of freedom; therefore don’t be, like me, without the memory of that illusion.” Now the freedom associated with the speeding train is presented as an illusion and yet valuable; the absence of the illusion constitutes an important loss. Here Strether seems to say that one conception of personhood requires for its completeness the memory of the other, which, if taken on its own, is an illusion. In this way, his seamless move from one idea of personhood to the other asks us to consider the possibility that both are true, in the sense that each is a part of the complete story of what it
means for a human being to be free. But this possibility is just the one that has been implicit in our discussion of the Kantian and feminist conceptions of personhood and freedom. We saw that respect for abstract agency could not vindicate the individual’s inviolable worth without recognizing the normative significance of the realized autonomy of the determinate and dependent human being. We saw that care for individual well-being and realized autonomy could not vindicate the individual’s inviolable worth without acknowledging the separateness of human beings, from each other and their communities, and without an understanding of human dignity that is sufficiently abstract to qualify all human beings for respect and concern. If these conceptions of personhood and freedom are mutually limiting and dependent parts of a whole, then perhaps private law is not the muddle of contradictions it seems to be.

That vindicating the human being’s worth requires both respect for abstract agency’s separateness and freedom to choose and concern for the dependent individual’s well-being and autonomous flourishing, that these two ideas are complementary parts of a complete understanding of human dignity and freedom, is what I hope our reading of Henry James’ novels will show. In particular, I hope the novels will challenge two one-sided claims commonly put forward in contemporary legal theory. One is the feminist claim that human beings are not essentially separate and that nothing important (from the perspective of individual worth) is lost if respect for the capacity for choice is replaced with the richer idea of concern for autonomous flourishing. The other is the Kantian claim that the capacity for free choice is the only non-contingently shared thing among human beings and so the only principle capable of legitimately coercing equal bearers of worth.
Chapter 2
Three Conceptions of Freedom in *The Portrait of a Lady*

We are first introduced to Isabel Archer through her aunt Lydia’s inscrutable telegram from America: “Changed hotel, very bad, impudent clerk, address here. Taken sister’s girl, died last year, go to Europe, two sisters, quite independent.”¹ The recipients of the telegram, Lydia Touchett’s husband Daniel and son Ralph, puzzle over the meaning of this message, which “seems to admit of so many interpretations”: “But who’s ‘quite independent’ and in what sense is the term used?—that point’s not yet settled. Does the expression apply more particularly to the young lady my mother has adopted, or does it characterise her sisters equally?—and is it used in a moral or in a financial sense? Does it mean that they’ve been left well off, or that they wish to be under no obligations? Or does it simply mean that they’re fond of their own way?” (24)

“I’m very fond of my liberty,” Isabel warns her cousin Ralph in the novel’s opening pages (30). As proof of her seriousness, Isabel rejects the marriage proposals of Caspar Goodwood and Lord Warburton, men “nineteen out of twenty women” would have accepted, in favour of the “free exploration of life” (101). Yet, when her independence acquires a new reality as a consequence of her unexpected inheritance, Isabel surprises everyone by marrying Gilbert Osmond, an art collector without position or fortune. The marriage turns out to be a bad one, and Isabel must in the end decide what to do in the face of that realization. This, of course, is a rough sketch of the novel’s events, but in this sketch we have the features of *The Portrait of a Lady* that have most puzzled critics—the fear that accompanies Isabel’s rejection of her first two suitors’ marriage

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proposals, Isabel’s decision to marry Osmond, and her final decision to remain with him—and that have led many to regard the novel as a history of one woman’s troubled psychology.²

I will argue for a different interpretation of the novel, one that draws a connection between Isabel’s apparently puzzling decisions and the development of her conception of freedom. The terror we find in Isabel’s rejection of her suitors, her attraction to Osmond, and her decision to return to her marriage with Osmond each reflect the implications of a particular conception of freedom.³ The novel’s movement, I hope to show, reflects the development of Isabel’s idea of freedom through three stages: freedom as the abstract capacity for choice, freedom as the realization of the capacity for choice in a self-authored life, and freedom as the reflective endorsement of one’s constitutive relations, circumstances, and values. The novel, I will argue, reveals the partiality of each of these conceptions as an understanding of what it means to lead a life of one’s own.


³ I thus hope to show that Sallie Sears is wrong to argue that in The Portrait of a Lady, there is no connection between Isabel’s private experiences and the novel’s concern with freedom, choice, and responsibility. See Sallie Sears, The Negative Imagination: Form and Perspective in the Novels of Henry James (Ithaca: Cornell University Press, 1968) 130.
The problem of Isabel’s independence, of what it means to live a life that is one’s own, is at the centre of *The Portrait of Lady*. This may seem to be very far from the concerns of private law, but I hope to show that it is not. I will do so by presenting the doctrine of unconscionability in contract as an example of the way private law doctrines depend upon a conception of human freedom and so of the way private law and James’ novels are mutually illuminating sources of understanding.

1 Freedom and Unconscionability

*Williams v. Walker-Thomas Furniture Co.* is perhaps the most famous American unconscionability case. Ora Williams was the single parent of seven children whose only income was a $218 monthly stipend from the government. From 1957 to 1962 she purchased sheets, curtains, rugs, chairs, a chest of drawers, beds, mattresses, and a washing machine, all on credit, from Walker-Thomas Furniture. In making these purchases, Williams signed a total of fourteen contracts. Each contract had a paragraph in very fine print. This paragraph provided that the customer’s payments to the balance owing would be pro-rated on all of the customer’s purchases. In other words, until the customer paid off the amount owing on all the items, a balance would remain due on each of them. This meant that title to all the purchases remained with Walker-Thomas until the account was paid in full. In April 1962, Williams bought a stereo set that was priced at $514.95. At the time of that purchase, she had made a total of $1400 worth

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of payments to Walker-Thomas and the balance still owing on her account was $164. Shortly after purchasing the stereo, she defaulted on her payments and Walker-Thomas sought to repossess all the items she had bought since 1957. At trial, Williams sought to have the contracts she signed with Walker-Thomas declared unenforceable.

In the lower court\(^6\), the judge relied upon a classical understanding of contractual freedom: a voluntary agreement between competent persons is sufficient to vary their interpersonal rights and duties.\(^7\) There was, the judge found, no evidence of duress, fraud, or mistake in Williams’ case. It was Williams’ own responsibility to read the contract and seek outside help if she found that she could not understand it.\(^8\) Since she voluntarily signed the contract, the judge found that there were no grounds for setting aside the bargain. In the Court of Appeals, Judge Wright disagreed that fraud, duress, and mistake exhaust the grounds for setting aside a bargain. He found that a court may refuse to enforce a contract that it finds unconscionable, that is, a contract made in the absence of meaningful choice on the part of one party resulting in contractual terms that are unreasonably favourable to the other party.\(^9\)

\(^6\) 198 A. 2d 914 (D.C. App. 1964).

\(^7\) See, for example, Epstein: “The classical conception of contract at common law had as its first premise the belief that private agreements should be enforced in accordance with their terms...there was no place for a court to impose upon the parties its own views about their rights and duties.” Epstein, “Unconscionability: A Critical Reappraisal,” (1975) 18 Journal of Law and Economics 293. This was the view the courts took at the time James was writing. As Atiyah writes in his description of the courts’ approach to contracts in the late 1800s: “The justice of the contract, the fairness of a bargain, was, indeed, not a matter which concerned the courts at all. It was for the parties to choose their own terms and make their own bargains, and if one chose skillfully while the other chose foolishly, this was merely the working of the free market system.” See P.S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979) 389.

\(^8\) 198 A. 2d 914 at 916.

\(^9\) The Court of Appeals found that it did not have enough evidence to determine whether this contract was in fact unconscionable and remanded the case to the trial court for further proceedings.
The Court of Appeals’ decision to expand the grounds of non-enforcement to include unconscionability has been criticized by some scholars as an illegitimate infringement upon contractual freedom. Richard Epstein, for example, describes unconscionability as an “assault upon private agreements”\(^\text{10}\) and so an assault upon the individual’s right to do what he pleases with what he owns so long as he respects a like entitlement in others. Epstein argues that liberty requires the court to confine its role to scrutinizing the process of contract formation but not the substance of the agreement, thereby invalidating contracts made under circumstances of duress, fraud, or incompetence but leaving the question of the reasonableness of the contract’s terms to the parties themselves.

I have argued that the Kantian approach to private law, if applied consistently, must agree with this view. It is true that if contract law is to cohere with the idea that no individual can be forced unilaterally to serve another, it requires a doctrine of equivalence in exchange, that is, a doctrine saying that a legally enforceable contract must be an exchange of things that are of equal value. But what substance can the Kantian view give this doctrine? On the view that the abstract capacity for choice is the sole locus of moral worth, all the individual’s particular choices and ends appear contingent and subjective. Thus the value of any particular thing is just its value to me given my subjective wants. When two persons contract with one another, they agree, as between themselves, that the values of the things they are exchanging are equivalent. As a matter of chance, their subjective purposes and ends cohere in a way that enables them to reach an agreement about the exchange value of these particular things. But if this is right, it means that the measure of equivalence is the parties’ agreement; the two things exchanged are of equal value because the parties agree that they are. There can be no objective standard of equivalence

beyond the parties’ voluntary agreement to exchange, for this would attribute objective value to things the Kantian must regard as essentially subjective. Thus a Kantian view of private law cannot agree with the judgment in *Walker-Thomas*. For in the absence of fraud, duress, mistake, or incompetence, there is no freedom-based reason to set aside a voluntary exchange between two competent parties.

Peter Benson argues that this is not so. Even a law that abstracts from considerations of need and well-being and views contract as a pure relation of “will to will,” he argues, can set aside a contract where there is “a gross discrepancy between the comparative values of the consideration and the promise” that was not intended by the impoverished party at the time of contract formation. Were this not the case, he suggests, contract law would force one unilaterally to serve another. The determination of whether there is such a gross discrepancy between the values of the consideration and the promise can be made by reference to the competitive market price.

There are two problems with Benson’s argument. The first is that it is not clear why a contract law that abstracts from purposes, needs, and interests can regard the market price of a particular commodity as having any legal authority, since the market price of a commodity merely reflects the aggregated subjective purposes, needs, and interests of all those in the market. The second is that it is not clear why a gross disparity in the comparative value of the consideration and the promise prompts extra scrutiny of the parties’ intentions so that the court now asks the impoverished party: “did you really intend to strike such a bad bargain?” Of course it is true

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that the law cannot force one to serve another and so can never *presume* that one party intended to benefit another unilaterally. But the safeguards against such a presumption are built into the doctrines that govern contract formation. There must be an offer and an acceptance of the very thing that was offered without fraud, duress, or mistake; there must be a bargain, an exchange of things on either side. These requirements must be understood as reconciling the parties’ equal freedom with contractual enforcement by safeguarding the free choice of each. Why do these requirements become insufficient when the contract fails to reflect the market price? Why are we now concerned, not merely with what the impoverished party chose, but with what she intended?

Even if we put these difficulties aside, however, and accept that the austerity of the Kantian account does not prevent it from setting aside bargains where there is a gross disparity in the comparative values of the promise and the consideration, we should notice that this formulation still fails to give us the modern doctrine of unconscionability. *Walker-Thomas* illustrates this point. Williams made an improvident bargain. She was a poor woman with eight children that required food, clothing and shelter. Without obtaining independent advice, she risked losing all their life’s necessities—beds and other basic household items—in order to purchase a stereo on credit. But as the dissenting opinion pointed out, the contract she signed was a common market practice in the area in which she lived and the terms of these contracts reflected the risk the furniture company took in extending credit to low income families. There was an improvident bargain here, but no gross disparity between the bargain Williams struck and the market price

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15 350 F. 2d 445 at 450. See also the discussion in Eben Colby, “What did the Doctrine of Unconscionability do to the Walker-Thomas Furniture Company?” (2001-2002) 34 Connecticut Law Review 625 at 649, where the author notes that the lawyer for Williams confirmed that stores such as Walker-Thomas took on considerable risk in extending credit to low-income families in the neighbourhood and that Walker-Thomas was not the only store in the area to engage in this sort of business practice.
and no gross disparity between the promise and the consideration. A Kantian account, even one that attributes legal authority to market price, has no grounds for setting such a contract aside.

Some feminist scholars have suggested that we give up the formal requirements that have long governed contract law—offer and acceptance, the doctrine of consideration—and simply focus on the “concrete human problems” that underlie the disputes. Robin West has written two articles that address the doctrine of unconscionability. In these articles she suggests two different, but not necessarily competing, visions of the human problem that underlies unconscionability cases. In her first article, “Taking Preferences Seriously,” West argues that unconscionability responds to situations where the party seeking avoidance has made a bargain that is contrary to his or her well-being. On West’s interpretation, the judge in *Walker-Thomas* sympathized with the subjective post-contractual plight of Mrs. Williams and found that whatever her preferences were at the time of the contract’s formation, its enforcement would now cause her unwarranted suffering. Of course, as West acknowledges, the decision in *Walker-Thomas* did not only affect Mrs. Williams. In ruling that such credit terms were unenforceable, the effect of the ruling was that no one could choose to bear the burden of such onerous credit terms in order to obtain goods at a lower price. On West’s interpretation of the outcome, Judge Wright concluded that the suffering the terms would cause in cases of default was just too great relative to the benefit derived from the ability to buy the goods more cheaply.

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19 It would be more accurate to say that the ruling was that such terms are potentially unenforceable, since Judge Wright simply ruled that a ruling of unconscionability was possible given the facts.
It is important to notice that on West’s argument, there is no room for an exception for the party who, with independent advice and full knowledge and understanding of the contract’s terms, chooses to take the risk of the burdensome terms in exchange for cheaper goods. For West, no one can be permitted to risk that suffering. A willingness to do so simply reflects a false consciousness that calls for a paternalist intervention in the name of that individual’s future well-being. Our entitlements and obligations fall out of the requirements of human welfare; we cannot make claims on the basis of our liberty that could limit what a government or judge does for the sake of our well-being.

In the more recent “The Anti-Empathic Turn,” West suggests that the real problem in many unconscionability cases is the contracting behaviour of the stronger party.\footnote{Robin West, “The Anti-Empathic Turn” (July 13, 2011) at 26. NOMOS, forthcoming; Georgetown Public Law Research Paper No. 11-97. Available at ssrn.com/abstract=1885079.} We can thus interpret the finding in \textit{Walker-Thomas} as one based upon the judge’s repulsion at “the seller’s callous disregard of the specific circumstances besetting the plaintiff.”\footnote{West, “The Anti-Empathic Turn,” 28.} The basis of the decision is the judge’s empathic attention to both litigants. This empathic attention allows for a sympathetic engagement with the buyers’ struggles, with the market demands of the seller’s business, and then with the question of whether the seller treated the buyer decently in the light of those struggles and demands.\footnote{West, “The Anti-Empathic Turn,” 29.} In asking herself questions about the stronger party’s behaviour, the judge is to be guided by her feelings of empathy, sympathy, and disgust.\footnote{West, “The Anti-Empathic Turn,” 23.} This, West acknowledges, is not a rational exercise.\footnote{West, “Taking Preferences Seriously,” 685.} It rests upon the judge’s “feel” as is suggested
by the questions West suggests the judge ask herself: does it “shock the conscience”\footnote{West, “The Anti-Empathic Turn,” 12.}?; does it pass “the smell test”\footnote{West, “The Anti-Empathic Turn,” 13.}?; does it “make you want to puke”?\footnote{West, “The Anti-Empathic Turn,” 12.} In answering these questions, the judge must consult his or her moral sense, must engage in a “test of conscience.”\footnote{West, “The Anti-Empathic Turn,” 13.}

Unconscionability cases thus rest upon the judge’s moral judgment of the stronger party’s behaviour in light of the circumstances of the weaker party, a judgment informed by the judge’s private conscience, her private feelings of sympathy and disgust.

The moralism of West’s “The Anti-Empathic Turn” is perhaps surprising. She seems not to notice any difficulty with the judge setting aside a voluntary agreement between two competent persons on the basis of the judge’s private feelings of disgust at the stronger party’s behaviour. But perhaps we should not be surprised. The willingness to subordinate the individual’s freedom to a judge’s private opinion was already present in the open paternalism of her earlier work, in her unwillingness to recognize the enforceability of a contract believed improvident by the judge but entered into with independent advice and full knowledge and understanding of its terms.

Thus, on West’s interpretation, the doctrine of unconscionability enforces a moral conception of human well-being, one that leaves no room for individual freedom. Its paternalism and its moralism fail to recognize the individual as a separate, thinking purposive moral agent with a capacity and responsibility for shaping a life of her own.

The Kantian view thus gives us a conception of freedom that has no room for a doctrine of unconscionability in contract and the feminist view gives us a doctrine of unconscionability that leaves no room for human freedom. It is in this respect that I hope to show that James’ \textit{The}
Portrait of a Lady can contribute to legal understanding. The Portrait of a Lady illuminates the flaw in the Kantian account of human freedom from within, for it shows it to be inadequate, not from some other perspective, say from the perspective of care or equality, but from the perspective of freedom itself. It thus suggests the need for a richer understanding of human freedom and so for private law doctrines that, like unconscionability, embody such an understanding. But we will find that light is also shed in the other direction. For as we will see, the unconscionability doctrine illuminates the deficiency in the conception of freedom that attracts Isabel to Osmond and in the conception of moral authority that finally binds her to him. This sharpens our understanding of what goes wrong in Isabel’s effort to lead a life of her own and this, in turn, deepens our understanding of the private law doctrine’s normative foundation.

2 Freedom as Free Choice

The feature of Isabel’s moral character that is most emphasized in the first half of the novel is the importance she attaches to her own freedom and the real firmness with which she guards it. Isabel regards the world as a place “of free expansion, of irresistible action” (53). To her suitor, Caspar Goodwood, she says: “If there’s a thing in the world I’m fond of...it’s my personal independence” (140). If we consider how Isabel understands freedom, we first notice that it means for her the rejection of all that is “stupidly conventional” (59), in particular of conventional views about what a woman ought to do with her life—namely, wait “in an attitude

27 As Atiyah’s history of contract law suggests, the ideas that underlie the doctrine of unconscionability were in the air when James was writing. Oxford political thinker T.H. Green delivered his lecture on Liberal Legislation and Freedom of Contract in 1881, arguing that: “To uphold the sanctity of contracts is doubtless a prime business of government, but it is no less its business to provide against contracts being made, which from the helplessness of one of the parties to them, instead of being a security for freedom become an instrument of disguised oppression.” R.L. Nettleship (ed), Works of T. H. Green (London, 1888) cited in Atiyah, The Rise and Fall of Freedom of Contract, 585.
more or less gracefully passive, for a man to come [her] way and furnish [her] with a destiny” (63). We thus find Isabel refusing two marriage proposals in the first part of the novel and, though regretful of the pain she causes, rejoicing in the way her rejection of men “nineteen out of twenty” (101) women would have accepted seems proof of her freedom—of her capacity to reject the influence of convention in shaping her life.  

Whereas other women in the novel are likened to empty vessels or blank slates, Isabel is most frequently imagined as the bird in flight or the ship at sea. Isabel is “as free as the bird on the bough” (187), has “wings and the need of free beautiful movements” (140-1). She seems to her cousin Ralph to be “soaring far up in the blue,” “sailing in the bright light, over the heads of men” (285) and he encourages her to “[s]pread... [her] wings; rise above the ground” (189). Her friend Henrietta describes Isabel as “drifting away—right out to sea” (108) and Ralph wishes “to put a little wind in her sails” so that he might “see her going before the breeze” (158-159). The bird in flight and the ship at sea, images of detachment from land, are metaphors for one who manages to transcend social conventions, to float unmoored from oppressive customary norms. They are also images of movement, activity, suggesting Isabel’s refusal of the attitude of passivity and her rejection of the idea that her agency is porous to external impositions. Isabel is determined to shape a life that she can regard as her own because it is the one that she has chosen.

As we consider Isabel’s character more carefully, however, we see that her rejection of the shaping influence of the conventional is part of a larger self-conception, and that is her  

28 The rejection of Lord Warburton’s marriage proposal gives Isabel a “sweet...feeling of freedom” (125).
29 Madame Merle is the empty cup with a crack in it (428); Pansy is “like a sheet of blank paper” (233), “a blank page, a pure white surface” (262), “transparent” (343); the Countess Gemini is “a bright rare shell...in which something would rattle when you shook it” (368).
conviction of self-sufficiency. The refusal of dependence on other things or other people—on anything outside herself—is an important part of what Isabel means when she insists upon her freedom. We thus first meet her as a young woman without parents or property, pointedly warning Ralph that she is “not a candidate for adoption” (29), believing that “one should try to be one’s own best friend” (53), and that she has an “orbit of her own” (94). We see that Isabel keeps her distance from other human beings, acknowledging no need of them. While she displays a keen interest in others, her interest is the interest of a detached observer. She thinks of other people as “specimens” (64) and her desire to know them seems just a part of her general desire for knowledge of human behaviour. Moreover, we find Isabel constantly “planning out her development, desiring her perfection, observing her progress” (55) in a way suggesting that she views her development, perfection, and progress as all of her own making, and that her sense of worth requires for its confirmation nothing more than an exercise in introspection. Believing that her happiness requires nothing beyond her control, Isabel even thinks that her “fate” is something she will “choose” (141).

Finally, we must notice the real note of fear, even of terror, in Isabel’s reactions to her three suitors’ declarations of love. The thought of a marriage proposal from Lord Warburton fills Isabel with a “certain alarm” (93) and the coldness of her response, the narrator tells us, comes from fear (77). She reacts to Lord Warburton’s proposal as “some wild, caught creature in a vast cage” (99) and views Caspar Goodwood as a man who “barred the way” (136), “naturally plated and steeled, armed essentially for aggression” (136). The narrator offers the following description of Isabel’s reaction to Osmond’s first declaration of love: “What made her dread

great was precisely the force which, as it would seem, ought to have banished all dread—the sense of something within herself, deep down, that she supposed to be inspired and trustful passion. It was there like a large sum stored in a bank—which there was a terror in having to begin to spend. If she touched it, it would all come out” (258).

This fear we find in Isabel’s reactions to declarations of love cannot simply be explained by her unwillingness to make a conventional marriage, for in that case we would expect Isabel to find these proposals merely unwelcome, annoying but not terrifying. The reason for Isabel’s fear, I think, is that love implies neediness of something beyond oneself, and marriage appears to be a confession of the individual’s incompleteness. Because love threatens the conviction of self-sufficiency and the idea of an invulnerable agency, it is incompatible with Isabel’s conviction that she has “an orbit of her own” (94). For not only does love seem to be something that happens to us rather than something we choose; in loving another person, we acknowledge an attachment that we cannot repudiate, thus making our happiness and the shape of our lives vulnerable to the agency of another person who is beyond our control. This, I think, is the meaning of the similarity Isabel feels between loving and spending a sum of money once stored safely in a bank; the agency that was once carefully guarded and invulnerable is, in loving another, porous, no longer safely protected.

This begins to make clear for us the connection between freedom and the conviction of self-sufficiency. The self-sufficient agent is free because a life that requires nothing external to it is a life that is fully under that agent’s control. To acknowledge the need of something external—particularly another human being—is to acknowledge that one’s life is not purely self-authored. A life whose completion requires others is a life that is necessarily dependent upon, and so shaped and influenced by, the others that one needs, others that are beyond one’s control.
Freedom, for Isabel, thus excludes the possibility of such neediness; she thinks that to be free is to be self-sufficient. Isabel’s rejection of the authority and shaping influence of conventional norms may thus be understood as an aspect of her more general conviction of self-sufficiency, her general rejection of the influence or need of anything external.

I want now to suggest, however, that Isabel’s sense of her own self-sufficiency is part of an idea that is still more foundational in her conception of freedom—the idea that freedom is the human capacity for choice, that freedom is the freedom “to choose” (67). This idea of freedom is connected to a particular theory of human personality, which Isabel articulates in the following often-quoted exchange with Madame Merle:

“I don’t care anything about his house,” said Isabel.

“That’s very crude of you. When you’ve lived as long as I you’ll see that every human being has his shell and that you must take the shell into account. By the shell I mean the whole envelope of circumstances. There’s no such thing as an isolated man or woman; we’re each of us made up of some cluster of appurtenances. What shall we call our ‘self’? Where does it begin? Where does it end? It overflows into everything that belongs to us—and then it flows back again. I know a large part of myself is the clothes I choose to wear. I’ve a great respect for things! One’s self—for other people—is one’s expression of one’s self; and one’s house, one’s furniture, one’s garments, the books one reads, the company one keeps—these things are all expressive.”

This was very metaphysical; not more so, however, than several observations Madame Merle had already made. Isabel was fond of metaphysics, but was unable to accompany her friend into this bold analysis of the human personality. “I don’t agree with you. I think just the other way. I don’t know whether I succeed in expressing myself, but I know that nothing else expresses me. Nothing that belongs to me is any measure of me; everything’s on the contrary a limit, a barrier, and a perfectly arbitrary one. Certainly the

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31 Richard Chase speaks of this feature of Isabel’s character as a belief “that the self finds fulfillment either in its own isolated integrity or on a more or less transcendent ground” in The American Novel and its Tradition, 131.

32 The idea of choice thus resonates throughout the first half of the novel. “I can do what I choose,” Isabel insists (141); “The world lay before her—she could do whatever she chose. There was a deep thrill in it all...” (267); “I gave you full warning that I’d do as I chose,” Isabel tells Caspar (275). Others have noticed the centrality of the idea of choice in this novel. See, for example, Jottkandt, “Portrait of an Act,” 70.
clothes which, as you say, I choose to wear, don’t express me; and heaven forbid they should!”

“You dress very well,” Madame Merle lightly interposed.

“Possibly; but I don’t care to be judged by that. My clothes may express the dressmaker, but they don’t express me. To begin with it’s not my own choice that I wear them; they’re imposed upon me by society.” (172-173)

In this exchange, Isabel’s theory of personality is juxtaposed with its opposite. We see that Madame Merle regards the self as entirely bound up with the public world and identity as inseparable from its things, preferences, and circumstances. For Madame Merle, the idea of one’s own life is indistinguishable from “one’s appearance, one’s movements, one’s engagements, one’s society...” (201). Isabel disagrees. She argues that none of these things constitutes the essential self, for they are all arbitrary. Nothing that simply “belongs” to her is hers; she insists upon a distinction between what she is and what she merely has, what is her and what is merely hers.33 We see elsewhere that Isabel includes among the things she merely has, the things that are merely hers, not only her clothing and other material possessions, but all the features of her history and circumstance, her values and her beliefs. Isabel, the narrator tells us, has a constant desire to “begin afresh” and thinks that she can “leave the past behind her” (39). Moreover, Isabel’s sense that her values and beliefs are not essential features of her person explains, I think, why Isabel seems to efface herself when she first meets Osmond, minimizing the importance of her own ideas and moral commitments.34

33 See Michael Sandel, Liberalism and the Limits of Justice (Cambridge: Cambridge University Press, 1982) for this distinction.

34 This is what Isabel later realizes: “She had effaced herself when [Osmond] first knew her; she had made herself small, pretending there was less of her than there really was” (350).
Isabel thus conceives of human personality as an abstract, essential self that is separable from its circumstances, relations, and all the determinate features of its character. The idea that the essential self is undetermined means that human beings are capable of self-determination; they are not the passive victims of circumstances or the receptacles of impulses given by nature. The idea that the essential self is distinct from its relations and circumstances means that human beings are separate persons, bounded rather than porous. Because they are separate and capable of self-determination, human beings are inviolable moral agents and bearers of absolute worth. The moral agent refuses to be used as the tool of others’ purposes, assumes responsibility for her actions, and treats others with the respect that other, equally free, moral agents deserve; she regards them as free and dignified persons, not as objects ministering to her ends or as needy victims requiring her care.

Justice is thus central in Isabel’s thinking. She has a “passionate desire to be just” (284), and insists upon the same treatment for herself: “I want to be treated with justice; I want nothing but that” (188). It might be noticed, however, that Madame Merle also insists upon justice, telling Isabel that “[j]ustice is all [she] want[s]” (170). For Madame Merle, however, to ask for justice

35 Philip Sicker describes this feature of Isabel’s theory of the self as the idea that identity “is a mystically elusive property of individual consciousness” in *Love and the Quest for Identity in the Fiction of Henry James* (Princeton: Princeton University Press, 1980) 54-55. Arnold Kettle writes that freedom, for Isabel, is “an abstract quality inherent in the individual soul.” See Kettle, *An Introduction to the English Novel*, 209. Osmond also expresses this view in conversation with Madame Merle: “Don’t you know the soul is an immortal principle? How can it suffer alteration?” (427).

36 Isabel the American thus shares the conception of human freedom as “boundary” that Jennifer Nedelsky argues was the central metaphor for the Framers of the United States Constitution. See “Law, Boundaries, and the Bounded Self” (1990) 30 Representations 162.

37 “Whatever happens to me let me not be unjust,” she said; “let me bear my burdens myself and not shift them upon others” (333). Isabel has a spirit that wishes always “to hold fast to justice” (333), and a “general determination to be just” (334). Adam Parkes points out that justice is a central theme in *Portrait* that has largely been neglected by critics in “A Sense of Justice: Whistler, Ruskin, James, Impressionism,” (1999-2000) 42 Victorian Studies 593 at 611.
is to ask for sympathy, for mercy in the face of neediness, and we see that justice means something very different to Isabel. When Lord Warburton speaks to her in the language of love, for example, Isabel responds with the language of justice: “I care nothing for Gardencourt,” said her companion. “I care only for you.” “You’ve known me too short a time to have a right to say that,” (96) Isabel responds and then later promises, in considering his proposal, to “do it justice” (99). By doing the proposal justice, however, Isabel means only that she will find some way to reject the proposal while treating Lord Warburton with the respect he deserves; she does not mean that she will make his neediness, the fact that his happiness is in her hands, a reason for action on her part (99 and 102). Similarly, Isabel informs Caspar Goodwood that he has “no right to talk of losing what’s not [his]” (135) and insists that she can’t marry Caspar simply to please him (137). Justice, for Isabel, is the idea that each person is a moral agent entitled to respect for her dignified freedom. This respect requires a kind of distance between persons, a distance that affirms their inviolability, agency, and self-sufficiency. Isabel’s sense of justice is the Kantian idea of rightful honour, the readiness to assert one’s own claims and the willingness to acknowledge a like entitlement in other human beings. Ralph thus notices in Isabel an impenetrable, edifice-like quality (63), and Lord Warburton senses that in her relations with others, Isabel bestows “stern justice” (76) rather than love, and judges “only from the outside,” without care (77).

39 Thus we notice that Isabel has a deep respect for the private. Henrietta thinks “one’s door should stand ajar” (86), but Ralph finds Isabel impenetrable: “He surveyed the edifice from the outside and admired it greatly; he looked in at the windows and received an impression of proportions equally fair. But he felt that he saw it only by glimpses and that he had not yet stood under the roof. The door was fastened, and though he had keys in his pocket he had a conviction that none of them would fit” (63). Richard Chase is therefore right to speak of Isabel’s coldness and tendency to observe life at a distance, but wrong to describe her aloofness as “amoral.” See Chase, The American Novel and its Tradition, 132. Her aloofness rather reflects the moral idea that each individual is autonomous, with a private, inviolable core that is entitled to respect.
In contrast to the distance Isabel maintains between herself and others, Madame Merle’s self, as Osmond says, “includes so many other selves—so much of every one else and of everything” (201). But where human personality is conceived as inseparable from its things, circumstances, and relations, there can be no idea of an autonomous self that commands respect for its agency and makes claims to inviolability. Thus, rather than shaping a life of her own, Madame Merle allows herself to function as the tool of other’s purposes: “She laid down her pastimes as easily as she took them up; she worked and talked at the same time, and appeared to impute scant worth to anything she did. She gave away her sketches and tapestries; she rose from the piano or remained there, according to the convenience of her auditors, which she always unerringly divined” (165). Madame Merle is the porcelain pot, “shockingly chipped and cracked” (166), the empty teacup with a crack in it (428). These are images suggesting hollowness, utility, and violation. Moreover, just as Madame Merle is herself lacking in dignity, her conception of the self leaves nothing to which a sense of responsibility to others could attach and gives her no reason to regard others as dignified, inviolable subjects. Willing to be treated as a means to others’ ends, she finds no reason not to treat others as means to her own ends: “I don’t pretend to know what people are meant for,” she declares; “I only know what I can do with them” (203). We thus begin to see that Isabel’s theory of human personality is also a theory of human freedom. The idea that the self is not constituted by its circumstances, its relations with others, or by the impulses, preferences, and goals that are given to it by nature or convention means that human beings are choosers, free agents, actively willing their circumstances and preferences and not simply being made by them. They choose to follow particular impulses rather than being pushed around by them. Isabel’s conception of personality is thus a conception of freedom as the capacity for choice. It is freedom as the capacity to stand apart from our concrete values,
goals, relations, impulses, preferences, and circumstances, regarding them as “arbitrary” (172) or only contingently ours, ours only because we have chosen them.  

We can now see, moreover, that this understanding of freedom is the basis for Isabel’s rejection of the influence of conventional values and for her conviction of self-sufficiency. The rejection of the conventional is, for Isabel, evidence of her freedom to reject external influences upon her choice and action, evidence that she is the agent of her life and not a passive conduit for the dictates of convention. Isabel thus informs her aunt that she “always want[s] to know the things one shouldn’t do,” “so as to choose” whether or not she will do them (67). There is also a connection between freedom as choice and the conviction of self-sufficiency which may be explained in the following way. Human beings with concrete needs, preferences, and goals are dependent upon other human beings for care and assistance in fulfilling them. As we noted earlier, such dependency challenges the agent’s freedom, for it challenges her control over the shape of her life. But when the self is conceived in abstraction from such needs, preferences, and goals, when these things are regarded as inessential, as mere choices capable of repudiation, then dependency also becomes inessential, a choice not part of the core that constitutes human personality. Abstract personality, having no determinate needs, preferences, or goals, is self-sufficient.

As we have seen, Isabel’s rejection of the conventional and her conviction of self-sufficiency go some way toward explaining her rejection of the marriage proposals of Caspar Goodwood and Lord Warburton. Her broader conception of freedom as the capacity for choice sheds further light on her actions. Isabel’s rejection of the marriage proposals of Lord Warburton and Caspar

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41 In conversation with Henrietta, Ralph expresses a contrary view of human personality: “Ah, one doesn’t give up one’s country any more than one gives up one’s grandmother. They’re both antecedent to choice—elements of one’s composition that are not to be eliminated” (84).
Goodwood may be viewed, not only as her rejection of these particular men, but also as characteristic of her general attitude toward life. This attitude might be described as one of negation, an attitude for which any commitment can only be viewed as a limitation of one’s capacity for perfect liberty, one’s capacity for “free expansion.” When the essential self is conceived in abstraction from concrete choices and freedom is conceived as the possibility of choice, any definite commitment threatens the self’s indeterminacy and looks like a restriction of its freedom. We have already noted that the images associated with Isabel, the bird in flight and the ship at sea, are images of detachment from social convention. They are, however, also images of restless movement, suggesting detachment, not only from a conventional way of life, but from any particular way of life. They thus suggest to us the way Isabel’s insistence upon the freedom to choose is an insistence upon a certain capacity—choice—and not itself a commitment to any particular thing. Isabel rejects conventional ideas about what constitutes a good life, not in favour of some other conception of that life, but in favour of sheer indeterminacy. She falls in love with “suddenly perceived possibilities, with the idea of some new adventure” (330). Isabel’s aspiration to freedom is in this sense content-less. She rejects her suitors’ proposals simply because she doesn’t want to be “tied” (133) or to “give up other chances” (117). Isabel’s idea that freedom is the freedom to choose is thus an abstract conception of freedom. Focused as it is on sheer capacity or potential, Isabel’s conception of freedom abstracts from actual engagement with or commitment to the concrete; in fact, it is a conception for which such engagement and commitment can only be viewed as “a limit, a barrier” (172).

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3 Isabel’s Mistake: The Problem with Choice

We have thus far developed a picture of Isabel’s early conception of freedom. We saw it first as the rejection of passivity before the shaping influence of conventional expectations and then as the broader rejection of all alterity, of any dependence on external things beyond one’s control. Finally, we saw that beneath this conviction of self-sufficiency is a conception of the self as abstract personality and of freedom as the capacity for choice. Here, as I have suggested, the essential self is conceived as prior to, and capable of standing apart from, its concrete choices and determinate relations and circumstances, dignified in its free agency and noble in its moral responsibility. Readers, particularly modern readers, must admire Isabel’s ideal. But as we consider Isabel’s thought and action more carefully, I think we must also begin to sense, not merely that something has gone wrong with the realization of that ideal here, but that there are contradictions inherent in the ideal itself, contradictions implicit in Isabel’s understanding of what it means to live a life that is her own.

We find that for Isabel, the rejection of the authority of the conventional leaves no content for conceptions of value except subjective opinion. Judgment is a question of one’s personal point of view (60). The idea that all value is subjective, a question of what I happen to find choice-worthy, is connected to the idea that freedom is the freedom to choose. For if value presented itself to us as objectively given, it would not be something we were free to either accept or reject; it would, rather, simply require our recognition of it as valuable. This would mean that in some

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43 Pippin makes this point as well in *Henry James and Modern Moral Life*, 132.
44 Adam Parkes has also noted Isabel’s early idea that judgment is an entirely subjective matter in “A Sense of Justice,” 619.
sense, we are not what Isabel believes herself to be—perfectly free “to choose” (67). We see this
tension between objective value and the freedom of choice in Isabel’s reaction to Lord
Warburton’s character: “She had received a strong impression of his being a ‘personage,’ and
she had occupied herself in examining the image so conveyed. At the risk of adding to the
evidence of her self-sufficiency it must be said that there had been moments when this possibility
of admiration by a personage represented to her an aggression almost to the degree of an
affront...” (94). What is the significance of Lord Warburton’s being a “personage” for Isabel and
why does she find this threatening? The answer, I think, is that she senses that this has
implications for her freedom to judge him:

When she had thought of individual eminence she had thought of it on the basis of
character and wit—of what one might like in a gentleman’s mind and in his talk...and
hitherto her visions of a completed consciousness had concerned themselves largely with
moral images—things as to which the question would be whether they pleased her
sublime soul. Lord Warburton loomed up before her, largely and brightly, as a collection
of attributes and powers which were not to be measured by this simple rule, but which
demanded a different sort of appreciation—an appreciation that the girl, with her habit of
judging quickly and freely, felt she lacked patience to bestow. (94)

Our narrator does not state precisely the nature of the “different sort of appreciation” that Lord
Warburton appears to Isabel to demand. But it is implicit in this passage by way of contrast.
The kind of judgment to which Isabel is accustomed is informed only by personal preference and
private enjoyment. Judgment is a question of “what one might like,” a question of whether
something “pleases.” To judge in this way is to judge “quickly and freely” because here value is
conceived as entirely personal—something is good and valuable just because Isabel happens to
find it so. But Isabel sees that this purely personal mode of judgment is inadequate to Lord
Warburton. He appears before her as a man of private and political virtue, a man of “responsible
kindness” (69), embodying a kind of worth that is independent of her preferences and simply
calls for her acknowledgment. The different sort of appreciation she can see he demands is the
kind that we bestow upon things that present themselves to us as worthy of our appreciation, things that are admirable because they are good and not merely good because we happen to admire them. But in demanding “a different sort of appreciation,” an acknowledgment of value that has authority over personal preference, Lord Warburton looms before Isabel as an “affront” to her theory of her perfect freedom.

Particularly striking, however, is the way Isabel’s view of value and judgment as purely personal questions of what pleases seems to stand in direct tension with our above discussion of Isabel’s commitment to freedom of choice as a commitment to treating oneself and others with the respect due to dignified, self-sufficient moral agents. There is a tension here because the subjectivity of all value implies the freedom to deny the worth of other human beings. We see this tension in Isabel’s confused reaction to the possibility of a revolution in England, one that would see the overthrow of feudalism and the liberation of the lower classes. Isabel’s uncle has heard her express conflicting views on the matter, sometimes siding with the forces of change and sometimes with those of conservatism, no doubt because her commitment to freedom and independence conflicts badly with the fact that the ancien regime appeals more to her romantic sensibility. This tension is again made plain when Isabel, in her most radical formulation of her theory, insists even upon the freedom “to commit some atrocity” (141-142). We notice, with Caspar, that there is “something ominous in the way she reserve[s] her option” (142). What we see here is that the logic of freedom of choice, which began as an idea of the agent’s moral dignity, in the end undermines itself as a moral ideal. Since perfect freedom of choice must logically include the freedom to judge on the basis of one’s taste alone, to act on the basis of personal preference regardless of the consequences to others, and even to dominate others for the sake of one’s own happiness, we see that freedom of choice, taken to its logical extreme, implies a denial of a like freedom in others. The incoherence we often find in Isabel’s thought is thus not
simply the result of Isabel’s psychological immaturity; it is rather a result of the incoherence of
the ideal to which she is committed.

I now want to argue that James suggests that the conception of freedom as the capacity for
choice is also inadequate to the ideal of living a life that can be regarded as one’s own. When
freedom is conceived as the capacity for choice—the capacity to accept or reject external
influences—all choices appear equal because all are equally reflective of that capacity. We have
already noted that Isabel rejects the conventional view of the good life, not in favour of some
other particular view, but in favour of sheer indeterminacy. The result of her refusal of
commitment, of her failure to order her life according to some principles, values, or goals, is that
Isabel’s choices have nothing for their content but “capricious forces” (40) and “happy impulse”
(53). But while it is true that all choices are equally reflective of the capacity to choose,
something seems to have gone wrong here. The difficulty is implicit in the following exchange
between Isabel and Henrietta. “Do you know where you’re drifting?,” Henrietta asks. “No, I
haven’t the least idea, and I find it very pleasant not to know,” Isabel replies. “A swift carriage,
of a dark night, rattling with four horses over roads that one can’t see—that’s my idea of
happiness” (144).

The swift carriage rattling over roads one can’t see is an image of indeterminacy and unfettered
movement, but it is not an image of a thinking agent shaping a life for herself. It is rather, an
image of a person being blindly pulled along by her impulses. Similarly, during her travels in
Europe, we find Isabel in “the vagueness of unrest” (265), her action reflecting restlessness and

45 This point is also made by Jottkandt in “Portrait of an Act,” 72.
46 We might also notice another feature of this picture that makes it an odd conception of happiness—it doesn’t include other people.
“incoherence” (268). As she acquires an increased sense of “the absolute boldness and wantonness of liberty” (267), Isabel moves “rapidly and recklessly...like a thirsty person draining cup after cup” (268). This is another image that suggests, not the freedom of thought and reflection required for deliberately shaping a life of one’s own, but the power of impulses that are simply presented to us by nature.

Living by immediate impulse is unproblematic from the perspective of choice since it remains true that one could have rejected the impulse had one thought about it. And yet, so long as one acts as a conduit for ends externally given (in this case, by nature), we can say that one is poorly realizing the human potential for shaping a life in accordance with self-chosen ends, in other words, for shaping a life of one’s own. During her restless travels in Europe Isabel thus finally discovers that there is no dignity in “[d]oing all the vain things one likes” (257). She sees that a life that can be viewed as genuinely one’s own is a life that reflects a scheme of commitments chosen upon reflection, and not merely the capacity for choice; for that capacity turns out to be consistent with a life lived in accordance with whatever impulses and whims are given to us by our nature.

Isabel’s conception of freedom thus undergoes an important refinement, signalled to us by her decision to marry Gilbert Osmond. Where she once conceived of freedom as nothing but the capacity to choose and so rejected commitment in favour of the “free exploration of life,” Isabel now conceives of freedom as the realization of the human capacity for a life reflective of a self-chosen scheme of commitments: “[t]he desire for unlimited expansion had been succeeded in her soul by the sense that life was vacant without some private duty that might gather one’s energies to a point” (291). Isabel’s revised conception of freedom might thus be described as freedom as self-authorship. A life of one’s own is a life that one has authored, reflectively
chosen and deliberately shaped. “One must,” Isabel tells Ralph, “choose a corner and cultivate that” (283).

This suggests a final difficulty with the conception of freedom as the capacity for choice and with the conception of the person as self-sufficient, abstract personality. For now we see that while Isabel first thinks of freedom as the capacity for choice, the realization of freedom will require the choice of something concrete; the undetermined self must, in order to actualize its freedom, take on some determinate shape. Although Isabel has dreamed of sailing away or soaring above, she begins to see that Ralph’s advice, “[s]pread your wings; rise above the ground,” is no advice for how to live in the world as a free human being. Land, after all, is where determinate human beings must live their particular lives, and their freedom, it turns out, requires such particularity and determinacy for its realization. This must mean that the abstract personality is not self-sufficient after all, because the realization of its freedom requires choice of something external, and so something more than its capacity for abstraction from its determinate circumstances, features, and choices. And the significance of this is that the need for something external appears as a need of human freedom and not merely a need of Isabel’s, suggesting the inadequacy of self-sufficiency as an ideal befitting the nature of human beings and not merely Isabel’s inadequate realization of that ideal.

4 Freedom as Self-Authorship

Isabel thus realizes that she must commit herself to something concrete in order to make her ideal of a free life, of a life that is genuinely her own, real. One of our difficult tasks as readers of James’ text is, I think, to understand why Isabel’s realization that she must finally commit herself to something particular becomes a decision to marry Osmond, who cannot but appear to readers, as he appears to Isabel’s friends and family, as cold and mean, narrow and selfish. This has been a puzzle for the novel’s critics, many of whom have argued that Isabel, neurotically afraid of her own sexuality, marries Osmond for his sexual passivity. But of this, I think, the novel gives no suggestion. Why, then, does Isabel marry Osmond? If we take *The Portrait of a Lady* to be a novel about freedom and Isabel’s decision to marry Osmond as an implication of a particular conception of freedom, I think we will not find Isabel’s decision to marry Osmond so puzzling. This is not to suggest that the decision is not also psychologically realistic; it suggests rather that we will better see its psychological realism if we see it as an implication of Isabel’s understanding of freedom as self-authorship, as the shaping of one’s life from a position of critical detachment from all of one’s circumstances, relations, and values.

The first thing we must notice about Isabel’s decision to marry Osmond is that it is completely unconventional. Osmond is a man who has “no property, no title, no honours, no houses, nor lands, nor position, nor reputation, nor brilliant belongings of any sort” (228) and the unconventionality of Isabel’s marriage to such a “non-entity” (273) seems to leave her free to shape her life within it. There is no clear conventional role for the wife of a poor art collector in the way that there is for the wife of an English Lord or American businessman. By bringing her

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newly inherited wealth to Osmond, Isabel can marry without compromise to her sense of agency; here she feels that “she [is] not only taking, she [is] giving” (292). Moreover, in marrying a man who is “nothing, nothing, nothing” (228), Isabel makes a match of which no one approves, one that no one ever expected. Her decision thus appears to her as a decision uninfluenced by conventional notions of value, and so one that seems truly of her own choosing. She takes marrying Osmond as the realization of her freedom to do whatever she chooses (275), the realization of her capacity for self-authorship, because in marrying him she feels she has shown her freedom simply to marry “a person she likes” (285), her freedom to “follow out a good feeling” (287). Everyone’s disapproval is only evidence for Isabel that she is, in choosing Osmond, a “free agent” (333). She marries “to please herself” and this for her, is just what makes the decision “honourable” (289).

We can suggest a further reason for Isabel’s decision to marry Osmond. While the conception of freedom at which Isabel has now arrived recognizes that we must realize our capacity for choice in a thought-out scheme of commitments, it nonetheless continues to treat these commitments as the contingent commitments of the abstract chooser who can always regard them from the perspective of detachment. The idea of critical detachment plays an important role in Isabel’s conception of freedom as the realization of the potential for self-authorship inherent in the capacity for choice; for it is only if the individual can regard her commitments, relations, and values from a perspective of detachment that she can regard them as freely chosen, made by her rather than making her. Osmond, I will argue, is the embodiment of this ideal of self-authorship.

49 We might already sense that something is going wrong with Isabel’s attempt to make a concrete choice while adhering to her philosophical commitment to independence. For in purposefully choosing what is not conventional, her choice, because a reaction against convention, is as much shaped by convention as if she had chosen what convention itself dictated.
from a position of detachment and Ralph is thus right to think that Isabel marries Osmond on the basis of “a fine theory” (288). Once we see this, we cannot be surprised at Isabel’s attraction.

Osmond is an art collector. His life is thus dedicated to the act of choice, the act of acquisition. Devoting himself to the “collection of choice objects” (253), Osmond lives by himself in a “sorted, sifted, arranged world” (220). The relationship between the art collector and his art is important here. For although the art collector attributes high value to his collection, and regards it as having a special importance in his life, he values the art as a possession and is related to his objects of value through the act of acquisition. By this I mean that the art collector regards his collection from a perspective of detachment. He is the sovereign chooser and regards the pieces of his collection as objects chosen by him from among numerous possibilities. He gazes upon his chosen objects from a critical distance, asking whether they satisfy his ideal of the aesthetically pleasing, asking whether each is an object worthy of his museum. These valued objects are thus only contingently connected to the collector, connected through the act of acquisition, and acquired because they pleased his taste.

Osmond’s art collection is a symbol for his worldview. For Osmond, life itself is an art collection, “a matter of connoisseurship” (220). Each feature of Osmond’s life is a carefully selected object. Osmond is thus a model of the ideal of self-authorship; indeed, he appears to be a self-created man. A poor art collector, Osmond is a “nonentity” (273) and is thus free from the bonds of social roles. Believing that “one ought to make one’s life a work of art” (256), Osmond carefully crafts his own identity (324). He is thus compared to a “fine gold coin...struck off for a special occasion” (194) or “one of the drawings in the long gallery above the bridge of the

50 Jottkandt also notes that Osmond’s life is dedicated to the “continual act of selecting and choosing” in “Portrait of an Act,” 72.
Uffizi” (209). Though he is an American, he seems to have come “from nowhere” (273), a man untouched by his circumstances, making himself rather than being made. This, I think, is partly what the narrator means when he refers to Osmond’s character as not “natural” (314). Osmond tells Isabel that he is not “conventional,” but is rather “convention itself,” suggesting that he is not merely a receptacle of conventional norms but himself the author of value (259). Osmond’s intimates are carefully chosen for their ability to improve the appearance of his life’s work; he thinks of Isabel as a woman who has “qualified herself to figure in his collection of choice of objects” (253). Isabel notices that “even Mr. Osmond’s diminutive daughter had a kind of finish that was not entirely artless” (215), that she is somehow “artificial” (341); indeed, Osmond’s daughter Pansy is carefully “directed and fashioned” (262) to suit his taste and to do what he “prefer[s]” (309), moulded into the kind of daughter Osmond would have chosen had she been the possible object of choice. Osmond’s house is thus fittingly on a hill-top. Shaping his identity, choosing his relations, and crafting his own circumstances and values, Osmond stands back and gazes upon his own life from a distance as the art collector stands back and gazes upon the collection that he, the sovereign chooser, has acquired.

5 Osmond’s Evil: The Disenchantment with Self-Authorship

For Isabel, Osmond is a model of detachment, independence, and dignified self-sufficiency. She can only admire Osmond’s being “so independent, so individual” (284). She thinks Osmond’s

51 There are other examples. Ned Rosier, Pansy’s suitor, knows that Osmond will evaluate him in this way. He tells Madame Merle, “I’m afraid that for Mr. Osmond I’m no—well, a real collector’s piece” (296). And consider also Osmond’s comment to Isabel regarding her own circle of friends: “You’re certainly not fortunate in your intimates; I wish you might make a new collection” (401).
detachment “grand” (354) and dignified (287), his independence “exquisite” (354). But while many critics have thought that Isabel’s first impression of Osmond is simply mistaken, a romantic illusion on her part or a total deception on his, I want to suggest that what Isabel realizes as she gets to know the man she has married is not only the falsity of her first impression of him, but the potential ugliness of the ideal of detachment she once embraced.52 As I will argue below, in Osmond we see the inadequacy of the ideal of self-authorship from a position of critical detachment to the recognition of intrinsic human worth. We see, moreover, that at its extreme, this conception of freedom turns out to be at once a kind of despotism and a kind of slavery. Isabel’s moment of disillusionment with her marriage is thus not simply her vision of the real man lurking behind the false external appearance; it is also her vision of the inadequacy of her conception of freedom which, taken to its strictest conclusion, is just Osmond’s worldview.

Let us begin by considering the language the narrator uses to describe Osmond’s feelings for Isabel:

...Contentment, on his part, took no vulgar form; excitement, in the most self-conscious of men, was a kind of ecstasy of self-control. This disposition, however, made him an admirable lover; it gave him a constant view of the smitten and dedicated state. He never forgot himself, as I say; and so he never forgot to be graceful and tender, to wear the appearance—which indeed presented no difficulty—of stirred senses and deep intention. He was immensely pleased with his young lady; Madame Merle had made him a present of incalculable value. What could be a finer thing to live with than a high spirit attuned to softness? For would not the softness be all for one’s self, and the strenuousness for society, which admired the air of superiority? What could be a happier gift in a companion than a quick, fanciful mind which saved one repetitions and reflected one’s

52 For example, Sicker argues that once she marries Osmond, Isabel finds “a vain and vicious brute” “in place of her ideal” in Love and the Quest for Identity, 62. Dorothea Krook speaks of Osmond’s “new character” that emerges after their marriage and argues that Isabel’s meditative vigil in Chapter 42 is the revelation of Osmond’s “real character,” and how “cruelly and completely” Isabel has been deceived in Henry James and the Ordeal of Consciousness (Cambridge: Cambridge University Press, 1967) 47-48.
thought on a polished, elegant surface? Osmond hated to see his thought reproduced literally—that made it look stale and stupid; he preferred it to be freshened in the reproduction even as “words” by music. His egotism had never taken the crude form of desiring a dull wife; this lady’s intelligence was to be a silver plate, not an earthen one—a plate that he might heap up with ripe fruits, to which it would give a decorative value, so that talk might become for him a sort of served dessert. He found the silver quality in this perfection in Isabel; he could tap her imagination with his knuckle and make it ring.

We are first struck by the feeling of detachment that runs throughout this description. This feeling is created first by the narrator’s own ironic tone towards Osmond, a tone that distances the narrator from the subject represented. Osmond’s excitement is an “ecstasy of self-control,” and the coldness of the term “state” is ironically juxtaposed with the usual language of love, words such as “smitten” and “stirred senses,” which suggest the loss of control and equanimity. The narrator’s detached irony in his description of Osmond matches Osmond’s own point of view. For Osmond is not immersed in the “smitten and dedicated state” but rather has a “view” of it. We thus sense that this is not the description of a lover’s perspective, but rather the description of an outsider, one looking at love from a critical distance and choosing to take up the lover’s posture.

Osmond selects Isabel as the object of his attention as the art connoisseur selects an object for his collection. She is selected by him from a standpoint of critical detachment and contemplation, chosen calmly for her ability to meet his ideal of what a wife of his should be: “We know that he was fond of originals, of rarities, of the superior and the exquisite; and now that he had seen Lord Warburton, whom he thought a very fine example of his race and order, he perceived a new attraction in the idea of taking to himself a young lady who had qualified herself to figure in his collection of choice objects by declining so noble a hand” (253).

Osmond thus chooses Isabel as the collector chooses a “silver plate.” But the irony of the passage I have cited above suggests to us that love cannot be regarded as a mere choice we make
without doing violence to the idea of what love is. And the reasons for the tension between the idea of choice and the idea of love are suggested by the passage as well. A person is related to his choices through his preferences; I choose something because it satisfies a preference I happen to have. Preferences are thus prior to, and more abstract than, the concrete things that are chosen in the sense that general preferences motivate particular choices. This means that our connection to chosen objects is mediated by our preferences and so we behold such objects always at a critical distance. This, the passage suggests, is how Osmond beholds Isabel. Isabel is an object of rational choice, selected by Osmond according to her ability to satisfy his general preference for a certain sort of wife. The narrator thus describes Osmond’s thoughts about Isabel beginning with a general vision of what a wife should be, “this lady’s intelligence was to be a silver plate, not an earthen one,” and then with the recognition that Isabel has the desired quality, “[h]e found the silver quality in this perfection in Isabel.” Osmond prefers “originals,” and Isabel, as Madame Merle tells him, “fills all [his] requirements” (203). The detachment we sense in Osmond’s view of Isabel is due to the fact that Osmond’s attachment is to his ideal—his preference for a “silver plate” rather than “earthen one”—and to Isabel only as an instance of that ideal—she “has the desired quality.” Thus, although the narrator first describes Isabel’s value for Osmond as “incalculable,” we see that this must be ironic, for he proceeds to offer an account of Osmond’s estimation of that value. We see that what is actually of incalculable value to Osmond is his own sense of worth. His ideal of what a wife ought to be is a wife who ministers to that sense of worth, reflecting his thoughts and enhancing their worldly appearance in the reflection. Isabel’s worth, for Osmond, is measured by her ability to fit that ideal, measured by her ability to “ring” at the tap of his knuckle.

But if we think that love is the recognition of the intrinsic and non-substitutable worth of another person, that it is an attachment to a particular and irreplaceable human being, we will see the
inadequacy of choice from a position of critical detachment to the idea of love. Osmond, we have seen, chooses and values Isabel for her ability to satisfy his preference. We thus sense that Osmond doesn’t really love Isabel, but rather certain qualities in her that minister to that preference. He has no sense of her as a separate and particular subject; indeed, he thinks her “as smooth to his general need of her as handled ivory to the palm” (254). Those features of Isabel’s character which one might have thought central to her particular identity and so of central importance to the one who loves her—her ideas—are, for Osmond, mere inconveniences that are to be “sacrificed” (239). And because the idea of preference-satisfying choice fails to give us the idea of love’s particularity, it also fails to give us the idea of love’s exclusivity. Isabel is, for Osmond, fully substitutable with anyone who possesses the “silver quality” that he seeks. In that his feeling for Isabel is mediated by his preference, Osmond looks upon her from a critical distance. Osmond’s attachment to Isabel is thus contingent, something he can survey with equanimity and revise according to her proved ability to meet the requirements of his taste. His point of view is that of the collector and that, we see, is incompatible with the viewpoint of one who is in love.

The passage I have cited above suggests a second reason for the tension between the idea of choice and the idea of love. The language that describes Osmond’s attitude is the language of choice, the language of one who is summoning his will to do a particular thing. Osmond is “self-conscious” and full of “self-control,” with a constant view of the state whose appearance he intends to wear. But the ironic tone of this description calls to our minds the opposite language, the language we usually associate with one who is in love. Osmond’s self-consciousness calls to

53 His affair with Madame Merle reveals that his relationship with his first wife also had none of the exclusivity we associate with love; his subsequent casting aside of Madame Merle when “tired of her” (332) reveals the same about that relationship.
mind the one who simply “finds” himself in love with another, who finds that love is something that has happened to him. His self-control reminds us of the loss of control we associate with “falling in love,” and the narrator’s emphasis on love’s “appearance” draws our attention to the one who simply is what Osmond tries to be. The important distinction here is the distinction between choice and recognition. Love, the narrator suggests in his ironic description of Osmond, is not a posture we choose. It rather seems to be the recognition of the intrinsic and irreplaceable worth of another human being, a worth objectively present that calls for our acknowledgment. The special worth of a particular person is something we see rather than something we can will. This is why we think of love as something that happens to us and not as something we can will. This is not to suggest that love is not an expression of agency. It suggests rather that agency is expressed, not only by summoning the will in an act of choice, but also through the act of reflection and understanding.

The recognition of intrinsic worth is a recognition of worth that is objectively present in another human being, a worth not simply relative to my preferences, and so an acknowledgment of a value not relative to choice. But for Osmond, the embodiment of an ideal of freedom as the realization of the potential for self-authorship implicit in the capacity for choice, value is just a question of what he prefers. Osmond is sovereign in his moral authority: “He had an air of refusing to accept any one’s valuation of anything, even of time, and of preferring to abide by his own” (428). As Ralph warns Isabel, Osmond “judges and measures, approves and condemns” according to his taste alone (286). Thus, Pansy is, for Osmond, “a precious work of art” (435). When we first meet Osmond, speaking of his daughter Pansy to the nuns who have raised her, he remarks, “I prefer women like books—very good and not too long” (195) and he later warns Pansy’s suitor, Mr. Rosier, that he “set[s] a great price on [his] daughter” (312). Osmond’s failure of love is thus just one example of his general failure to recognize the intrinsic worth of
other human beings, his failure to recognize that their value is independent of their value for him and that persons are therefore different from the objects he collects. But without the recognition that others have an objective worth, we cannot recognize that they make claims upon us, claims that may conflict with our preferences and curtail our perfect freedom to choose.

We see this, for example, in Osmond’s refusal to allow Isabel to visit Ralph on his deathbed. In considering Isabel’s need to visit Ralph before he dies, Osmond does not contemplate how seeing Ralph figures importantly in Isabel’s life, or how seeing Isabel is an essential ingredient in Ralph’s happiness, but only how Isabel’s visit with Ralph will look in the eyes of others, and the appearance this will give his own marriage. Of course, Osmond’s failure to recognize his duties towards others is most obvious in his total denial of any agency in his daughter, in his reducing Pansy to “a passive spectator of the operation of her fate” (199), one with “no will, no power to resist, no sense of her own importance” (262). Osmond raises Pansy so that she will, in every case, do what he prefers (309). He acknowledges no duties to care for Pansy’s well-being that might conflict with his own desires. In discussing Pansy’s marriage, for example, Osmond remarks that Mr. Rosier is “not what [he’s] dreamed of for Pansy” (308). But Osmond’s dream for Pansy, we see, is not that she marry a man she loves, but that she marry a man who will enhance the appearance of Osmond’s own life and testify to his superiority; that she doesn’t love

54 We see this also in the narrator’s comparison of Osmond and Caspar Goodwood. The narrator suggests that an important distinction between Osmond and Goodwood lies in the fact that Caspar acknowledges duties to others that conflict with his preferences whereas Osmond does not. Whereas Goodwood has enough imagination “to put himself in the place of a poor gentleman who lay dying” (405), Osmond can only see Ralph’s illness as an inconvenience to himself. And when the narrator tells us that Henrietta “had crossed the stormy ocean in midwinter because she had guessed that Isabel was sad” (399), we cannot help but compare her fidelity with Osmond’s, for whom another’s sadness could never be a reason for doing anything.
Lord Warburton has, for Osmond, “nothing to do with the matter” (395). We thus see that the idea of self-authorship from a position of critical detachment is inadequate, not only to the idea of love, but also to the idea of duty. The idea that value is relative to choice, that it is something we attribute to things that satisfy our preferences, stands in tension with the idea of an objective claim to worth which is the basis of duty. The idea of love and the idea of duty are both inadequately understood as attitudes we choose to adopt; they alike require the idea of recognition, the recognition of value that is independent of our contingent preferences, value that is objectively present and calls for our acknowledgment. Osmond’s failure is therefore a failure of recognition, a failure to see. His house on a hill-top, the narrator tells us, is a house that has “no eyes” (192).

Osmond, we have seen, refuses to recognize the worth of others. His own sense of worth, however, is of great importance to him. But as a conviction of worth asserted from a position of detachment from the world, asserted from Osmond’s faceless villa on a hill-top, it is a conviction existing only in his mind and so having no concrete reality. Osmond thus envies Lord Warburton, not for his distinction simply, but for the “solid actuality” of his distinction (253). It is this “solid actuality,” this worldly recognition of his worth, that Osmond longs for and it is what he thinks marriage to Isabel will finally bring:

The desire to have something or other to show for his ‘parts’—to show somehow or other—had been the dream of his youth; but as the years went on the conditions attached to any marked proof of rarity had affected him more and more as gross and detestable; like the swallowing of mugs of beer to advertise what one could ‘stand.’ If an anonymous drawing on a museum wall had been conscious and watchful it might have known this peculiar pleasure of being at last and all of a sudden identified—as from the

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55 In the context of the proposed marriage between Pansy and Lord Warburton, Osmond assumes that Isabel also acts to frustrate the proposal out of her own self-interest; Osmond cannot believe that she acts only out of concern for Pansy’s well-being.
hand of a great master—by the so high and so unnoticed fact of style. His ‘style’ was what the girl had discovered with a little help; and now, beside herself enjoying it, she should publish it to the world without his having any of the trouble. She would do the thing for him, and he would not have waited in vain. (255)

Osmond wants his distinction published to the world and the worldly recognition that will make his distinction real; he wants to be the anonymous painting—its anonymity testifying to its indifference to recognition—suddenly recognized as the work of a grand master. Osmond thinks that his own worth inheres in his independence from others, in his indifference to the world, and yet that conviction of worth can only obtain reality through worldly recognition, in other words, from the confirmation of that worth by other human beings. But this, we see, is a deep problem for one who refuses to recognize the objective worth of others.

Because Osmond regards the value of others as relative to his own preferences, his own sense of worth is a conviction of his superiority to other human beings who are merely ministerial to that conviction: “...this base, ignoble world, it appeared, was after all what one was to live for; one was to keep it for ever in one’s eye, in order not to enlighten or convert or redeem it, but to extract from it some recognition of one’s own superiority” (353). The narrator’s use of the word “extract” is important here, for it suggests that the recognition of superiority Osmond seeks is not freely bestowed but obtained by him by force. And indeed, the recognition that Osmond seeks is not the free recognition of an independent mind. For that independent mind might claim worth on its own and demand recognition in return, which Osmond cannot provide.56 As we have seen, to recognize the objective worth of another would be to recognize the presence of value not relative to choice, to judge according to some standard other than his own taste. The claim to

56 This perhaps is the meaning of Osmond’s statement that he envies the Pope “for the consideration he enjoys” (223). The Pope is one who enjoys the recognition of others without having to bestow equal recognition in return.
superiority must therefore be extracted forcefully, despotically, by reducing others to mere mirrors that will reflect his own claims without challenge and without a demand for reciprocity.

This is what Isabel is to be for Osmond. Her mind is to be “richly receptive,” “a silver plate,” “a polished, elegant surface,” reflecting for him his own conviction of worth. Her own ideas must be “sacrificed” (230), and “[h]er mind [is] to be his—attached to his own like a small garden-plot to a deer-park” (355). Since the claim to superiority cannot tolerate a claim of independent and equal worth, Osmond “wishe[s] [Isabel] to have no freedom of mind” (379); the two are thus “united,” as Osmond tells Caspar Goodwood, “as the candlestick and the snuffers” (413). Life as Osmond’s reflector, as the confirmer of his superior worth, is the life of a slave ministering to the self-esteem of a despot. Isabel is “shut up” (355) in Osmond’s house, which becomes for her “the house of darkness, the house of dumbness, the house of suffocation” (353).

What is striking, however, is the way Osmond’s despotism is at the same time a kind of slavery. Because worth, for Osmond, is just a question of what pleases, he thinks that the worldly recognition of his superior worth depends on his pleasing the tastes and satisfying the preferences of those around him. The result is that although Osmond thinks his independence the basis of his worth, in fact his life reflects nothing but a slavishness to convention. As Ralph realizes, “under the guise of caring only for intrinsic values Osmond lived exclusively for the world. Far from being its master as he pretended to be, he was its very humble servant, and the degree of its attention was his only measure of success...Ralph had never met a man who lived so much in the land of consideration” (325). And Isabel also finally sees that “indifference was really the last of [Osmond’s] qualities; she had never seen any one who thought so much of others...He looked at [the world] out of his window even when he appeared to be most detached from it” (354). The man Isabel thought the embodiment of freedom and detachment thus turns
out to be the opposite. As she insists on their freedom to shape a life of their own, he insists that “[t]here [are] certain things they must do, a certain posture they must take, certain people they must know and not know” (354). But here I want to emphasize that Osmond’s slavishness to convention is not merely the “true” man that emerges from beneath a mask of independence. The slavery to convention, to what others think, is rather the consequence of the purely subjective basis of worth pushed to its logical extreme. What began as an idea of individual freedom ends as slavishness to the opinion of others.

There is a further difficulty. We see that if the individual’s claim to worth is a claim of superior worth (because it recognizes no other locus of independent value), the individual must look down upon the rest of the world in its inferiority. Thus Osmond beholds the world with “sovereign contempt” (353), regarding it as base, stupid, and vulgar. And yet, the need to make the claim of superiority real requires deference to the confirmation of the very objects of contempt. This, Isabel sees, constitutes Osmond’s paradoxical relation to the world around him: “[o]n the one hand it was despicable, but on the other it afforded a standard” (353). We should thus not be surprised that Osmond has never found the worldly recognition that he seeks, for how could something despised for its worthlessness provide a meaningful confirmation of one’s own worth? And so we begin to see that implicit in Osmond’s failure is the idea that the claim of worth must be a claim of equal rather than superior worth, a claim that reciprocally recognizes the independent, objective worth of other human beings, and so can find satisfactory validation in their freely bestowed recognition.
6  Freedom as Self-Understanding

In Chapter 51, Isabel receives a telegram from her Aunt Lydia: “Ralph cannot last many
days...and if convenient would like to see you. Wishes me to say that you must come only if
you’ve no other duties. Say, for myself, that you used to talk a good deal about your duty and to
wonder what it was; shall be curious to see whether you’ve found it out” (436). *The Portrait of a
Lady* concludes as Isabel decides to return to her marriage after visiting Ralph on his deathbed in
open defiance of her husband’s wishes.

We thus arrive at the question that has most troubled readers and puzzled critics of James’ novel:
why does Isabel return to Osmond? Why does she return to the house she now acknowledges as
the “house of darkness, the house of dumbness, the house of suffocation” (353)? What
conception of duty, we must now ask, is reflected in this decision and what is its relation to the
conception of freedom we have thus far been exploring?

Many critics have tried to understand Isabel’s return to Osmond as a philosophic triumph, a
triumph of freedom. They have argued that when Isabel returns to Osmond, she chooses him for
a second time, this time with open eyes. Thus, they argue, the novel ends with Isabel finally
becoming truly free, free because she freely chooses her “determined status.”57 But this reading,
I think, faces at least two difficulties. The first is that it fits uncomfortably with the ordinary
reader’s experience of the novel’s ending as a tragedy. Isabel, once vibrant and brimming with
youth, confident in her worth and dignity, full of ideas about her own freedom and determined to

57 Jottkandt refers to this as Isabel’s “free choice of her determined status” in “Portrait of an Act,” 80. Jottkandt
further writes, “If, as Isabel now discovers, her first choice had been unfree, her decision to choose the same choice
again might be conceived as a remaking of that first choice.” 83. Robert Weisbuch also explains Isabel’s final
decision in terms of free choice: “…the magic of James’s art here is to make freedom meaningfully itself only when
it confronts—and even may appear like—necessity. Isabel chooses to make her world.” See Robert Weisbuch,
shape a valuable life she can regard as her own, in the end returns to a man who is cold, selfish, and—as we see in his final banishment of Pansy to the prison of the convent—evil. Life with Osmond, we know, is “a dark, narrow alley with a dead wall at the end” (349); his house is one of “darkness,” “dumbness,” and “suffocation” (353) and it is thus hard to see Isabel’s final decision as something other than a kind of suicide. To interpret the novel’s end as a triumph of freedom is to transform James’ novel into an allegory, so that Isabel’s final decision to return to Osmond becomes nothing but a symbol for something else. But this is to ignore the way James has, in Isabel Archer, given us a concrete human subject and asked us to regard her with the sympathetic attention of a friend. The reader of James’ novel cares for Isabel’s happiness, is concerned with her particular suffering, and so cannot regard her individual pain as a moral triumph.

There is a second difficulty with reading Isabel’s final decision as a triumph for freedom. For if Isabel’s conscious choice of a life with Osmond is meant to be a triumph for freedom, then it can only be a triumph for freedom in its thinnest sense—freedom as the abstract capacity for choice. But, as we have seen, it was the sufficiency of just this conception of freedom that Isabel finally rejected when she saw that the capacity for choice is compatible with a life lived according to the dictates of impulse or convention. We now see that the capacity for choice is also compatible with a life of slavishness, a life ministering to the self-esteem of a despot, for such a life might be the product of an agent’s free choice. The bare idea of choice gives no criterion for ranking the choices that are made and so the capacity for choice, taken alone, is inadequate to the ideal of living a life that can be regarded as one’s own. Isabel’s final choice of Osmond, though no doubt “free,” is thus not a triumph of any meaningful conception of that ideal. We need, it seems to me, a different account of the significance of Isabel’s final decision.
I have argued that in Osmond, Isabel sees that where freedom is conceived as the detachment of the isolated individual authoring a life for herself as the art connoisseur assembles a collection of chosen objects, the result is a failure to recognize the intrinsic worth of others, to recognize their objective claims to value independent of preference, claims that are binding regardless of choice. Isabel discovers that the independent and sovereign chooser is really a despot, recognizing no worth in others, and a slave, dependent upon the subjective preferences of others for the confirmation of his own worth. And so we see, in the years following her marriage to Osmond, an important change in Isabel’s self-conception, a change that is most explicit in the novel’s famous Chapter 42 where Isabel sits alone by the fire late into the night, reflecting, not only on the marriage she has made, but on the person she is.

The chapter, which comprises a long and complex interior monologue, is celebrated as the place in *Portrait* where James most fully realizes his idea of placing Isabel’s consciousness at the novel’s centre. Here we see Isabel without the irony that characterizes the narrator’s earlier efforts to present her point of view. We thus see Isabel, not from a perspective of detached observation, but from the inside. And as we see Isabel thinking and judging, as we watch her recognize the truth about her self and her marriage, she becomes for us a fully realized human subject, a particular person with a distinct character, touched by her circumstances and capable of suffering. There is, moreover, a symmetry between form and content here. For it is just in the place in the novel where Isabel is best presented as a fully realized character that we see her arriving at a new and more complete self-understanding, reflecting upon her own identity, character, and history, and acknowledging the constitutive nature of her attachments and moral commitments.
As Isabel considers what has gone wrong with her marriage to Osmond, we see, I think, that she acknowledges a much more robust conception of personality—a richer conception of who she is—than she earlier admitted.

She knew of no wrong he had done; he was not violent, he was not cruel: she simply believed he hated her. ...He had discovered that she was so different, that she was not what he had believed she would prove to be. He had thought at first he could change her, and she had done her best to be what he would like. But she was, after all, herself—she couldn’t help that... There were times when she almost pitied him; for if she had not deceived him in intention she understood how completely she must have done so in fact. She had effaced herself when he first knew her; she had made herself small, pretending there was less of her than there really was. ...It was a wonder, perhaps, in view of this, that he didn’t hate her more. She remembered perfectly the first sign he had given of it—it had been like a bell that was to ring up the curtain upon the real drama of their life. He said to her one day that she had too many ideas and that she must get rid of them. ...She had too many ideas for herself; but that was just what one married for, to share them with someone else. One couldn’t pluck them up by the roots, though of course one might suppress them, be careful not to utter them. ...What he had meant had been the whole thing—her character, the way she felt, the way she judged. This was what she had kept in reserve; this was what he had not known until he had found himself—with the door closed behind, as it were—set down face to face with it. She had a certain way of looking at life which he took as a personal offence. (350-352)

While Isabel earlier argued with Madame Merle for an abstract conception of human personality and regarded herself as an abstract will detachable from its particular circumstances and concrete commitments, we now see Isabel as a woman deeply touched by her circumstances and embracing a conception of selfhood inseparable from its values. She now acknowledges that she has a worldview, a distinct character, a way of feeling and judging, and that these features of her personality cannot simply be “pluck[ed]...up by the roots.” As she finds that she cannot simply give up her ideas, cannot judge things as Osmond judges them, cannot see the world as Osmond sees it, Isabel realizes that in conceiving of her essential self as “unencumbered,”58 nothing but the abstract capacity for choice, she had “effaced herself...made herself small, pretending there

was less of her than there really was” (350). Isabel now discovers that she has a history, a “vital principle” (349), and a conception of what it is to be a moral, responsible, and dignified human being. She recognizes that she cannot do what Osmond wants her to do: “Was she to cultivate the advantage she possessed in order to make [Lord Warburton] commit himself to Pansy, knowing he would do so for her sake and not for the small creature’s own—was this the service her husband had asked of her?” (348). Now Isabel recognizes that her moral ideas are part of her essential nature, commitments she cannot stand apart from or regard as merely contingent, and cannot forsake while remaining herself.59

Moreover, while Isabel once insisted upon her essential separateness from others—Ralph compared her to an edifice to which he couldn’t find the key—she now seems to see herself as an inseparable part of a larger whole:

[In old Rome]...she dropped her secret sadness into the silence of lonely places, where its very modern quality detached itself and grew objective, so that as she sat in a sun-warmed angle on a winter’s day, or stood in a mouldy church to which no one came, she could almost smile at it and think of its smallness. Small it was, in the large Roman record, and her haunting sense of the continuity of the human lot easily carried her from the less to the greater. ...[S]he had grown to think of [Rome] chiefly as the place where people had suffered. This was what came to her in the starved churches, where the marble columns, transferred from pagan ruins, seemed to offer her a companionship in endurance and the musty incense to be a compound of long-unanswered prayers. There was no gentler nor less consistent heretic than Isabel; the firmest of worshippers, gazing at dark altar-pictures or clustered candles, could not have felt more intimately the suggestiveness of these objects nor have been more liable at such moments to a spiritual visitation. (423)

The carriage, leaving the walls of Rome behind, rolled through narrow lanes where the wild honeysuckle had begun to tangle itself in the hedges, or waited for her in quiet places where the fields lay near, while she strolled further and further over the flower-freckled turf, or sat on a stone that had once had a use and gazed through the veil of her

59 See Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts, Possibilities,” (1989) 1 Yale Journal of Law and Feminism 7 at 10, for the idea that “one’s own law” is something we “find” and “recognize” rather than something we “choose.”
personal sadness at the splendid sadness of the scene—at the dense, warm light, the far gradations and soft confusions of colour, the motionless shepherds in lonely attitudes, the hills where the cloud-shadows had the lightness of a blush. (424)

No longer conceiving of herself as wholly separate and bounded, Isabel senses among the Roman ruins and in the ancient churches “the continuity of the human lot.” Her personal suffering seems to speak of universal suffering and so of universal human aspirations and needs. In Rome, Isabel sees herself as a person in history, the question of who she is expanding beyond her personal attachments and values to the question of her place in the world and her relation to other human beings. And once outside the walls of Rome, Isabel senses her own continuity with the natural world.60 Whereas she once insisted in conversation with Madame Merle that nothing was capable of expressing her, we now see that she finds an expression of her own sadness in the “splendid sadness of the scene.” The “tangle” of honeysuckle in the hedges and the “confusions of colour” suggest Isabel’s sense of her own connectedness with the world around her, a world that now seems to form a part of the person she is.61

We earlier saw that the abstract conception of the person was also a conception of human freedom. The idea that the self is not constituted by its circumstances and relations, or by the impulses, preferences, and goals that are given to it by nature or convention means that human beings are free agents, actively willing their circumstances and preferences and not simply being


61 All this might remind us of the following passage from Sandel: “But we cannot regard ourselves as independent in this way without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are—as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic. Allegiances such as these are more than values I happen to have or aims I ‘espouse at any given time.’ They go beyond the obligations I voluntarily incur and the ‘natural duties’ I owe to human beings as such. They allow that to some I owe more than justice requires or even permits, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am.” Sandel, Liberalism and the Limits of Justice, 179.
made by them. The abstract self is free in the sense that she holds the world at bay and then chooses freely from a position of critical detachment. Isabel’s revised conception of her self as partly constituted by its attachments, moral values, circumstances, and relations is also implicitly a conception of what it means to be a free agent, what it means to shape a life of one’s own.

When we see Isabel during her midnight meditation, reflecting on the moral commitments that make up her identity and the circumstances that have shaped her character, we see her in “a passion of thought, of speculation, of response to every pressure” (349). Her mind, the narrator tells us, is in “a state of extraordinary activity” (357) as she tries to work out an understanding of who she is, of which relations, circumstances, and values are central to her being, of how she should think about her life and her obligations to others, and what she should do in light of this deeper understanding of her self. We must see this as an expression of agency. It is agency conceived as a process of thought and reflection that begins with the recognition of one’s immersion in the world—in relations, circumstances, values—and then asks, who am I? Which relations, circumstances, and values are central and constitutive, distinguishing me as a separate human being and making me the particular person that I am? Isabel expresses her agency here, not by denying her constitutive nature, but by reflecting upon it, endorsing it as her own, and so achieving a more complete self-understanding.62

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62 For this idea again see Sandel: “Where the ends of the self are given in advance, the relevant agency is not voluntarist but cognitive, since the subject achieves self-command not by choosing that which is already given (this would be unintelligible) but by reflecting on itself and inquiring into its constituent nature, discerning its laws and imperatives, and acknowledging its purposes as its own.” Liberalism and the Limits of Justice, 58. See also MacIntyre: “...we all approach our own circumstances as bearers of a particular social identity. I am someone’s son or daughter, someone else’s cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation. Hence what is good for me has to be the good of one who inhabits these roles. As such, I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. These constitute the given of my life, my moral starting point.” Alasdair MacIntyre, After Virtue (Notre Dame: University of Notre Dame Press, 1984, c1981) 220.
We saw the conception of duty that was implicit in the abstract conception of human personality. There duty referred to the requirement of respect for the boundaries of the moral agent, for the agent’s inviolability and capacity for free choice. But where human personality is conceived as constituted by its relations, its history and moral tradition, there is room for a richer conception of duty. Now our duties need not be limited to the requirement that we keep our distance from one another, but can include duties that sustain our common life and moral traditions. Thus, where Isabel insisted upon justice in the first half of the novel, she now insists upon her duty in marriage. Here marriage functions, I think, both as a symbol for the idea of law-based community and as an instance of moral tradition sustained in a particular way of life: “She had not as yet undertaken to act in direct opposition to his wishes; he was her appointed and inscribed master; she gazed at moments with a sort of incredulous blankness at this fact. It weighed upon her imagination, however; constantly present to her mind were all the traditionary decencies and sanctities of marriage. The idea of violating them filled her with shame as well as with dread...” (379). When Henrietta encourages Isabel to leave Osmond and Isabel responds, “I can’t change that way” (399), we see that Isabel conceives of her identity as bound up with the moral ideal that marriage represents, an ideal that she cannot give up without losing her sense of who she is.

Thus, when Osmond tells Isabel that she should not go to Ralph in defiance of his wishes, telling her that what he values most in life “is the honour of a thing” (438), his words strike an important chord: “His last words were not a command, they constituted a kind of appeal; and, though she felt that any expression of respect on his part could only be a refinement of egotism, they represented something transcendent and absolute, like the sign of the cross or the flag of

one’s country. He spoke in the name of something sacred and precious—the observance of a
magnificent form” (439). The use of the word “form” is of course important here, for it suggests
to us the way Isabel’s commitment is to the duties that comprise the moral tradition in which she
finds her self-orientation, the way her commitment is to the fulfillment of her matrimonial duty
without thought to its content. Critics thus miss the point, I think, when they say that Isabel in
the end chooses her marriage with open eyes, for the narrator is explicit about the fact that Isabel
does not regard her duty to Osmond as a matter of choice: “He was not one of the best husbands,
but that didn’t alter the case. Certain obligations were involved in the very fact of marriage, and
were quite independent of the quantity of enjoyment extracted from it” (474). Wife of Osmond,
mother of Pansy now appear as part of her very substance, not contingencies to be stripped away.
Isabel doesn’t choose her obligations to her husband; she rather recognizes the authority of those
obligations, an authority grounded in the moral tradition that she now acknowledges as
constitutive of the person she is.

Following Ralph’s death, Isabel has a final encounter with Caspar Goodwood during which he
begs her to leave her husband and pleads the cause of freedom: “...We can do absolutely as we
please; to whom under the sun do we owe anything? What is it that holds us, what is it that has
the smallest right to interfere in such a question as this? Such a question is between ourselves—
and to say that is to settle it!” (481). The narrator’s description of this encounter and Isabel’s
reaction to it is one of the novel’s most difficult passages:

The world...seemed to open out, all round her, to take the form of a mighty sea, where
she floated in fathomless waters. She had wanted help, and here was help; it had come in
a rushing torrent. I know not whether she believed everything he said; but she believed
just then that to let him take her in his arms would be the next best thing to her dying.
This belief, for a moment, was a kind of rapture, in which she felt herself sink and sink.
In the movement she seemed to beat with her feet, in order to catch herself, to feel
something to rest on.
He glared at her a moment through the dusk, and the next instant she felt his arms about her and his lips on her own lips. His kiss was like white lightning, a flash that spread, and spread again, and stayed; and it was extraordinarily as if, while she took it, she felt each thing in his hard manhood that had least pleased her, each aggressive fact of his face, his figure, his presence, justified of its intense identity and made one with this act of possession. So had she heard of those wrecked and under water following a train of images before they sink. But when darkness returned she was free. She never looked about her; she only darted from the spot. There were lights in the windows of the house; they shone far across the lawn. In an extraordinarily short time—for the distance was considerable—she had moved through the darkness (for she saw nothing) and reached the door. Here only she paused. She looked all about her; she listened a little; then she put her hand on the latch. She had not known where to turn; but she knew now. There was a very straight path. (481-482)

The next day, we learn, Isabel returns to Rome, to Osmond. How should we understand this complicated description of Isabel’s reaction to Goodwood and her realization that she must return to her marriage? The first thing to notice is the significance of the water imagery. In the first half of the novel, Isabel was frequently likened to the ship at sea. She was “sailing in the bright light” (285) and Ralph thought of putting “a little wind in her sails” and seeing her “going before the breeze” (158-159). The image of the ship sailing away from land, we said, is an image for one who is detached from social conventions and free from the oppression of customary moral norms. It is just this kind of freedom, the freedom of Isabel’s early conception, that Caspar insists upon when he tells Isabel that they can do absolutely as they please. But while the conception of herself as perfectly independent with unfettered powers of choice once thrilled Isabel, it now fills her with the sense, not of sailing, but of sinking in a “mighty sea,” of having nothing to hold onto and nothing solid to rest upon. The reason for this change must be what Isabel learned in her marriage to Osmond. The freedom to do as one pleases, the freedom that acknowledges nothing that “holds” it, swallows up any conceptions of objective value or duty. Where freedom is conceived as unfettered choice, the self is left at sea among subjective preferences, with no reason to value others and no basis for a claim to objective worth. This conception of freedom culminates in Osmond’s despotism and his slavishness. Thus freedom,
for Isabel, is now found, not in the sea’s “fathomless waters,” but in the house, an image for the moral traditions and values of a particular way of life, a moral framework within which the individual shapes an identity and a life of her own.

7 Isabel’s Tragedy: The Limits of Recognition

This is where the novel leaves Isabel and yet it is not, in my view, the whole story. The reader sees something in Isabel’s final decision that Isabel does not see, something signalled by the narrator’s language. We notice that the narrator describes the “straight path” as a path of darkness—“when darkness returned she was free”—and Isabel’s movement toward the straight path as a kind of blindness—“she saw nothing.” This recalls something we noted earlier and that is the way Isabel’s commitment to her duty in marriage is a commitment to a “magnificent form.” She accepts her duty in marriage to Osmond without questioning its content. In thinking of her duty, we see that she focuses on her marriage as an aspect of a moral tradition, as a sacred ceremony: “What he thought of her she knew, what he was capable of saying to her she had felt; yet they were married, for all that, and marriage meant that a woman should cleave to the man with whom, uttering tremendous vows, she had stood at the altar” (441). But what Isabel shuts her eyes to as she moves through the darkness is what the moral tradition means for her particular life, what marriage to a man who wishes her to have no ideas and no independent mind means for her individual happiness and flourishing. Isabel’s final decision is obedience to a moral law that makes Osmond her “appointed and inscribed master.” We must wonder how Isabel could possibly regard this law—and her life under it—as her own.

In her repudiation of her earlier conception of freedom as incompatible with any meaningful understanding of duty, Isabel seems to miss the kernel of truth that lay at the heart of that
conception. It is that human beings, though touched by circumstance and constituted in part by relations and values they acknowledge, are also separate centres of value and self-determining activity, bearers of ultimate worth and entitled to respect as distinct persons with individual lives. And while it is true that duty cannot be coherently limited by the idea of unfettered choice, duty can be limited by the idea of what we can call self-imposability or reflective endorsement, by the individual’s ability to see in the law’s substance respect for her worth as a determinate individual, a particular and separate human being with the capacity for agency and whose flourishing matters. Isabel’s failure to see this is, in my view, her tragedy. Thinking that she has found a conception of freedom compatible with a robust sense of duty, she ends up with a conception of duty incompatible with the ideal of living a life one can recognize as one’s own.

8 Unconscionability Revisited

We have thus traced the development of Isabel’s conception of freedom from freedom as the self-sufficient capacity for choice to freedom as the actualization of that capacity in a self-authored life to freedom as the endorsement of one’s constituent commitments and values. We may call Isabel’s earliest conception of freedom a Kantian conception for it shares with the Kantian account of legal freedom a conviction of individual self-sufficiency and a singular focus on the moral agent’s bare capacity for choice. As Isabel discovers the inadequacy of this conception, the flaws in the Kantian account are put before us as well.

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64 Isabel’s final decision is thus an illustration of why some feminist scholars have worried about the communitarian tendencies in feminist thought. Like Isabel, communitarians seem to accept without question the moral authority of a community’s traditions and practices, which can be oppressive and exploitative. See Marilyn Friedman, “Feminism and Modern Friendship: Dislocating the Community,” (1989) 99 Ethics 275-290.
In discussing Isabel’s discovery of the inadequacy of her earliest understanding of freedom, we saw that where freedom is conceived as the bare capacity for choice, freedom turns out to be consistent with a life lived in accordance with whatever impulses or whims are thrown at us by our nature and so with a life that fails to *realize* the human capacity for choice. We see something else that I did not yet mention explicitly because it is not apparent to Isabel until the novel’s end. All readers of James’ novel must feel that there is an important sense in which Isabel’s marriage to Osmond is contrived by others. The marriage is the result of others’ manipulation of Isabel and their exploitation of her innocence and vulnerability for their own purposes, whether only carelessly in the case of Ralph or maliciously in the cases of Osmond and Madame Merle. And yet it is also important to notice that there is no sense in which Isabel’s marriage to Osmond is not the product of her free choice. A life in which one’s choices are manipulated by others, in which one’s vulnerabilities are exploited for the purposes of others, turns out to be perfectly consistent with the bare freedom to choose.

All this suggests the following, which we also noted in our earlier discussion. Where freedom is the abstract capacity for choice, the sheer capacity for negation, freedom is nothing but a fact of consciousness; it has no worldly meaning or reality. But if *human* freedom is our ideal, then our understanding of freedom must include a conception of its realization in lived human lives. An ideal of freedom that lacks such a conception must be incomplete as an ideal for human beings. This line of thought ought to prompt our reconsideration of the sufficiency of the Kantian account of freedom because it, like Isabel’s earliest conception of freedom, fails to attribute normative significance to freedom’s realization in concrete human lives.

We have already noted how James’ novel dramatizes the fact that the freedom to choose may co-exist with the exploitation of vulnerability. It also shows us that realized freedom, because it is
not merely a fact of consciousness or a quality of the human soul, has material conditions. It is clear in the novel that freedom’s realization requires money, for without her uncle’s gift Isabel’s conviction of freedom could not have acquired any reality. Without a minimum amount of money, we are forced to live our lives meeting the needs that are simply given to us by nature—our needs for food, clothing, and shelter—and so cannot shape lives that reflect a thoughtful conception of what makes life worth living. The revealed deficiency of freedom as the bare capacity for choice thus begins to illuminate the normative foundation of the doctrine of unconscionability, for the doctrine seems to respond to just this deficiency.

What we see in the novel we also see in the facts of Walker-Thomas and Lloyds Bank. In Lloyds Bank, Mr. Bundy mortgaged the full value of his farm, his only asset, to the bank in order to borrow money for his son’s troubled business. When the son’s business failed, the bank insisted upon the sale of Mr. Bundy’s farm. Out of concern for his son’s well-being and without independent advice, Mr. Bundy risked his only property and means of subsistence to buy his son a brief respite from his creditors. In Walker-Thomas, Mrs. Williams, without outside advice or understanding of the meaning of the terms she was accepting, risked her household’s necessities, beds and other basic items, in order to purchase a stereo on credit. In both cases, the doctrine of unconscionability responds by allowing the judge to set aside a bargain that, though the product of a free choice, nevertheless exploits a vulnerability and results in one party’s alienation of the material conditions of her realized freedom.

When the doctrine of unconscionability is understood in this way, it affirms our understanding of why Isabel’s decision to marry Osmond failed as an effort in realized freedom. When Isabel discovers that freedom must mean self-authorship, shaping a determinate life one can regard as one’s own, she fails to recognize the consequences of this development for her conviction of
human self-sufficiency and independence. She chooses a husband who appears not to threaten this conviction; indeed, she chooses a husband whose life and character appear to embody it. But the falsity of this conviction has been suggested all along. It is suggested, as we have said, in the dependence of both Isabel’s and Osmond’s way of life on a certain amount of money; it is suggested in the way Osmond’s ability to be the sort of person he wants to be depends on another’s confirmation of his magnificent independence; it is suggested in the way Isabel’s attempt to shape a life for herself is thwarted by everyone around her. It is suggested also in the doctrine of unconscionability, where we see, not only that realized freedom has material conditions, but that it is vulnerable to exploitation and so depends upon the law’s support and concern for its flourishing. All this suggests that human beings are not the self-sufficient authors of their own lives that Isabel imagined. They find themselves in this world with particular bodies, in particular circumstances, within certain families and moral communities. Who they are and how their lives go depends very much on what happens to them and on how others treat them.

Isabel’s recognition of the falsity of her conviction of independence leads to her final conception of free agency as the reflective endorsement of one’s place within a moral order, a set of traditions embodied in a way of life. In the end, she recognizes the authority of the moral law that makes her the person she is and that provides the context within which she can regard her life as valuable. But as we have seen, the moral tradition Isabel now recognizes as defining her duties as a responsible subject is one that makes Osmond her “appointed and inscribed master.” This means that the law to which Isabel finally defers is indifferent to her independence of mind, to her separate and individual worth, and to her ability to regard her life as her own. This, I think, is why Isabel can only stare at her marriage with “a sort of incredulous blankness,” why
the path she chooses is described as a path of “darkness” and why her movement along it is presented as a kind of blindness.

It is here, ironically in light of her feminism, that Robin West makes Isabel’s mistake. West interprets unconscionability as a judicial intervention on the basis of the judge’s moral conception of human well-being, one which is indifferent to the individual’s own view of the matter. West would thus enforce a moral law whose concern for human vulnerability denies the individual her status as a separate, thinking, responsible moral subject. But as we learned from James’ presentation of Osmond’s futile efforts to command others’ unilateral recognition, authority cannot be asserted despotically. The reality of the moral law’s authority requires recognition; moreover, it requires the recognition of one whose recognition can be meaningful, in other words, one with an independent mind. This means that the recognition of the subject’s dignity and independence is a constitutive feature of the moral law’s authority, for this is the only way the subject will be capable of providing the recognition on which law’s authority depends. This is what Isabel and West fail to recognize. It is, however, just what the doctrine of unconscionability does recognize where it is interpreted to require, not merely an improvident bargain, but an improvident bargain in the absence of independent advice. This requirement means that the individual who acts with full knowledge and understanding may still choose to do with her own life what the morally authoritative conception of her well-being thinks she ought not to do. It means that although the doctrine of unconscionability embodies the idea that realized freedom is fragile and requires support, it also captures the particle of truth that lay at the heart of Isabel’s earliest conception of freedom. It is that human beings are separate, dignified centres of self-determining activity, capable of independent thought and responsible action. In the next chapter, we will further investigate the question of how this conception of freedom can be reconciled with a conception of duty.
Chapter 3
What We Owe to Others:
Contract and Care in *What Maisie Knew*

1  From Divine Law to Contract

Maisie’s parents are divorcing. In the battle over custody, the child is “divided in two,” (35)\(^1\) each parent having the care of her for six months of the year. Both parents remarry, introducing a set of step-parents into Maisie’s life. The step-parents meet each other and begin an affair. Maisie’s parents, each also carrying on a series of affairs, eventually both abandon her to the care of her step-parents.

*What Maisie Knew* is a modern novel. Its world is secular, its characters viewing themselves as radically free, its sounds all “chatter” (37) and the jingle of money, its paradigmatic image of human association, contract.\(^2\) There are no transcendental norms to be found, no divine order or plan for human life and flourishing. There is no community here, only a meeting of individual wills for the purposes of self-satisfaction. This is the picture presented in the novel’s opening scene:

> The litigation had seemed interminable and had in fact been complicated; but by the decision on the appeal the judgement of the divorce-court was confirmed as to the assignment of the child. The father, who, though bespattered from head to foot, had made good his case, was, in pursuance of this triumph, appointed to keep her…Attached however, to the second pronouncement was a condition that detracted, for Beale Farange, from its sweetness—an order that he should refund to his late wife the twenty-six

\(^1\) References to *What Maisie Knew* are to the Penguin edition of 1985 and will be cited parenthetically in the text.

\(^2\) James’ status as an American literary realist is usually ascribed to the psychological realism with which he presents his characters. In *American Literary Realism and the Failed Promise of Contract* (Berkeley: University of California Press, 1997) 8, Brook Thomas argues that a defining feature of works of literary realism is their focus on contract as a horizontal ordering of social life. Thomas thus suggests that literary realism, of which *What Maisie Knew* is an example, is not only a literary style but also a worldview.
hundred pounds put down by her...in the interest of the child’s maintenance and precisely on a proved understanding that he would take no proceedings...He was unable to produce the money or to raise it in any way...his only issue from his predicament was a compromise proposed by his legal advisors and finally accepted by hers.

His debt was by this arrangement remitted to him and the little girl disposed of in a manner worthy of the judgement-seat of Solomon. She was divided in two and the portions tossed impartially to the disputants. They would take her, in rotation, for six months at a time. (35)

This scene has a number of features that are salient for us. Most important is the allusion to the judgment of Solomon. The allusion is of course ironic. King Solomon’s famous judgment arose in the context of a dispute between two women over a baby, both claiming to be its true mother. When Solomon ordered that the baby be divided in half, one of the women agreed while the other refused, preferring to relinquish her claim to the baby than see it killed, thus revealing herself as the baby’s true mother. The obvious irony is that whereas Solomon’s order to divide the baby in half relied on the true mother’s natural preference for the baby’s well-being over her own, Ida and Beale Farange self-interestedly use Maisie as an object in their battle. Maisie is the object of their contract, but her well-being is not its purpose. In the custody arrangement, Maisie functions as the contractual substitute for Beale’s squandered debt payment; she is treated as fungible with the twenty-six hundred pounds he owes Ida. Each parent wants her, not out of concern for her welfare, but because each thinks she will be a vehicle of revenge: “What was clear to any spectator was that the only link binding her to either parent was this lamentable fact of her being a ready vessel for bitterness, a deep little porcelain cup in which biting acids could be mixed” (36).

There is, however, a deeper irony. In the biblical story, the language suggests that when the woman refused to see her child killed, Solomon did not therefore realize that she was the true
mother as though he were discovering an already present fact. Solomon simply pronounces: 
“she is its mother.” This language suggests the possibility of viewing the woman’s unselfish prioritization of the baby’s well-being not merely as evidence of true motherhood, but rather as constitutive of that role. This introduces the possibility of a gap between biological parenthood and “true” parenthood, that is, parenthood in accordance with some conception of what a parent ought to be. In the Bible, such an ideal of parenthood finds its objectivity in the image of God’s unselfish love for his children. And the appearance of an objective conception of parenthood reveals a ground of authority; it suggests the possibility of an authoritative standard against which parents may be judged.

But it is of course just this kind of authoritative standard that is missing from the account of the Faranges’ litigation over Maisie’s custody. The narrator’s reference to “the heavy hand of justice” (37) is surely ironic, for the court does nothing but endorse the custody arrangements that the Faranges have themselves devised. This is a free market and the parents appear free to strike any bargain they wish. The Faranges initially agreed that Beale would have custody of Maisie and twenty-six hundred pounds for her maintenance on condition that he take no further proceedings against Ida. Beale breaks his promise and takes proceedings in the course of which the court merely enforces the original contract, awarding Beale custody of Maisie. When Beale cannot come up with the twenty-six hundred pounds he now owes Ida, Beale and Ida devise yet

\[\text{1 Kings 3.}\]

\[\text{4 It is thus significant that What Maisie Knew was published in 1897 and that Atiyah marks 1870 as the year in which the prominence of freedom of contract reached its highpoint. The prominence of freedom of contract is characterized by, among other things, a particular attitude in the court: the idea that the parties must make their own contract and select their own terms; that the court’s function is purely passive and interpretive; that in interpreting a contract, a court is only giving effect to the intentions of the parties. See P.S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press, 1979) 389.}\]

\[\text{5 Atiyah writes that in the late 1800s, the courts began to apply “the abstract law of the market place” even to matrimonial agreements. Atiyah, The Rise and Fall of Freedom of Contract, 401.}\]
another arrangement for custody: they will divide custody of Maisie in two. Again, the
judgment of the court does nothing but endorse the arrangement the parents have agreed upon.

The wisdom of Solomon’s judgment was taken by the people of Israel as evidence that the
wisdom of God was in him and so as confirmation of King Solomon’s authority. King
Solomon’s authority is thus explicitly linked to the objective wisdom his judgment evinces. In
contrast, the secular divorce court seems unable to muster any principles of its own. The
straightforward endorsement of the Faranges’ own contractual agreements suggests a court
uncertain of its own authority, uncertain of any principles which could ground such authority.
Indeed, far from confirming the authority of the court, the judgment constitutes “odd justice in
the eyes of those who still blinked in the fierce light projected from the tribunal—a light in
which neither parent figured in the least as a happy example to youth and innocence” (35).

This description of the Farange’s litigation and custody arrangement, narrated in several pages
that precede the novel’s first numbered chapter, presents a modern world. The ecclesiastical
court has been replaced with the divorce-court, the secular thus freed from religious authority.
Marriage is conceived, not as a sacred bond between husband and wife sanctioned by God, but as
a contract, thus making available divorce and emancipating the private good from repression by
Christian virtue. Throwing off the burdens of religious duty, these radically free persons
acknowledge no claims besides self-interest. Ida and Beale Farange have “a constitutional
inaptitude for any burden, and a base intolerance of it” (25). Contract thus becomes the model of
human association. Indeed, in the custody arrangement between Ida and Beale, the parent-child

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6 Tessa Hadley has similarly argued that although there is plenty of law in What Maisie Knew, law is not constructed there as an authority. Henry James and the Imagination of Pleasure (Cambridge: Cambridge University Press, 2002) 42.
relationship takes on a contract-like appearance. It is an agreement between the parents for child-raising, an obligation voluntarily assumed. Moreover, during the course of the litigation, a “good lady” comes forward to propose that “having children and nurseries wound up and going, she should be allowed to take home the bone of contention and, by working it into her system, relieve at least one of the parents” (36). The activity of child-raising thus appears as a commercial enterprise, a contractual role undertaken on the basis of the efficient pursuit of self-interest. Human society is here nothing more than a series of market relations.

I have thus far tried to highlight the deeply ironic tone of the narrator’s description of the custody litigation, a tone which makes clear to the reader that something is going wrong here. Moreover, we should notice that the scene is not mediated by the consciousness or perspective of a particular character. The scene is an event straightforwardly described by a third person narrator, an unusual perspective for James, suggesting that what is wrong here is objectively wrong and not something that merely seems wrong from within the psychology of a particular individual. Thus the narrator’s ironic, authoritative tone opposes the court’s passive acquiescence; the narrator seems to deny the court’s implicit claim that there are no principles to bring forward here, no grounds for any objective judgment. But in a world that no longer acknowledges the absolute moral authority of God, that no longer views itself as governed by a divine order that specifies our rights and duties, how shall we say what is wrong here and how shall we give

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7 Critics are generally agreed that the world of James’ novels is secular and that James’ moral vision is wholly rooted in the finite social world. Berland argues that “James’s eyes were fixed firmly on finite and mortal men living in a finite social world” and that his subject was not “man-in-the-universe” but “man-in-society.” See Culture and Conduct in the Novels of Henry James (Cambridge: Cambridge University Press, 1981) 9-10.
reasons that have any authority for others? The novel’s question is a question about obligation in a modern world: What do human beings now owe one another and why?

2 From Contract to a Secular Duty of Care

The question of what members of a community owe one another and why is also a central concern of private law. On the Kantian account of private law, however, the individual whose rights private law protects is the individual considered apart from community. As we have said, the Kantian account conceives of the individual as an abstract chooser with no ties or commitments that he or she could not in principle repudiate. The individual’s place in a community is contingent, morally arbitrary, and the law accordingly treats the individual as isolated and self-sufficient, claiming worth on his or her own. Individuals are related to one another only when they find that they must contract with one another, that is, only through a mutually self-interested exchange of commodities. Contract is the only way these isolated individuals can owe one another positive obligations; absent contract, their only obligation is to leave each other alone.

That this is the view the Kantian account takes is evident, for example, in Peter Benson’s argument justifying the general tort doctrine that there is no duty to rescue another. The only rights the plaintiff has against the defendant absent a contract between them, Benson argues, are rights to the defendant’s non-interference with his bodily and proprietary sovereignty. In circumstances where the question of a duty to rescue arises, the defendant comes upon the

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8 Robert Pippin writes that James was fascinated by the question of the possibility and meaning of the judgment that something is wrong in “such a secular, non-religious, self-interested society” in Henry James and Modern Moral Life (Cambridge: Cambridge University Press, 2001) 3.
plaintiff with his or her body or property already in peril. All the plaintiff can assert against the defendant is his right to the defendant’s non-interference with his body or property in this present condition of danger. But of course the defendant does nothing to impair this right; in fact, in refusing to interfere, the defendant precisely honours the plaintiff’s right.9

The view of individual rights at private law captured by this argument against a duty to rescue was the common law’s view for much of the nineteenth century, during the period that can be called the period of classical contract law.10 During this time, a right to another’s care was something one could only acquire through contract.11 This is illustrated by the Court of Exchequer’s decision in Winterbottom v. Wright.12 In that case, a mailcoach driver sued the manufacturer of a defective coach after suffering injuries when the coach broke down. But the manufacturer of the coach had a contract only with the post-master general. Baron Rolfe argued that the duty to take care for the coach’s safety arose only through contract because such a duty could arise only voluntarily and only in a relationship of mutual self-restriction, that is, only in return for payment. To subject the manufacturer to a duty of care to the driver would be to impose a one-sided obligation, for the driver has not paid the manufacturer anything for his solicitude.13

But the decision in Winterbottom v. Wright, fully compatible with the Kantian account of our rights at private law, was famously overruled in Donoghue v. Stevenson, a watershed in the

12 152 E.R. 402 (Exch. 1842).
development of the modern law of negligence. As we have seen, in *Donoghue v. Stevenson*, the defendant sued the plaintiff manufacturer of ginger beer because she suffered shock and gastro-enteritis as a result of finding the decomposing remains of a snail in the bottle of beer she had already partly consumed. The lower court dismissed the action on the ground that a manufacturer is under no duty to anyone with whom he has no contractual relation. But the House of Lords took a different view. Lord Atkin wrote

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.\(^{14}\)

Lord Atkin is clear that private law is not the law of the Christian community, a community governed by a God-given duty of unselfish love for one’s fellow human beings. Nevertheless, his judgment also makes clear that private law does not view the legal subject as isolated, dissociated, and self-sufficient. Lord Atkin’s neighbour principle embodies a conception of community,\(^ {15}\) a community of people who are “so closely and directly affected” by one another’s acts and omissions that the security of their essential interests is mutually dependent on one another’s care. And from these relationships of mutual dependency there emerges a positive duty: individuals must take care not to harm the important interests of those who their action will foreseeably affect. The view of individual rights at private law that Benson’s argument assumes is thus belied by the development of the modern law of negligence, which imposes a


\(^{15}\) Weinrib finds that there is “no trace of community in this passage,” but that is because he assumes that a community must be a community of mutual love and ignores the possibility of a community of mutual concern. See Weinrib, “Liberty, Community, and Corrective Justice,” (1988) 1 Canadian Journal of Law and Jurisprudence 3 at 9.
positive obligation of care between persons even in the absence of any contractual arrangement between them.

In our earlier discussion of the feminist approach to tort law, I suggested a number of difficulties that arise when we make care for well-being the centrepiece of our understanding of negligence. If human well-being in relation to essential interests is elevated to negligence law’s fundamental norm, then we would expect the duty of care to be asymmetrical. If welfare is our goal, we would expect a duty of care tailored to the particular individual whose well-being we are trying to promote. Some will be more vulnerable than others and the protection of their interests will require more care. And perhaps we should go further and say that in the case of those who are most vulnerable, strict liability is appropriate; for strict liability says that we must compensate for harm caused regardless of how careful we have been to avoid it. Moreover, I suggested that if care for well-being is the fundamental norm, it no longer makes sense to distinguish between wronging and failing to aid since well-being is likely to require both avoidance of harm and positive support. And the failure to aid would include, not only a failure to rescue from immediate danger, but also a failure to support the projects and goals of those who cannot realize their projects and goals on their own. Finally, we must observe that to say that failing to aid is wrong as a matter of private law is to say that the one does not aid must pay damages for the consequences of his or her failure to provide assistance.

All this, I suggested, is a problem, for it effaces the distinction between persons. It treats the shape of each human life as a community responsibility and so denies that each human being, as a free and responsible agent, has a life that is essentially his or her own. In this denial, it forces some unilaterally to serve the purposes and interests of others at the expense of their own goals and life plans. In short, it seems that if we make care for essential interests the fundamental
norm of tort law, we arrive, not at a legal community of individual persons pursuing separate projects and responsible for the shape of their own lives, but at the Christian community of unselfish love between brothers always engaged in and collectively responsible for a common enterprise.

Now we must ask the following question. If we think, as Lord Atkin thought, that individuals who live in a community with one another must care for one another’s welfare, can we avoid the problems that plague the feminist account? Can we respect the separateness of human lives, their freedom and their individual responsibility, while insisting upon obligations of concern for human well-being? This question, we will see, is James’ question in *What Maisie Knew*, for here he is searching for a conception of obligation consistent with human freedom.

3 Moral Duty as External Command: Mrs. Wix

Maisie’s governess Mrs. Wix is out of place in modern London:

[Her hair] had originally been yellow, but time had turned that elegance to ashes, to a turbid sallow unvenerable white. Still excessively abundant, it was dressed in a manner of which the poor lady appeared not yet to have recognized the supersession…She wore glasses which, in humble reference to a divergent obliquity of vision, she called her straighteners, and a little ugly snuff-coloured dress…glazed with antiquity. (49)

It is not only Mrs. Wix’s appearance that is out of date; she is also an old-fashioned moralist, one whose moral categories seem to have no connection with the world she inhabits. Mrs. Wix adopts the Bible’s sharp moral terms, easily distinguishes right from wrong, and condemns accordingly. She is like “a prophetess with an open scroll,” or “some ardent abbess speaking with the lips of the Church” (163). In the figure of Mrs. Wix, James puts before us the stringent conception of duty we might have thought missing from the proceedings before the divorce
court. Mrs. Wix is a moral courtroom; she is armed with a fixed conception of moral obligation and judges accordingly. But if, in the ironic tone of his depiction of the divorce court proceedings, we thought James was simply lamenting the passing of a time when Biblical commands were believed to provide human beings with their duties and all the moral guidance they needed, James’ portrayal of Mrs. Wix suggests that his view of the problem is much more complex.

Mrs. Wix condemns the adulterous affair between Maisie’s two step-parents, Sir Claude and Mrs. Beale, as a crime branded by the Bible. But to Mrs. Wix’s dismay, Maisie seems to know of the affair without condemning it. This leads Mrs. Wix to the question that becomes her refrain: “Haven’t you really and truly any moral sense?” (211). At the seashore in France, Mrs. Wix presses her appeal:

The bathers, so late, were absent and the tide was low; the sea-pools twinkled in the sunset and there were dry places as well, where they could sit again and admire and expatiate: a circumstance that, while they listened to the lap of the waves, gave Mrs. Wix a fresh support for her challenge. ‘Have you absolutely none at all?’

She had no need now, as to the question itself at least, to be specific; that on the other hand was the eventual result of their quiet conjoined apprehension of the thing that—well, yes, since they must face it—Maisie absolutely and appallingy had so little of. (212)

The connection between twinkling sea-pools and moral judgment, bewildering to modern readers, appears to one who views morality as a system embedded in the universe; the order of nature testifies to the presence of God and confirms the authority of that realm of value over human beings who are just one more aspect of purposeful creation. In this light, our surprise at
the move from description of the seashore to insistence upon the moral sense only underscores
the view that that realm of value is *everywhere* in the universe.16

On its face, the passage seems to endorse this worldview, which becomes, in Mrs. Wix’s hands,
a rigid moralism that judges the permissible and the impermissible according to the categories
provided by the Bible. But we must be careful in our reading. The narrative voice that describes
the tranquil seashore in France, sea-pools twinkling and dry places for thought and admiration, is
passive before nature’s wonder and appreciative of its beauty. Against this description, the next
words are jarring. Sea-pools twinkling in the sunset become “a circumstance,” a mundane event
no longer intrinsically worthy of our appreciation; instead, the seashore’s beauty ministers to the
vindication of something else. The voice that views the seashore at sunset as a circumstance
ministering to a moral code cannot be the voice that puts that scene so vibrantly before our eyes.
In this passage, James gives us, not one perspective, but two. I suggest that the first perspective,
the voice of passive wonder and appreciation, is our narrator’s; the second belongs to Mrs. Wix.
It is thus she, not the narrator, who finds the vindication of the moral code at the seashore; the
seashore gives *Mrs. Wix* fresh support for her challenge.

What, then, is the critique implicit in the juxtaposition of perspective at the seashore? The
seashore in France, the *plage* that “shimmered, in a thousand tints” (182), is a scene that calls
forth our passive wonder before nature’s beauty; it calls for no judgment, only appreciation and
enjoyment. Indeed, the shimmering *plage*, calling to mind the gaiety of its spectators and
bathers, suggests that there are things in life that are valuable quite apart from our judgments of
what is morally good. The joyful spontaneity of French life, suggested not only in the gaiety at

at 384.
the beach but also in the pink houses, the chatter in cafés, the savoury food, and the songs of ‘amour,’ appeals to us with its sweetness, humour, and beauty, not its moral stringency. France presents a picture that invites, not the application of fixed evaluative terms, but spontaneous response and passive enjoyment, the kind of reaction we see in Maisie upon her arrival: “She was ‘abroad’ and she gave herself up to it, responded to it, in the bright air…Her vocation was to see the world and to thrill with enjoyment of the picture…she recognized, she understood, she adored and took possession; feeling herself attuned to everything and laying her hand, right and left, on what had simply been waiting for her” (181-182). Moreover, French life not only evokes our spontaneous response and love of life’s pleasures; it is founded upon such love and response, for it is this that gives us houses painted pink, delicious food carefully prepared, and songs of love.

But if the value we find in the French way of life presents a challenge to Mrs. Wix’s moral rigor, she cannot see it; that is the whole point. Mrs. Wix cannot see in France a challenge to her all-encompassing morality for to see the possibility of challenge would be already to regard that moral perspective as less than all-encompassing. Thus Mrs. Wix sees in the seashore—because it is all she can see there—a fresh support for her moral code. Her passion, James tells us, is deep but narrow (163).

All this suggests that the world is not as narrow as it appears through Mrs. Wix’s “straighteners” and that her moral rigor thus constitutes a kind of blindness. Indeed, French life is symbolic of a range of values that are fundamentally misunderstood if one tries to subsume them under a rigid

17 Tessa Hadley notes that in James’ work, France stands for “the sensual and the beautiful,” an alternative system to the “moralising and conscientious Anglo-Saxon one.” _Henry James and the Imagination of Pleasure_, 89.

system of fixed duties. One value in particular is love. On a moralistic worldview, love follows
duty; love is subsequent to moral judgment. Thus, Mrs. Wix thinks that if Sir Claude only
understood his duty, if he could be made to see the straight path, he would give up his adulterous
affair with Mrs. Beale and devote himself to Maisie and herself. Mrs. Wix offers her proposal on
the ground that it will save Sir Claude from sin, that coming away with herself and Maisie offers
him an opportunity to “cling to the right” (100). For Mrs. Wix, beauty is the right; but we see
that Sir Claude’s understanding of beauty is not so narrow. “Think of the beauty of it,” Mrs.
Wix tries to persuade Sir Claude. “Of bolting with you?,” he replies (100). Mrs. Wix’s proposal
and Sir Claude’s surprised response reveal Mrs. Wix’s failure to see love for what it is, as one
person’s spontaneous feeling of the particular specialness and beauty of another human being.

There are two issues here. The first is that the prioritization of “the right” suggests that we can
love whoever is prescribed to us by duty. This suggests that love is directed towards an ideal—
say, virtue—and that we love concrete human beings as instantiations of that ideal. This
understanding of love allows for the possibility of substitution, of giving up one love in favour of
another that better fulfills the ideal. Love is thus completely bound up with our pursuit of an
ideal which is alone valued for its own sake. This view, however, is belied by Mrs. Wix’s own
devotion to Sir Claude. For Sir Claude appeals to Mrs. Wix and to us with his charm, his easy
manner, and his joyful spirit, but not at all with his moral character; as a moral character he is
deeply flawed. Mrs. Wix’s view of love, in unacknowledged tension with her own love for Sir
Claude, fails to appreciate love’s specificity, its attachment to particulars—to this determinate,
irreplaceable person—rather than universals. Maisie, on the other hand, understands the
specificity of love. She understands that the difficulty for Sir Claude is that Mrs. Wix is asking
him to give up his “greatest intimate,” his “particular favourite” (205). The obstacle to Mrs.
Wix’s proposal is just that Sir Claude is in love with Mrs. Beale and love admits of no substitutes.

The second issue is closely connected to the first. For to view love as following duty is not only to deny love’s attachment to particulars but also to view love as a conclusion of impersonal judgment. In part, the difficulty seems to be that love is a feeling, something that simply happens to us.\(^\text{19}\) Thus, the burden of Mrs. Wix’s proposal appears to be the burden of trying to govern something that is essentially spontaneous. But the problem may be deeper. For even if we think that love embodies judgments about the intrinsic specialness of another human being, these seem to be judgments of a particular kind. Whereas we generally think of judgment as shareable and detachable, that is, transparent to impersonal reason and only contingently connected to the concrete person whose judgment it is, love does not appear this way. Perhaps because of its thoroughgoing particularity, love seems to be a judgment that cannot be detached from the person whose love it is and so cannot be understood from an impersonal perspective.\(^\text{20}\)

As Sir Claude insists, love is a judgment that is essentially \textit{one’s own} (200).

As an aspect of human life that cannot be understood from a perspective that transcends our individual separateness and particularity, love seems to confirm this very particularity and separateness. To prescribe love from an impersonal perspective is thus, not only to


\(^{20}\) John Hardwig has thus argued that it is not appropriate to speak of rights in the context of personal relationships. He argues that while rights are impersonally defined, we want personal affirmation in relationships with intimates and that “there is a difference between respecting a person and loving an individual.” Hardwig, “Should Women Think in Terms of Rights?” (1984) 94 Ethics 441 at 443-444. But as I argue below, in the character of Sir Claude, James suggests that Hardwig draws this contrast between personal and impersonal relationships too starkly and that something \textit{is} missing when the personal affirmation between spouses or parent and child is not also accompanied by a sense of obligation.
misunderstand love’s spontaneity, but to deny the particularity and separateness that a proper understanding would affirm. It is thus fitting that Mrs. Wix puts her proposal to Sir Claude with Maisie “enclosed” in her arms: “For the rest of the conversation she was enclosed in Mrs. Wix’s arms, and as they sat there interlocked Sir Claude, before them with his teacup, looked down at them in deepening thought. Shrink together as they might they couldn’t help, Maisie felt, being a very large lumpish image of what Mrs. Wix required of his slim fineness” (99). Enclosure and “lumpishness,” images that deny the separateness of things that are separate, are the images for Mrs. Wix’s prescription. It is this denial that explains why her proposal appears, to the reader as well as to Sir Claude and Maisie, not only obtuse, but stifling; she provokes in us, as in Maisie, a “sigh of oppression” (215).

Mrs. Wix’s denial of love’s specificity and separateness may be thought of as instances of a general denial of particularity and the free moral conscience. These are closely connected. In the scene at the seashore, Mrs. Wix’s “Have you absolutely none at all?” is unspecified, the abstractness of the question alluding to the general abstractness of Mrs. Wix’s moral code. Hers is a system of fixed general rules and the generality of the rules requires abstraction and detachment from the concrete situation. Mrs. Wix thus does not delve into particulars. In France, Mrs. Wix and Maisie together “mount to the quaint and crooked rampart” and from the rampart look down on the little town beneath, Mrs. Wix all the while insisting on the immorality of the relationship between Sir Claude and Mrs. Beale. The rampart is old, responding to Maisie’s idea of the Middle Ages; and from the rampart, the “new little town” beneath “seem[s] to them quite as old” (204). The rampart, I think, is a symbol for Mrs. Wix’s whole moral view. The strict moral code is a fortification, for its authoritative determinacy provides a sure guide, staving off moral conflict by neatly demarcating right from wrong. It is also remote, “uplifted” (98)—like the rampart, it looks down from on high—and its remoteness obscures the particulars
beneath. Moreover, in their obscurity, the particulars seem to fit neatly within the general framework, just as from the height of the old rampart, the new little town looks as old as the rampart itself.

Mrs. Wix’s moral code is formal. It requires line-drawing on the basis of Biblical commands, the strict rule-based categorization of permissible and impermissible relationships. After both Mrs. Beale and Sir Claude have been deserted by their spouses and so are, in some sense, “free,” Maisie wonders why their new freedom shouldn’t make their relationship right. In response to Maisie’s pointing out her stepparents’ freedom, Mrs. Wix declares, “nobody, you know, is free to commit a crime” (207). But Maisie’s implication is not, it seems, that the two are free to commit a crime, but rather that their freedom ought to transform our understanding of their relationship as criminal. Maisie’s point is that Mrs. Wix’s categories are too blunt, the term “adultery” failing to capture all the morally relevant features of the concrete situation. But Mrs. Wix is associated with a closed hand: the fixity of her moral condemnation admits of no openness in the face of the particular circumstance, no subtle response to the concrete example.

How should we explain Mrs. Wix’s hostility to particularity? The explanation, in my view, is that attention to particularity will work to undermine the authority of the fixed rule, with unacceptable consequences if the fixed rule is conceived as the eternal law of God. If we come to think that judgment requires us to look closely and carefully, to engage with situational particulars, no general rule will seem adequate to the moral complexity of the case before us. A general rule may still seem a useful guide, but its usefulness is very different from its authority.

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21 Irene Tucker also makes this point about the formal quality of Mrs. Wix’s moral sense. See Tucker, A Probable State: The Novel, the Contract, and the Jews (Chicago: Chicago University Press, 2000) 173.

22 “…and though they went home in silence it was with a vivid perception for Maisie that her companion’s hand had closed upon her. That hand had shown altogether, these twenty-four hours, a new capacity for closing...” (210).
To attribute normative importance to particulars will thus seem to undermine the ultimate authority of the general rule, for the rule will be justified only insofar as it manages to correctly capture the particular.\textsuperscript{23} Where the general rule is conceived as the eternal Law of God, acknowledging the normative force of the particular thus has grave implications. As a challenge to the ultimate authority of that Law, it can be understood as nothing other than sin.

Our sense that Mrs. Wix’s presence in the novel is stifling and oppressive is connected to her indifference to particulars. There seems, in other words, to be an important relationship between the free moral conscience and attention to particularity. This relationship is implicit in Sir Claude’s refusal of Mrs. Wix’s proposal:

\begin{quote}
My dear friend, it’s simply a matter in which I must judge for myself. You’ve judged \textit{for} me, I know, a good deal, of late, in a way that I appreciate, I assure you… But you can’t do it always; no one can do that for another, don’t you see, in every case. There are exceptions, particular cases that turn up that are awfully delicate….” (200)
\end{quote}

On its surface, this passage suggests the deficiency in Mrs. Wix’s moral code to which we have already alluded. An antecedently fixed general rule will never provide a sufficiently subtle response to the complex particulars of the concrete case. But Sir Claude’s insistence that he must judge for himself suggests two other ideas that might be found in this passage, two ways in which moral autonomy and the normative force of the particular are connected. First, a moral system that leaves room for the individual to consider the circumstances of the particular case, to compare the general rule to the particular case, determining whether or not the rule adequately grasps what is salient in the particular, and finally to revise the general rule in light of the particular makes room for interaction between the standing rule and the independent mind. In this interaction, the moral law will cease to confront the individual as simply “other.” Because

\textsuperscript{23} For a discussion of this matter in relation to Aristotelian rationality, see Nussbaum, \textit{Love’s Knowledge}, 68.
no longer wholly imposed from without, no longer a mere external judgment, but rather requiring
the participation of the subject, the moral system becomes what we might call self-imposed, a
judgment that is in part one’s own.

There is a further connection between attention to particularity and moral autonomy. The
abstractness of Mrs. Wix’s understanding of moral duty is not only a matter of its inattention to
situational particulars. It denies particularity in a second sense. The abstractness of Mrs. Wix’s
language, insisting that Sir Claude cling to “the straight path” or “the right,” suggests the general
abstractness of the good to which Sir Claude is to devote his life. But how can a particular
human being regard an abstract, unspecified good as his own? Subjection to an abstract good
looks like an external imposition to the concrete human being. In isolating the normative
importance of duty, Mrs. Wix’s moral sense abstracts from all the other things that make up a
good human life and so seems to deny Sir Claude his particular good. Moreover, in its
objectivity—in its being Sir Claude’s good whatever he may think—it denies Sir Claude the
ingredients of his subjective conception of well-being. The injunction to make his duty his life is
thus oppressive because inconsistent with living a life according to Sir Claude’s own
understanding of what makes his particular life worthwhile. Sir Claude’s insistence that he must
despite himself may thus also be understood as an insistence on shaping a life that he can view
as his own.

The idea that the moral law must make room for the participation of the subject in its application
and must allow for individual conceptions of what makes a good life are both aspects of a single
claim: free conscience demands a moral law that is consistent with its freedom. The moral law
must therefore justify itself to the free conscience, must seek its validation in the independent
mind. But the authority of the objective principles of right action contained in Mrs. Wix’s moral
code inheres in their source, and has nothing to do with how those principles figure in the lives and minds of particular human beings. Thus, when Maisie inquires of Mrs. Wix “why is it immorality?” (207), asking Mrs. Wix to explain her condemnation of the relationship between Sir Claude and Mrs. Beale, Mrs. Wix gives no answer. Mrs. Wix’s silence in response to Maisie’s question indicates a point of view for which morality requires no justification. For Mrs. Wix, the justification of the moral code is just its source; its content need not be further justified because its authority does not inhere in its justification. Indeed, to seek such justification is to suggest that its source is not a sufficient grounding for its authority. Like the claims to judge for oneself what makes a valuable life and to regard the moral law as a judgment of one’s own, to seek the justification of the moral law asserts an independence of mind incompatible with the absolute authority of God. Thus, when Maisie insists that Sir Claude and Mrs. Beale are free, Mrs. Wix responds, “I don’t think you know how free they’ve become” (208). Freedom, for Mrs. Wix, is just another word for sin.

Mrs. Wix’s moral code thus does not simply strike us as old-fashioned. For the problem appears to be deeper than one of “fit” between an out-dated moralism and the modern way of life. The moral norm presented in the figure of Mrs. Wix is narrow and oppressive: closed to life’s pleasures, blunt in its judgment, blind to the human attachment to particulars, and hostile to the independent mind. Her moral view fails to grasp the claims of the spontaneous and independent conscience, claims which are, in James’ presentation, moral claims connected to human freedom.24 Mrs. Wix’s failure of vision is thus also a presentation of the failure of the religious

24 This, of course, is a recurring theme in James’ work. As Tony Tanner has argued, “Rigidity, inflexibility, intransigence—these are bad characteristics in the Jamesian world. The rigorous imposition of moral preconceptions and social prejudices on the organic stuff of life is usually shown to be ill-advised or cruel, and always impoverishing.” Tony Tanner, The Reign of Wonder: Naivety and Reality in American Literature (Cambridge: Cambridge University Press, 1965) 271.
conception of duty. Let us now consider the rival conception that James puts before us in the figure of Sir Claude.

4 Duty as Self-Given by Conscience: Sir Claude

Sir Claude represents for us a moral ideal that opposes that of Mrs. Wix, one that places the freedom of the spontaneous conscience at its centre, insisting upon the freedom to see the world in its beauty, to appreciate the complex particulars of human relationships, to judge for oneself or withhold judgment altogether, to love, to play, to enjoy. This moral ideal is closely connected to an aestheticism often associated with James himself and summarized by Pippin as follows: “see as much as you can, feel as much as can be felt, imagine intensely, appreciate and acknowledge the complexity of your own and another’s particularity.”

This connection with aestheticism makes fitting Sir Claude’s first appearance in the novel through a photograph. Gazing at his picture, Maisie loses herself “in admiration of the fair smooth face, the regular features, the kind eyes, the amiable air, the general glossiness and smartness of her prospective step-father…” (64). “Isn’t he beautiful?” Maisie asks (66). But although James is frequently understood as endorsing aestheticism, I think a careful exploration of his treatment of Sir Claude suggests otherwise.

What appeals to us in Sir Claude, what makes him loveable, is everything we found lacking in Mrs. Wix. In contrast to Mrs. Wix’s dingy sternness, Sir Claude is romantic and charming, a “shining presence” (70). He is always amused, displaying “a positive disposition to romp” (76),


and bringing life and energy to Maisie’s otherwise bleak schoolroom. Mrs. Wix’s constant embraces forcefully enclose and restrain Maisie, but Sir Claude kneels down and opens his arms out to her, spontaneous, equalizing, warm, and kind (101). Whereas Mrs. Wix’s stifling embrace suggests subjugation to the moral law, Sir Claude’s gesture indicates his own indifference to authority. Similarly, Sir Claude’s pet names for Maisie, “old boy,” “old chap,” “my good man,” his habit “in talking with her to take the tone of her being also a man of the world” (84), reveal Sir Claude’s easy and equalizing manner, his refusal to patronize or act as a figure of authority. Moreover, in contrast to Mrs. Wix’s judgmental vision, in which the good triumph and the wicked are punished, Sir Claude seeks an arrangement of interpersonal relationships where everyone is “squared.” For Sir Claude, “squared” implies, not a notion of judgment and desert, but only an arrangement wherein everyone finds the satisfaction of their preferences. When he tells Maisie that he has “squared” her mother, he means only that “your mother lets me do what I want so long as I let her do what she wants” (105).

Sir Claude is not only indifferent to authority; he also rejects Mrs. Wix’s whole worldview:

…in the National Gallery…Maisie sat beside him staring rather sightlessly at a roomful of pictures which he had mystified her much by speaking of with a bored sigh as a ‘silly superstition.’ They represented, with patches of gold and cataracts of purple, with stiff saints and angular angels, with ugly Madonnas and uglier babies, strange prayers and prostrations…. (104)

For Sir Claude, the authoritative structure of value provided by Christianity, symbolized in the image of the Madonna and child, is nothing but a false and ridiculous belief. Stiff, boring, ugly, and strange, it captures nothing of life’s beauty, sweetness, or humour. And it is just the appreciation of these pleasures that constitutes Sir Claude’s way of life—riding on top of buses, visiting parks, attending cricket matches, trying “a hundred places for the best one to have tea” (103). All this is encapsulated in the way Sir Claude is perfectly at home in France, perfectly
skilled in the French language, at ease in the joyful spontaneity of French life. Untroubled by fixed rules, Sir Claude “takes things just as he finds them.”27 But Sir Claude’s rejection of Christian duty and his love of life’s pleasures should not be confused with egoism. He is in fact genuinely concerned with Maisie’s well-being.28 I suggest, however, that his concern for Maisie is grounded entirely in his particular love for her; it is not rooted in any general conception of what one owes a dependant and vulnerable human being, in any acknowledgment of the standing moral obligation symbolized by the Madonna and child. That, for Sir Claude, is nothing but “silly superstition.”

Nevertheless, Sir Claude seems to see the strength of Mrs. Wix’s objection to his affair with Mrs. Beale; he too has an “all but insurmountable distaste for allowing their little charge [Maisie] to breathe the air of their gross irregularity—his contention, in a word, that they should either cease to be irregular or cease to be parental” (164). But we can of course see the narrator’s irony here and so the vagueness of Sir Claude’s conviction. The fixity of the term “insurmountable” is qualified—his distaste is all but insurmountable. Moreover, “distaste” suggests that this is a matter governed by personal preference or aesthetic appeal. Distaste fails to express any acknowledgement of the force of obligation. Similarly, “irregular” suggests an aesthetic difficulty rather than a moral one and the possibility of ceasing to be parental indicates that care for Maisie’s well-being is not overriding for Sir Claude, but rather equally balanced with the pleasure of “irregularity.” Sir Claude’s contention presents as a choice what, from Mrs. Wix’s point of view, duty has already resolved. Indeed, for Sir Claude, there is no moral certainty here.

27 Maisie’s words in France are “we’re just taking it as we find it” (198). It is clear, I think, that she is imitating Sir Claude here, trying to come up with the words that will please him.

28 We see, for example, that Sir Claude seems genuinely troubled by Ida’s treatment of Maisie. And he does seem to think it important to find out whether or not Mrs. Beale “really cares” for Maisie (82).
The decision as to whether he should cease to be irregular or cease to be parental is, for him, a genuine conflict. His concern for Maisie’s well-being points in one direction and the pleasure he takes in the company of Mrs. Beale points in the other. For Sir Claude, there are no standing principles to adjudicate this conflict. We thus find him always wavering, always “in a fidget,” refusing definite choice, and insisting upon complexity (180).

Indeed, in the face of Mrs. Wix’s single-mindedness about his relationship with Mrs. Beale, Sir Claude insists upon the complexity of the concrete situation. He insists that “the situation isn’t after all quite so desperate or quite so simple” (101) and that Mrs. Wix is “too hard on Mrs. Beale” who has “great merits of her own” (192). Of course, for Mrs. Wix, the point is that Mrs. Beale’s particular merits are insignificant since a relationship with her would simply be a sin.

Once in France with Mrs. Wix and Maisie, and having been deserted by his own wife, Sir Claude learns that Mrs. Beale has been deserted by her husband and plans to return to England to see her. But for Mrs. Wix, as I have earlier suggested, Mrs. Beale’s desertion by her husband makes no difference at all. Mrs. Beale is still legally married and that is all that is salient for the crime of adultery (196). Sir Claude, however, insists upon the relevance of the desertion to the concrete situation before him: “Her situation, by what has happened, is completely changed; and it’s no use your trying to prove to me that I needn’t take any account of that” (198). As we have seen, Sir Claude insists upon his freedom to judge for himself in this matter and upon the insignificance of Mrs. Wix’s fixed rule in the face of the exception, the particular case. Finally, in an exchange with Maisie, Sir Claude admits that Mrs. Wix is right, but only “from her point of view” (247), as though moral rightness is not only wholly context-specific, but person-specific as well. If Mrs. Wix is the rampart, the high, solid, fortification, then Sir Claude is the little boat bobbing on the open sea in France, the plage shimmering in a thousand tints. His is the free
conscience, floating unmoored from fixed principle, and consequently as infinitely various as the shades of sand.

Maisie adores Sir Claude and though we can see why she does, we are in the end disenchanted with the beautiful picture to which we were first introduced, for Sir Claude’s free spontaneity is frequently associated with oppression: “The strangest thing of all was what had happened to the old safety. What had really happened was that Sir Claude was ‘free’ and that Mrs. Beale was ‘free,’ and yet that the new medium was somehow still more oppressive than the old” (251-252). Sir Claude’s freedom is connected to oppression in two different ways. Of course, Mrs. Wix has a great deal to say about Sir Claude’s “slavishness;” she insists that he is nothing but a slave to his passions. But Mrs. Wix’s understanding of slavishness must be bound up with her own understanding of freedom, and as we have seen, this is a very limited understanding. For Mrs. Wix, the good things in life are just those prescribed by duty. On the Christian view, goods are objective and it is the task of reason to apprehend them as such; reason simply directs us to those things that are good. Action that denies the objective goods—in this case, Sir Claude’s relationship with Mrs. Beale—thus cannot be conceived as an exercise of reason; it can evince nothing but slavishness to the passions.

Yet, even if we do not accept Mrs. Wix’s understanding of what constitutes slavishness (because we have found her own moral view oppressive), we may nonetheless feel that she is right to call Sir Claude a slave. But what reason have we, who have rejected Mrs. Wix’s worldview, for thinking Sir Claude’s way of life deficient from the perspective of freedom? One reason, I think, is that Sir Claude’s sense of joyful spontaneous freedom prevents him from embracing any standing commitments, any set of fixed principles according to which he may guide his life, symbolized by the fact that he has never taken up a career in public service but prefers to “potter
about town of a Sunday” (103). As a result, Sir Claude ends up flitting through life like “a butterfly” (89), pushed around by his various sympathies, desires, and fears. Moreover, we see that those sympathies, desires, and fears are manipulable, especially by beautiful women. The irony of Sir Claude’s freedom, of his refusal to commit himself one way or another, is his essential passivity and as Graham has pointed out, his hollowness. Without any purposes of his own, Sir Claude is ultimately “plastic” (163), and so subject always to the purposes of others.

Sir Claude is associated with oppression in a second, more important, way: his failure to commit himself to any plan or to undertake any obligations that would shape his life threatens the well-being of the one who is vulnerable to him. From the outset, Sir Claude is described as “intermittent” (76), “careless and free” (89). He is always coming “in and out” of Maisie’s schoolroom (76); when he is there, he is the life of the schoolroom, but he sometimes disappears for days at a time (78). Though he loves Maisie, the language James uses to describe Sir Claude’s attitude toward her, making her “his particular lark,” suggests a certain frivolousness (89). On the beach in France, Sir Claude listens to Maisie only half-heartedly and “with an absent gaze—absent, that is, from her affairs—follow[s] the fine stride and shining limbs of a young fishwife who had just waded out of the sea...” (184). Moreover, we might read Sir Claude’s references to Maisie as “old boy” and “old chap” as an effort to conceive the child as an independent adult, and so as an attempt to evade the thought that he might have special positive obligations towards her, that he might have to commit himself to and endure sacrifices for her well-being.

Indeed, the refusal of commitment is a general feature of Sir Claude’s relationship with Maisie. Sir Claude is perpetually making promises to Maisie but they embody no commitment on his part: they are broken just as easily as they are made. Moreover, the language James uses to describe Sir Claude has all the equivocation of Sir Claude’s own character: “If it had become now, for that matter, a question of sides, there was at least a certain amount of evidence as to where they all were. Maisie of course...was on nobody’s; but Sir Claude had all the air of being on hers” (93, emphasis added). Or, Sir Claude has been for some time “on the point of making arrangements for regular music lessons” (emphasis added). And, Maisie’s happiness at the future he promises “might have made him feel the weight of the pledge his action had given” (85, emphasis added). Thus, for Maisie, being with Sir Claude is “like being perched on a prancing horse” with nothing to hold on to (117). We see that Maisie’s well-being is compromised by her vulnerability to Sir Claude who, in his vagueness, withholds the stability upon which her welfare depends.

Of course, “something to hold on to” is just what Mrs. Wix represents for Maisie. Maisie finds Mrs. Wix “peculiarly and soothingly safe” and draws from her “a support, like a breast-high banister in a place of ‘drops’, that would never give way” (50). Yet as we have seen, the rigid system of duties that provides the sense of security is also restraining and enclosing, blind to particularity and to freedom. On the other hand, Sir Claude’s joyful spontaneity and attentiveness to particulars have a frivolous, care-free quality and are associated with a refusal of commitment and a refusal of the pull of obligation that we must find troubling.30 For James’ portrayal of Maisie’s vulnerability, particularly his portrayal of her terror in the face of the

30 Cora Diamond also argues that James’ works offer a non-moralistic critique of aestheticism as a failure of responsibility. See “Henry James, Moral Philosophers, Moralism,” 251.
adults’ refusal of care, must make us feel that something is missing here. What is missing is an acknowledgment of an obligation of care, an obligation that is not to be thrown into a mix of considerations that include Sir Claude’s own pleasure and convenience, but is rather of overriding authority.

5 Duties to Others and The Image of Contract

For Mrs. Wix, our moral obligations derive from God, an authority that is independent of, and indifferent to, individual wills. The novel’s opening scene, however, presents a world that has abandoned this view of obligation. In its place, we are presented with contract as an image for the obligations between persons. The Faranges’ contractual ordering of their obligations to one another and to Maisie suggests a contractual conception of obligation generally: interpersonal obligation is limited to the freely formed agreements between dissociated agents whose self-interest requires one another’s co-operation. The only service human beings owe one another is the fulfillment of the promises they have chosen to make and justice is nothing more than receiving that which you were promised in contract. Contract thus appears to provide a way out of the dilemma that emerged in our discussion of Sir Claude and Mrs. Wix. As a relation in which our obligations to one another are generated by our own freely formed agreements, contract makes our responsibilities to others just the dictates of self-interest properly understood. Contract thus seems to provide a basis for obligation alternative to the religious one and a picture of duty that dissolves the tension between freedom and obligation. Yet, the instability of

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32 This is the will theory of contract, the idea that obligation arises from the fact that the parties have agreed to be bound and that contract law merely protects the wills of the parties to the contract.
contract as a ground of obligation is introduced immediately, for the novel begins in the shadow of the Faranges’ broken promises of marital fidelity and its action depends upon the consequences of Beale’s broken promise to refrain from taking “further proceedings” against Ida. Indeed, in his presentation of the Faranges’ contract for Maisie’s custody, James suggests the inadequacy of contract, understood as a free agreement based upon mutual self-interest, as a conception of the basis and nature of the obligations between persons.

The contract between Ida and Beale is an agreement that is supposed to unite two self-interested parties. Since we assume the parties to the contract are equally self-interested, we assume that neither cares for the well-being of the other and that neither is prepared to make a gift. The result is that neither will be able to extract from the other more than he is willing to give up and both must therefore be prepared to give as much as they wish to take. The compromise reached by such self-regarding actors is a co-operative scheme for mutual advantage. But is there anything here out of which we can generate a non-contingent obligation to do what was promised? Our self-interest is just our desires combined with a view of how best to achieve them. This means that our self-interest is changeable in at least two ways. One is that our desires may change. There is nothing essential or unconditional about our present desires. People change over time and what they want or think valuable changes as well. The second is that our view of how best to achieve what we want may change, particularly as things change in the world around us. But a contract is a promise to do something in the future and the mutability of self-interest means that when the future moment arrives, my self-interest may no longer seem

33 Habegger writes that the breaking of contracts constitutes the novel’s pattern: “the adults make a contractual arrangement, which they violate and replace with another agreement, violating this one in turn, and so on indefinitely.” See Alfred Habegger, “Reciprocity and the Market Place in The Wings of the Dove and What Maisie Knew,” (1971) 25 Nineteenth Century Fiction 455 at 466.
to lie in performance. This is just what the novel dramatizes. Although Beale and Ida initially think that their interest in punishing the other is best served by snatching Maisie away, they soon discover that it is actually better served by foisting her upon one another. Under these circumstances, the concept of self-interest gives us no reason for holding them to their promises, for self-interest contains no reason for privileging my earlier conception of my self-interest over my present conception.

One might think this problem could be remedied by distinguishing between short term and long term self-interest. One might argue that regardless of one’s particular desires, the best way to maximize their satisfaction over the course of one’s life as a whole is not to decide whether or not to keep one’s promises on a case-by-case basis, but to adopt a general rule of promise-keeping. This is because the ability to rely upon stable agreements is in each individual’s long term self-interest and I will be excluded from the co-operative scheme of promise-making and promise-keeping if I am perceived as untrustworthy.  

But this, of course, will not resolve the problem. For even if it is true that this is what our long-term self-interest demands as a general rule, it remains the case that the rule is open to revision whenever we can find exceptions, in other words, whenever we find that breaking our promises yields short term satisfaction without threatening long term satisfaction. Maisie is, for the adults in the novel, just such an exception. They do not need to rely on her promises because she is completely vulnerable to them; they can simply make her do what they want.  

34 This is a line of argument we find, for example, in David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986).

35 The novel is thus full of instances and imagery of Maisie being pushed around. Maisie is “pulled hither and thither” (39); “she was the little feathered shuttlecock they could fiercely keep flying between them” (42); Ida “suddenly thrust the child away and…sent her flying across the room…(90); “The next moment [Maisie] was on her
gives them no reason to keep the promises they make to her. In Maisie’s vulnerability to the adults around her we see that even the argument from long term self-interest can give us no reason to keep promises to those whose co-operation and trust we can dispense with, to those we can simply exploit and dominate in the pursuit of our desires.

We can put this point in a slightly different way. Because it is an optional agreement between persons who are free to set the terms of their interaction, what is at stake in contract can only be a question of something’s relative and subjective utility, that is, its instrumental worth. If any particular thing had an intrinsic, objective value, it could not be the object of contract, for its value could not be set by the parties to the agreement. Thus where contract is understood as a source of duty, that duty must be conceived instrumentally—it must be conceived as a function of its utility—or else contract could not be its source. But this means that on the contractual conception of obligation, the only reason I owe another human being any sort of moral concern is the usefulness of that person’s co-operation to me; there is nothing intrinsic in other human beings that makes claims upon me.36

The language of the novel’s opening scene emphasizes Maisie’s status for her parents as thing. She is a “vessel,” a “porcelain cup,” something that can be “divided” and “the portions tossed,” and a “bone of contention” (35-38). And this suggests the perhaps obvious connection between

mother’s breast, where, amid a wilderness of trinkets, she felt as if she had suddenly been thrust, with a smash of glass, into a jeweller’s shop-front, but only to be as suddenly ejected with a push… (125-126). Sir Claude says of Ida: “[s]he has chucked our friend [Maisie] here overboard not a bit less than if she had shoved her, shrieking and pleading, out of that window and down two floors to the paving stones” (190); at the Exhibition, Maisie’s father “thrust her into a hansom” (144).

the instrumental conception of worth and the quality of being a “thing,” the suitability of the instrumental conception of worth as a measure for the value of things. But Maisie, of course, is not a thing but a human child. And the important difference between a thing and a human being is put before us in the first sentence of the first numbered chapter, which marks the transition from objective description of the litigation to narrative engagement with Maisie’s perspective on her situation: “[t]he child was provided for, but the new arrangement was inevitably confounding to a young intelligence intensely aware that something had happened which must matter a good deal and looking anxiously out for the effects of so great a cause” (39). Maisie is not a passive object, but a separate thinking and feeling being, actively concerned with the shape of her own life. And this status gives Maisie a kind of value that is essentially different from her instrumental value; it gives her value that inheres in her person, an intrinsic worth that makes moral claims on others regardless of their interest, and which makes wrong her treatment as an instrument ministering to the purposes of others. But that persons have such value, value that is objective and that demands recognition rather than subjective attribution, is just what is denied by the contractual conception of obligation.\(^38\)

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\(^37\) We should notice that the difference between the novel’s prologue and the numbered chapters is not a difference in the narrative voice. Both are narrated in the third person. The difference is that in the prologue we are simply offered an account of the litigation; the litigation is the subject matter. In the numbered chapters we are concerned, not simply with Maisie’s situation, but with Maisie’s perspective on her situation. Moreover, I say that the narrator engages with Maisie’s perspective rather than takes up Maisie’s perspective, because the novel rarely “puts words in Maisie’s mouth,” that is, Presumes to articulate her thoughts as she would articulate them. The novel thus insists upon the opacity and separateness of human minds. For a discussion of the differences between James’ centres of consciousness and the narrative voice see Sister Kristin Morrison, “James’s and Lubbock’s Differing Points of View,” (1961) 16 Nineteenth Century Fiction 245. For a discussion of narrative voice in Maisie and its relation to the representation of another’s consciousness see Susan E. Honeyman, “What Maisie Knew and the Impossible Representation of Childhood,” (2001) 22 The Henry James Review 67.

\(^38\) Jean Hampton points out that Hobbes readily admitted this conclusion: “the Value, or WORTH of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute; but a thing dependent on the need and judgement of another.” Hobbes, Leviathan, chapter 10, paragraph 16 cited in Hampton, “Feminist Contractarianism,” 234.
The symmetry of the Farange’s custody agreement prompts us to imagine the Faranges as two opposing poles with Maisie, the object of the contract and litigation, at the centre. But Maisie is an absent centre. She is absent not only from the novel’s opening scene, but also absent in the sense that her care is, by the symmetrical agreement, constructed as something the Faranges owe, not her, but one another. The void at the centre of the Faranges’ opposing poles thus suggests what we have just seen. There is an unbridgeable gap between contingent self-interest and non-contingent obligation; there is no path from the subjective attribution of instrumental worth to the recognition of the authority of intrinsic worth.

It might now be objected, however, that the picture of contract we find in the novel relies on a Hobbesian understanding of contract and that an alternative and more promising interpretation of contract is available. The Kantian account says that human beings, equal in their status as free agents, are entitled to the maximum amount of freedom consistent with an equal entitlement in every other human being. The very idea of free agency generates a duty of non-interference with the free agency of others. On the Kantian understanding of contract, the laws of contract express the duty human beings have to interact with one another on terms appropriate to their equal status as free agents. They express the idea that human beings have no right to one another’s unilateral service. They owe one another only the negative duty of non-interference with the freedom to choose and can have positive duties to one another only when undertaken voluntarily in a relationship of mutual self-restriction. If we take this to be the meaning of contract, perhaps contract can be rehabilitated as a conception of obligation generally, for the idea of contractual

39 Jean Hampton, for example, has suggested that the Kantian conception of contract is a good image for relationships of justice in the family. See “Feminist Contractarianism,” 239. Shultz has also argued for a contractual approach to marriage in “Contractual Ordering of Marriage,” (1982) 70 California Law Review 207.

obligation now expresses mutual respect for free agency rather than a mere coincidence of self-interest. For isn’t it the case that to pay someone for something or promise something in return for something else is importantly different from simply taking it? Far from implying an instrumental conception of human worth, haven’t I, by entering into a voluntary exchange, acknowledged that the other person is sovereign over her person and property and is not my servant or a mere tool of my purposes? Moreover, doesn’t the symmetry of the contractual form emphasize this two-sidedness, thus constituting a formal representation of mutual respect for free agency?\footnote{41}

But there remains a problem here. It is that contract, even understood through a Kantian rather than a Hobbesian lens, can satisfy our conception of obligation only if we think that our non-consensual obligations to one another are limited to the wholly negative ones of non-interference with the freedom to choose, for this is what the contractual theory of positive obligations assumes. On the Kantian account, contract law will enforce the positive obligations that the parties to a contract voluntarily undertake; but the existence of these obligations is wholly dependent on the parties’ willingness to undertake them in the first place.\footnote{42} And yet our novel, by showing us what it is for a vulnerable child to be surrounded by those who acknowledge no non-consensual obligations besides non-interference, no independent obligations of positive care, 

\footnote{41} Barbara Eckstein seems to recognize these two possible interpretations of the symmetries in the novel, that is, that symmetry evokes both a coincidence of selfish self-interest and a kind of formalist ethics: “Though James very early shows the squaring-off of one parent against another to be selfish manipulation, he much more slowly discloses the difficulties with a morality intended to square things—discloses it as though he, or his narrator, learns the limitations of ethical...symmetry...” in “Unsquaring the Squared Route of \textit{What Maisie Knew}” in Cornwell and Malone (eds), \textit{The Turn of the Screw and What Maisie Knew: Contemporary Essays} (New York: St. Martin’s Press, 1998) 180.

\footnote{42} Thus we saw that the decision in \textit{Winterbottom v. Wright} is fully at home in the Kantian framework.
suggests the inadequacy of this conception of obligation as an understanding of what is owed between persons.

Symmetrical non-interference is the touchstone of many of the agreements that are made in the novel. It is the essence of the initial divorce and custody agreement between Ida and Beale. They each agree to leave the other alone and to act as parents separately, in rotation for six months of the year. Consider also Sir Claude’s explanation of his announcement that he has “squared” Ida: “I mean that your mother lets me do what I want so long as I let her do what she wants” (105). This agreement, as Habegger writes, is a “mutual nonaggression pact.”

When Mrs. Beale declares that she’s “squared” Beale, Maisie remembers Sir Claude’s earlier words: “I know how!...By letting him do what he wants on condition that he lets you also do it” (114). Similarly, Mrs. Beale tells Maisie that Ida “isn’t your mamma any longer...Sir Claude has paid her money to cease to be...She lets him off supporting her if he’ll let her off supporting you...It’s a regular signed contract” (228-229).

But the inadequacy of a conception of obligation that is wholly constituted by non-interference with the agent’s freedom to choose is suggested in our novel in the following scene between Sir Claude and Maisie. Sitting in the cab outside her father’s house, Sir Claude tells Maisie that the decision as to whether she will go back to Beale’s is hers alone.

‘Look here, if you say so we won’t after all go in.’

‘Ah but I want to see Mrs. Beale!’ the child gently wailed.

‘But what if she does decide to take you? Then, you know, you’ll have to remain.

Maisie turned it over. ‘Straight on—and give you up?’

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‘Well—I don’t quite know about giving me up.’

...

I leave the thing, now that we’re here, absolutely with you. You must settle it. We’ll only go in if you say so. If you don’t say so we’ll turn right round and drive away.

‘So in that case Mrs. Beale won’t take me?’

‘Well—not by any act of ours.’

‘And I shall be able to go on with mamma?’ Maisie asked.

‘Oh I don’t say that!’

...

‘Then if she turns me out and I don’t come here—?’

Sir Claude promptly took her up. ‘What do I offer you, you naturally inquire? My poor chick, that’s just what I ask myself. I don’t see it, I confess, quite as straight as Mrs. Wix.’ (110)

We might understand Sir Claude’s insistence that the choice is Maisie’s as an insistence upon her freedom. After all, Sir Claude’s conversations with Mrs. Wix have made him especially aware of the oppressive quality of attempts to shape another person’s life. This might seem to be an improvement over the way the other adults in the novel treat Maisie as a passive object. And yet there does seem to be something troubling here; indeed, the narrator describes this as “the choice imposed on [Maisie] in the cab” (111, emphasis added). Tucker has argued that the trouble with the adults’ insistence upon Maisie’s freedom to choose is that they are assuming her status as “a wholly autonomous and efficacious subject” despite her “obvious financial, emotional, and intellectual dependency.” 44 We can expand upon this interpretation.

What we see in this exchange with Sir Claude is that the reality of Maisie’s freedom, her ability to shape a life of her own, depends, not only on her freedom to choose, but also on her ability to

44 Tucker, A Probable State, 133.
rely upon some reasonable view of the consequences of her choice. In the passage I have just cited, the choice Sir Claude offers Maisie in the cab is a choice between two different lives, but the picture of each life remains essentially vague, completely dependent on the choices the adults will make. If she goes to Mrs. Beale, will she ever see Sir Claude and will her father consent to keep her? If she stays with her mother, will she ever see Mrs. Beale? And will her mother simply throw her out? If her mother throws her out, will Sir Claude look after her? The choice put to Maisie thus presents a picture, not of Maisie’s freedom to choose, but rather of Maisie’s absolute vulnerability to the choices of other people—people who refuse to honour their promises and conceive of their own choices as perfectly free and unfettered by obligations. In Maisie we see that freedom of choice is meaningful only if it includes some reliable understanding of what we are choosing. Without such an understanding, Maisie is choosing blindly and her fate is as hostage to others as if they had made the choice for her. Thus what Maisie needs from Sir Claude is a promise about her future that she can depend upon, a promise that he will regard as binding.

I have said that the Kantian interpretation of contract says that no one owes another any positive obligations unless he or she voluntarily undertakes them. It does not suggest that there are any normative reasons for entering into contracts with others, any non-instrumental reasons for exchanging promises with others. But our novel, as I think we have now seen, suggests such a reason. In the “restless change” (94) and perpetual uncertainty that characterize her childhood, Maisie clings to promises, especially promises from Sir Claude: “Though there were parts of childhood Maisie had lost she had all childhood’s preference for the particular promise” (87). Why are promises so important to children? In his portrayal of Maisie, James suggests that it is because children face a “peculiar passivity” in their own lives; they are “present at [their] history” as spectators (101). Maisie’s insistence on promises from Sir Claude illuminates her
vulnerability to him and to his indecision. It illuminates the way her ability to shape a life that she can regard as her own depends upon her ability to rely upon his promises. This suggests that one reason for making and keeping promises to those who are vulnerable to our decisions is that doing so demonstrates appropriate care for their autonomy and subjectivity, that is, for the fact that our choices figure importantly in their lives, the shape of which matters a great deal to them. And this means that the obligation to keep one’s promise may be derived, not from a coincidence of self-interest or the fact of mutual agreement, but from the fact that reliable promises are a condition of meaningful freedom.

That Maisie’s freedom to choose is shown to be perfectly compatible with her complete lack of control over the shape of her life suggests what we have already seen in *The Portrait of a Lady*. That is that the bare idea of an unfettered choice cannot give us the whole story of human freedom. And if our obligations to one another are derived from the requirements of mutual freedom, this suggests also that mere non-interference with another’s freedom to choose cannot be a complete account of human obligation. In Maisie’s vulnerability to the adults around her, we see that the realization of the capacity to shape a life of one’s own is dependent on obligations of positive concern and care for this capacity’s flourishing in other human beings.

Thus, if we think that a person is entitled to, not just respect for her freedom to choose, but also

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45 I think Hannah Arendt may have something like this in mind when she argues that promises dispel the unpredictability that comes with human freedom: “The unpredictability which the act of making promises at least partially dispels is of a twofold nature: it arises simultaneously out of the “darkness of the human heart,” that is, the basic unreliability of men who never can guarantee today who they will be tomorrow, and out of the impossibility of foretelling the consequences of an act within a community of equals where everybody has the same capacity to act.” See Hannah Arendt, *The Human Condition* 2nd edition (Chicago and London: University of Chicago Press, 1958 and 1998) 244.

her ability to shape a life of her own, we cannot be satisfied with a contractual conception of obligation. In contract the positive duties of others are subject to their changing wills, to their contingent preferences and desires. But if the members of a community are linked, not only in their chance coincidences of self-interest, but in their mutual dependence on one another’s support and concern for their freedom’s flourishing, then we must conceive of them as members of a moral community, a community in which the obligations between persons arise in virtue of the mutual dependency of their realized freedom, and so exist independently of their consent. The question we must now ask is whether we can have such a conception of obligation that does not swallow up the freedom that is its foundation. To answer this question, we must turn to James’ presentation of Maisie.

6 Freedom, Duty, and Reciprocity

In our discussion of Mrs. Wix, we have already noticed, by way of contrast, Maisie’s sensitive perceptions of life’s complexity and the connections between this awareness and the freedom of the spontaneous conscience. Maisie resists the rigidity of Mrs. Wix’s categorical judgment. Thinking for herself, she recognizes that Sir Claude’s and Mrs. Beale’s respective spouse’s desertion seems to transform their relationship. She also recognizes that love is particular and spontaneous and does not merely follow the dictates of impersonal duty. She understands that Sir Claude loves Mrs. Beale, not Mrs. Wix, and that this makes Mrs. Wix’s suggestion that she could function as Mrs. Beale’s substitute “ridiculous” (201). Her rejection of Mrs. Wix’s fixed conception of duty, a conception indifferent to the individual’s independent mind, is the development of her moral autonomy.
Some critics have thought, however, that James presents Maisie’s moral development as the
development of a capacity for perceptive sensitivity, an essentially passive moral capacity that
excludes judgment and avoids principle. 47 Tony Tanner, for example, writes that What Maisie
Knew is about “the difficulty of knowing, not the difficulty of judging.” 48 Barbara Eckstein
argues that Maisie’s moral growth could be added to Carol Gilligan’s case studies of little girls
for whom relationships and responsibilities override rules and principles. 49 For these critics,
Maisie’s moral vision is “synonymous with ‘feeling knowingly,’” a “personal and original”
response to complex problems. 50

However, I think that we have seen, in our study of Sir Claude, that the morality which might be
described as “anything goes as long as one is ‘sensitive’” 51 has been shown to be deeply
problematic. Though in some ways appealing just as Sir Claude is appealing, it is ultimately not
serious and without content; it fails to take seriously the obligations that are present and
encourages a free-floating purposelessness. I think we must therefore be careful to see the ways
in which Maisie, though highly sensitive to particulars and sympathetic to the claims of the free,
spontaneous conscience, is importantly different from Sir Claude. We must be careful to notice

47 See for example, Tessa Hadley, Henry James and the Imagination of Pleasure, 44. Walter Isle argues that the
child’s natural status as a passive spectator forces James to focus on “passive” moral themes in Experiments in
that Maisie’s knowledge dispenses with judgment in Meaning in Henry James (Cambridge: Harvard University
Press, 1991) 259. Kenneth Graham argues that Maisie rejects Sir Claude’s proposal not on the basis of “logic or
moral scruple” but rather on the basis of “an extreme instinctual emotion” in Indirections of the Novel, 70. Hynes
argues that Maisie’s moral vision “is entirely pragmatic. She behaves according to what she sees, proceeds step by
step in keeping entirely with what her impulses tell her...” See Hynes, “The Middle Way of Miss Farange: A Study
of James’ Maisie,” (1967) 34 English Literary History 528 at 553.

48 Tony Tanner, The Reign of Wonder, 286.


50 Merle Williams, Henry James and the Philosophical Novel: Being and Seeing (Cambridge: Cambridge

193.
that for Maisie, the idea of shaping a life of one’s own is the basis for her sense of moral
obligation. This, I will argue, is what we see in Maisie’s final proposal to Sir Claude.

The concluding scenes of *What Maisie Knew* begin with Sir Claude asking Maisie to abandon
her governess Mrs. Wix and live together with him and Mrs. Beale:

My idea would be a nice little place—somewhere in the South—where [Mrs. Beale] and
you would be together and as good as anyone else. And I should be as good too, don’t
you see? For I shouldn’t live with you, but I should be close to you—just round the
corner, and it would be just the same. …That came to me yesterday, in London, after
Mrs. Beale had gone: I had the most infernal atrocious day. ‘Go straight over and put it
to her: let her choose, freely, her own self.’ So I do, old girl—I put it to you. Can you
choose freely? (247)

Maisie’s eventual answer to the choice Sir Claude puts before her—to either abandon Mrs. Wix
and live with him and Mrs. Beale or abandon him and live with Mrs. Wix alone—is not a choice
between the options given. Maisie insists upon a proposal of her own: “‘Yes, I’ve chosen,’ she
said to him. ‘I’ll let [Mrs. Wix] go if you—if you—’ She faltered; he quickly took her up. ‘If I, if
I--?’ ‘If you’ll give up Mrs. Beale’ ” (255).

Some have argued that Maisie’s final proposal to Sir Claude is a self-centred bargain in the
image of contract, exhibiting nothing but a hollow and selfish symmetry, and treating the human
beings concerned as merely instrumental.⁵² For example, McCloskey argues that Maisie’s
“conduct to the end is a kind of bargain-and-trade ethics seeking personal advantage from the
evolving final situation,” embodying an “unlovely firmness which stiffens character into self-

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⁵² Barbara Eckstein argues that when Maisie tells Sir Claude she will sacrifice Mrs. Wix if he will sacrifice Mrs.
Beale, she is practicing the rules of squaring that she has learned from the adults. See "Unsquaring the Squared
Alan Bellringer argues that Maisie’s proposal to Sir Claude amounts to an insistence that he give her first priority
and refers to this insistence as her “selfish stirrings before she decides upon respectability.” Dennis Foster refers to
this as Maisie’s “play for power” in “Maisie Supposed to Know: Amo(u)ral Analysis,” (1984) 5 The Henry James
Review 207 at 214.
regard without any real perception of moral grounds at all.”

There are, to be sure, allusions to contract in Maisie’s exchange with Sir Claude. Sir Claude’s emphasis upon choice and Maisie’s ability to “choose freely” call to mind the notion of the free agent as abstract chooser that is at the heart of contract. There is, moreover, the symmetry of Maisie’s counter-proposal—she’ll abandon Mrs. Wix if he’ll abandon Mrs. Beale—which is a prominent feature of the novel’s contracts. To see that Maisie’s proposal to Sir Claude is importantly different from the contractual bargains that reverberate throughout the novel, we must consider the difference between symmetry and reciprocity.

Symmetry most often describes an aesthetic value, a relationship of outward sameness between two objects. Aesthetic symmetry may reflect the purposiveness of the creator, but it need not reflect any purposiveness in the objects that stand in a symmetrical relationship with one another. Indeed, we find symmetry even in the absence of purpose—in a snowflake, for instance, or the wings of a butterfly. Symmetry thus seems to describe an outward relationship. It does not refer to, or even require, a purposeful attempt to bring this relationship of sameness into being. As we have seen, this makes symmetry a fitting description for a relationship of mutual selfishness where particular interests happen to coincide as in the case where we enter into an exchange because I want the very thing you happen to have and you want the very thing I happen


54 In “Reciprocity and the Marketplace in The Wings of the Dove and What Maisie Knew,” Habegger distinguishes between reciprocity and “the self-seeking contract.” However, Habegger equates symmetry with reciprocity and thus does not notice the way James has in fact connected symmetry and contract. As I will argue, I think James suggests an important distinction between symmetry and reciprocity.

55 Thomas L. Jeffers writes in his discussion of What Maisie Knew that the symmetries in the novel are merely patterns and are therefore morally neutral. “Maisie’s Moral Sense: Finding Out for Herself,” (1979) 34 Nineteenth Century Fiction 154 at 158.
to have. Neither party is actively interested in satisfying the other’s objective or is positively concerned with the other, but a coincidence of self-interest brings about this symmetrical result.  

The fact that symmetry describes a relationship from a purely external perspective, that is, a perspective that is indifferent to the internal perspectives of the things or persons it describes, makes it also a fitting description for a relationship of cold respect for free-agency. On the Kantian understanding of contract, a bargain satisfies the conditions of mutual respect if it is two-sided. Formal symmetry—something in return for something else—is all that is needed to satisfy the requirement of respect, for this is sufficient to show that neither party is asserting a right to the other’s unilateral service. Respect does not, however, require a bargain that is substantively fair from the particular perspectives of the parties, from the perspectives of their particular needs, interests, or flourishing, because these are irrelevant to the bare capacity for free agency. Moreover, respect for abstract worth does not require the parties to appreciate the significance of their bilateral trade; they need not actively work to bring about a relationship of mutual respect and they need not care about whether they do. Abstract respect just is present in the two-sidedness of the exchange, there to be seen from the outward perspective from which symmetry is described.

57 As we have seen, this explains the traditional contract doctrine that a court will not inquire into the adequacy of consideration.
58 Weinrib writes, “The relationship...between free wills does not deal with the specific purpose that either actor has in mind, because this purpose is only internally significant” in “Law as a Kantian idea of Reason,” (1987) 87 The Columbia Law Review 472 at 489.
59 So for example, as Benson argues following Kant and Hegel’s discussion of abstract right, “the equality of persons is merely implicit in the concept of personality; it is not explicitly an object for the self-consciousness that constitutes personality. Consequently, although the duties of abstract right are rooted in the abstract universality of personality, they need not be ends that persons self-consciously pursue.” Peter Benson, “Abstract Right and the
Reciprocity, like symmetry, implies that there is a kind of sameness on either side of the relationship it describes. But although the word ‘symmetrical’ can describe a relationship between objects lacking any purposive capacity, the word “reciprocal” cannot. We would not say there is reciprocity between the wings of a butterfly. The fact that the term ‘reciprocal’ cannot describe a relationship between objects suggests that this term is importantly connected to purposiveness.

The connection between reciprocity and purposiveness suggests two other ideas that are important for us. It suggests, first, that a reciprocal relationship is at least partly constituted by the active attempt to bring that sort of relationship into being. Such a relationship is one in which the parties are oriented to one another, in which the parties are engaged in a common enterprise. Moreover, if reciprocity is something that is aimed at, the parties to the relationship cannot be indifferent to one another’s attainment of his or her objective, for the attainment of that objective is just what will make the relationship reciprocal from that person’s point of view. This suggests that reciprocity is a principle of community. It is a principle internal to a relationship that is deliberately cultivated and directed at a good common to its members; it is not merely a principle that externally regulates the chance collisions between dissociated persons. But the link between reciprocity and purposiveness suggests something else. Purposiveness is a capacity that separates human beings; it marks the separateness of their minds and bodies; it distinguishes them as separate centres of self-determining activity. This means
that if reciprocity is a principle of community, it must be a principle of community in which the separateness of human beings as purposive agents is preserved.

The possibility of a community, of a collaborative effort to achieve a common good, that preserves human separateness has already been suggested in the novel in the friendship Maisie offers Mrs. Wix. After the scene at the seashore discussed above, Maisie and Mrs. Wix return to the question of Maisie’s moral sense and to the relationship between Sir Claude and Mrs. Beale, causing Mrs. Wix to burst into tears:

Then [Maisie] saw the straighteners all blurred with tears which after a little seemed to have sprung from her own eyes. There were tears in fact on both sides of the spectacles, and they were even so thick that it was presently all Maisie could do to make out through them that slowly, finally Mrs. Wix put forth a hand. It was the material pressure that settled this and even at the end of some minutes more things besides. It settled in its own way one thing in particular, which, though often, between them, heaven knew, hovered round and hung over, was yet to be established without the shadow of an attenuating smile. Oh there was no gleam of levity, as little of humour as of deprecation, in the long time they now sat together or in the way in which at some unmeasured point of it Mrs. Wix became distinct enough for her own dignity and yet not loud enough for the snoozing old women.

‘I adore him. I adore him.’

Maisie took it well in; so well that in a moment more she would have answered profoundly: ‘So do I.’ But before that moment passed something took place that brought other words to her lips; nothing more, very possibly, than the closer consciousness in her hand of the significance of Mrs. Wix’s. Their hands remained linked in unutterable sign of their union, and what Maisie at last said was simply and serenely: ‘Oh I know!’ (217-218)

The scene begins as the perspectives of Maisie and Mrs. Wix seem to melt into one: Maisie feels that Mrs. Wix’s tears spring from her own eyes. The blurring of perspective deepens as Mrs. Wix’s tears fall on both sides of her spectacles, with the effect that neither Maisie nor Mrs. Wix is able to see the other clearly. Maisie’s first reaction to Mrs. Wix’s “I adore him” is thus “So do I.” Fully immersed in Mrs. Wix’s point of view, Maisie feels Mrs. Wix’s feelings as her own.

What Mrs. Wix wants Maisie wants as well. But we may find this merger of perspectives
troubling. Mrs. Wix and Maisie are not one person but two. We know that Mrs. Wix’s romantic attachment to Sir Claude is not the same as Maisie’s daughterly love and care and that the goods they are each seeking are thus fundamentally different, even, as we shall see, in tension with one another. Moreover, although Maisie can imagine what it would be like to have Mrs. Wix’s needs and to feel Mrs. Wix’s suffering, those needs and that suffering are nevertheless importantly not hers but Mrs. Wix’s alone. Maisie’s empathetic identification with Mrs. Wix is therefore associated with blurred vision, suggesting the effacement of difference, the inability of each to see the other’s unique particularity and essential separateness.

This scene, however, only begins with Maisie’s total immersion in Mrs. Wix’s perspective. The moment of undifferentiated oneness, when Maisie imaginatively feels Mrs. Wix’s tears springing from her own eyes, is interrupted by Mrs. Wix putting out her hand and Maisie’s “closer consciousness in her hand of the significance of Mrs. Wix’s.” This closer consciousness of the significance of Mrs. Wix’s hand in hers constitutes Maisie’s deeper vision, for its significance is Mrs. Wix’s determinate embodiment, her separateness, implying that her ends and her suffering are fundamentally her own. Maisie’s uttered words are thus “Oh I know,” not “So do I.” The movement from “So do I” to “Oh I know” is a movement from immersion in an undifferentiated community to the perception and understanding of another determinate person’s fundamental separateness. But the recognition of separateness here implies nothing like radical independence. It is no threat to the genuineness of community, of Maisie’s concern for Mrs. Wix’s well-being: “[t]heir hands remained linked in unutterable sign of their union.” Indeed, the recognition of another’s separateness seems to be an essential part of what concern for her individual well-being requires; without it, our concern for another is just an undifferentiated aspect of our general concern for humanity as a whole. But as we have seen, what Maisie offers Mrs. Wix she does not reciprocate, for the separateness of human minds and lives is just what Mrs Wix’s moral
sense denies. In her proposal to Sir Claude, Maisie insists upon a reciprocal relationship, the moral foundation for their community of two.

F. R. Leavis has argued, correctly I think, that we are meant to notice a significant development in Maisie’s capacity for perceptive judgment upon Mrs. Beale’s arrival in France. Where Maisie was once dazzled by Mrs. Beale’s beauty and elegance, she now sees the ugliness of her stepmother’s character. She sees that Mrs. Beale’s arrival in France is merely the culmination of her self-serving struggle for power and economic security. Maisie now recognizes in her a resourcefulness for which “nothing so much mattered as the new convenience of Mrs. Beale” (226). Mrs. Beale’s new determination to use Maisie in her bid for Sir Claude works, for the proposal he puts before Maisie reflects Mrs. Beale’s design. The proposal is exploitative: Sir Claude and Mrs. Beale intend to use Maisie in order to make their relationship appear proper. What is perhaps worse, Sir Claude’s proposal tries to exploit Maisie’s love for him to get her to agree to a living arrangement in which she will function as an instrument of their purposes. The proposal is, moreover, entirely one-sided. It asks Maisie to sacrifice Mrs. Wix while Sir Claude and Mrs. Beale sacrifice nothing. In refusing this proposal, Maisie asserts for the first time her legitimate claim against such treatment. Maisie’s refusal to live with both Mrs. Beale and Sir Claude is an insistence that Sir Claude recognize that she is not a tool of his purposes or a mere cog in his plan. Maisie’s insistence that Sir Claude give up Mrs. Beale, interpreted by

60 Mrs. Wix’s failure to acknowledge Maisie’s separateness is comically presented when Maisie has a tooth pulled and it is Mrs. Wix who screams as though in pain (51).

61 F. R. Leavis, Anna Karenina and Other Essays (London: Chatto and Windus, 1973) 87.


63 Gauthier suggests that this, relying on one person’s affection to induce her to agree to a practice that one-sidedly benefits the other, is the core form of exploitation. David Gauthier, Morals by Agreement (Oxford: Clarendon Press, 1986) 11.
some as selfishness\textsuperscript{64}, is an insistence upon her own self-worth, upon her entitlement to respect as a separate and dignified person. It is important to notice also that Maisie’s first refusal to be used is also her first refusal to choose among the options manipulatively presented to her, her first insistence on determining for herself the shape of her own life. Together, these represent Maisie’s assertion of her absolute worth and autonomy—her claim to be treated not as a tool ministering to the purposes and interests of others, but as one who has purposes and interests of her own and is capable of actively shaping a life that reflects them.

But respect for her dignity as a human being with purposes of her own is only a part of what Maisie asks from Sir Claude. Maisie not only refuses to function as the pre-text for Sir Claude’s relationship with Mrs. Beale. In her proposal, Maisie acknowledges that her claims of worth and autonomy are not self-sufficient. She is thus not seeking to be merely left alone and she cannot remain satisfied with Sir Claude’s easy friendship that acknowledges no standing obligations. Her claims, she realizes, depend upon the recognition and support of another; they depend on another’s commitment to care for her well-being. But following her parents’ desertion, Maisie’s alternative guardians are Mrs. Beale—who views Maisie as an object to be possessed and used—and Mrs. Wix—whose dogmatic moral sense refuses to acknowledge Maisie’s separateness and moral freedom.\textsuperscript{65} The love and guardianship of Sir Claude, if he will only finally commit himself to her care, is what Maisie’s flourishing requires. And this, in my view, is what she is asking him to recognize. She is asking Sir Claude to take account of the way his actions affect her flourishing and her vulnerable autonomy, in a manner that echoes her earlier attempts to

\textsuperscript{64} Jeffers argues that it reveals that Maisie’s love for Sir Claude is possessive. “Maisie’s Moral Sense,” 169.

\textsuperscript{65} Tony Tanner describes Mrs. Beale and Mrs. Wix as the dual threats of “selfish appetite and spiritual appropriation” in Reign of Wonder, 291.
elicit promises from him. She is thus asking not only for his respect for her freedom, but for his positive care and commitment to her welfare, to providing the conditions under which her freedom may flourish.

Maisie’s proposal is not one-sided. Although I have emphasized Maisie’s vulnerability to the adults around her, we should be careful to see that James does not treat dependency as a mere feature of childhood, a vulnerability which culminates in adult self-sufficiency. It is clear, I think, that Sir Claude’s flourishing, dignity, and effective freedom also depend on Maisie. For although Sir Claude insists upon his freedom throughout the novel, he seems unable to give that freedom any concrete reality. He is perpetually vulnerable to manipulation by women and is unable to organize his life around a purpose that would give it any meaning. Maisie is the only one who recognizes any obligations of concern for him, who recognizes that his worth is intrinsic and non-substitutable and that his life is his own. Moreover, commitment to Maisie’s well-being would give Sir Claude’s life shape and meaning; it would allow his life to reflect a scheme of ends chosen upon reflection and not merely a slavishness to his passing whims and desires.

And there is something more to be said about Maisie’s proposal to Sir Claude. Readers have been critical of Maisie’s willingness to give up Mrs. Wix in her effort to shape a life with Sir Claude. They have not noticed, in my view, that the sacrifice of Mrs. Wix is a part of Maisie’s respect for Sir Claude. Maisie’s giving up Mrs. Wix represents her recognition that there are limits to what we can require of individuals in terms of care for the well-being of others. It represents her recognition that care for well-being cannot require some to sacrifice their ability to shape lives of their own for the sake of others’ welfare. Thus Maisie does not propose, as Mrs. Wix would have her do, that she and Sir Claude and Mrs. Wix make a life together. For as we have seen, Maisie understands what a life with Mrs. Wix would be for Sir Claude. She
understands that although Mrs. Wix “clings” to Sir Claude, he does not love her. In giving up Mrs. Wix, Maisie recognizes that Sir Claude cannot be sacrificed to Mrs. Wix’s needs, that Sir Claude’s freedom and sense of life cannot flourish in her presence, and that a life with Mrs. Wix would not be a life that was truly his own.

In his presentation of Maisie, James suggests that in thinking about what human beings owe one another, we need not either accept a conception of duty that is indifferent to human freedom or else subordinate duty to self-interest. The disenchantment with the Christian worldview does not entail a universe that is normatively mute, leaving us with no basis for obligation besides the dictates of self-interest. For the universe contains human beings and to see human beings fully and clearly, James suggests, is to see them in their particularity and in their humanity, in their essential otherness and fundamental sameness. To see other human beings with Maisie’s careful and sensitive perceptivity is to recognize their dignity and so to recognize the claims they make to our respect and concern. We have only to look, to be “finely aware and richly responsible,” to just see that this is so. Yet to acknowledge the force of an obligation that we have not chosen is not to subordinate ourselves to an indifferent moral law; it is not a return to Mrs. Wix’s religious world view. For although the force of the obligation does not depend on our free choice, its authority does depend on our free recognition. And we need not bestow our recognition one-sidedly. Our free recognition requires reciprocal recognition; it thus requires an obligation that recognizes, and is therefore consistent with, our status as dignified, individual human beings. And this, I think, is just the kind of obligation that Maisie insists upon at the novel’s end.

66 An obligation that lacks the free recognition of those it binds is nothing more than a command. It is a command that is likely to be obeyed if it is backed by force; it is “silly superstition” (104) if it is not backed by anything at all.
What Maisie Knew: The Law of Negligence

In Maisie’s proposal to Sir Claude, James gives us the beginning of an answer to the problem we posed at the beginning of this chapter. We have begun to see that the realization of human freedom and dignity depends on the recognition of other human beings. Without the recognition of another, my freedom and dignity are mere unilateral assertions and have no worldly reality. This is what we saw in Osmond. In What Maisie Knew, we see it in all the adults in the novel, in the empty meaninglessness of their repeated claims to be finally “free.” We will see it again in Madame Vionnet in our study of The Ambassadors. This is significant, for it means that community—a relationship with other human beings—is a requirement of human freedom and dignity, that it is a good we must seek and not simply an empirical circumstance that our freedom and dignity must find a way to accommodate.

One might have thought that another’s respectful non-interference with my freedom of choice would be sufficient to constitute the recognition we are seeking. But the insufficiency of this has been put before us, most forcefully, I think, in the scene between Maisie and Sir Claude outside her father’s house. For that scene, as I have argued, shows that respect for another’s dignity as a free agent is not a recognition of that individual’s determinate worth, of the worth of the concrete human being that she is. To recognize another’s determinate worth, we have to see that person as one whose particular life is valuable and vulnerable and we have to show the concern for flourishing and suffering that such a vision entails.

But if a community of mutual concern is a requirement of realized freedom and dignity, we have seen that it also threatens to submerge them. It will subordinate some to the welfare of others and will recognize no freedom-based limit to the requirements of mutual care. In Maisie’s rejection of Sir Claude’s proposal, and in the proposal she suggests in its place, we seem to find a
way out of this difficulty. The moral principle that Maisie suggests for their community of two can be described as reciprocity of concern limited by reciprocity of respect. On this principle, the members of the community mutually care for one another’s well-being, but the obligation of care is limited by their mutual respect for one another’s right to pursue a life that is reflective of her own ends. Reciprocity of concern limited by reciprocity of respect thus gives us a relationship of mutual care between persons who are free and equal; it ensures that care does not require the subordination of one to the other. It ensures that the foundation of care is self-worth and not self-abnegation, and that the care we have is care between dignified persons, not care between non-entities. After all, it is because human beings are dignified persons that we have reason to care for their well-being in the first place.

Reciprocity of concern limited by reciprocity of respect is, I think, the idea behind the law of negligence. And yet neither the Kantian nor the feminist account of law can fully capture it. The Kantian account, which understands private law as requiring respectful non-interference with proprietary rights, cannot explain why negligence imposes a positive duty to take care not to harm the important interests of others. The feminist account, which raises mutual care to the sovereign norm, cannot explain why care is limited by such concepts as duty, reasonableness, and foreseeable or why the standard of reasonableness is not tailored to the particular circumstances of the one who is in need of care. Moreover, the difficulties that each of these accounts faces concern not merely their explanatory power, but their justificatory strength as well. For if each of these accounts aims at a private law justified by its vindication of individual

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67 Habegger also argues that Maisie’s proposal to Sir Claude is founded on the principle of reciprocity in “Reciprocity and the Market Place in The Wings of the Dove and What Maisie Knew,” 470.

human worth, neither succeeds. The human individual cannot find the vindication of her worth as a human being in a theory that fails to recognize the moral importance of her determinate existence and concrete life; and she cannot find the vindication of her worth as an individual in a theory that fails to recognize the moral importance of her separateness and of her capacity for shaping a life that reflects her own sense of what matters.

Reciprocal concern limited by reciprocal respect answers the explanatory difficulties and, I think, goes some way toward answering the justificatory problems as well. It explains why we have a legal doctrine that requires the members of a community to show reasonable concern for the well-being of others as they pursue their own ends. It also explains why the requirement of care is limited by concepts such as duty, foreseeability, and reasonableness as between the parties—concepts that ensure that care for the well-being of others is consistent with the reasonable priority an individual gives to her own ends. Moreover, reciprocal concern limited by reciprocal respect gives us the recognition of individual human worth that we have been seeking. The requirement of reciprocal concern is a recognition of the fact that human freedom must be realized in concrete lives and that these lives are vulnerable to circumstance. The requirement of reciprocal respect is a recognition of the fact that the concrete lives we are concerned with are the lives of separate individuals, each with a mind of her own and capable of choice and responsibility. Together these principles ensure that the parties to the relationship are the sort of persons capable of providing the recognition we are seeking, for in the recognition of the other, each remains, and is recognized as, a dignified end.

Nevertheless, this account is still incomplete as an alternative to the Kantian theory of what we owe others. For the Kantian account does not limit obligation to equal respect only because it thinks that respect is sufficient for the vindication of human dignity. It also limits obligation to
equal respect because it thinks that concern for well-being is incapable of grounding an obligation that is equal. On this theory, we have seen, individual well-being is a purely subjective matter. It is a matter of contingent and variable needs and the satisfaction of personal preferences and desires. Given the differences between persons, what concern for well-being requires in a particular case will vary. For some it will require more; for others it will require less. If the obligations binding two people happened to be equal and therefore reciprocal, this would be purely coincidental. All this makes the obligation of concern for well-being incapable of legitimately coercing free and equal human beings, for it will always result in the wrongful subordination of one to the purely subjective conditions of another’s well-being.

Forceful though the argument is, it depends upon a claim the necessity of which has not been established. The claim is that there no possibility of a conception of human well-being, of a well-being that is common and shareable rather than subjective and idiosyncratic. In the next chapter, I try to show that James puts that very possibility before us. For now, however, we might notice the following. That such a possibility exists is already implicitly acknowledged in the account contemporary Kantians give of negligence. In recognizing the tort of negligence, Kantians admit that there ought to be liability for negligently causing harm to another’s body or property. But in acknowledging that care for others’ interests in an able body and useful property is capable of grounding a reciprocal obligation that legitimately coerces free and equal persons, they have also acknowledged that these are aspects of human welfare—aspects of a non-contingent, non-arbitrary conception of human well-being. Such a conception is what James offers us in *The Ambassadors*. 
Chapter 4  
Detachment and Immersion: Judgment in *The Ambassadors*

1 Two Cases in Contract Law

We can begin our discussion of *The Ambassadors* by placing side by side the following two cases about the appropriate measure of damages for a breach of contract.

Willie and Lucille Peevyhouse owned a homestead farm on 120 acres of land in Oklahoma.¹ They entered into a contract with Garland Coal Company. Under the contract, the Peevyhouses leased a substantial portion of their land to Garland Coal for stripmining and Garland Coal agreed to perform remedial work on the affected land when the mining lease was at an end. At the end of the lease, Garland Coal did not perform the remedial work, leaving large portions of the Peevyhouses’ land unfit for use. The Peevyhouses sued for breach of contract. Since Garland Coal admitted that it was in breach, the only issue before the court was the appropriate measure of damages. The Peevyhouses claimed damages in the amount of $25,000, the cost of performing the remedial work that would restore the land to usable condition as farmland and pasture. The Oklahoma Supreme Court awarded them only $300, an amount reflecting the difference in the market value of the land as it was left by Garland Coal and the market value with the remedial work performed.

In *Jacob & Youngs v. Kent*², the plaintiff built a country residence for the defendant. One of the contract’s specifications was that all the pipe used for the house’s plumbing was to be made by

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the Reading manufacturing company. When the defendant, George Kent, discovered that most of the pipe used was not Reading but from other factories, he asked the plaintiff to correct the mistake, which would have required the plaintiff to demolish substantial parts of the completed structure. The plaintiff refused to do this work and the defendant refused to make the final payment. The plaintiff sued. Justice Cardozo held that, since the cost of performance was grossly out of proportion to what would be gained by performance, the measure of the defendant’s loss was not the cost of doing the work, but the difference in market value between what he contracted for and what he received, which was nothing.

I place these two cases side by side because despite the apparent similarities in their fact patterns, the scholarly intuitions about the justice of the verdicts in each case are significantly divergent. Many scholars have argued that Peevyhouse was wrongly decided. The court, it seems, wrongly abstracted from the particularity of the Peevyhouses’ situation, ignored the fact that their family homestead and source of livelihood were destroyed, and left their loss uncompensated. Jacob & Youngs, on the other hand, is widely regarded as having correctly established the rule that where the cost of completion is “grossly and unfairly out of proportion to the good to be attained,” the measure of damages is the difference in value between what was contracted for and what was received. In refusing to require the builder to destroy substantial portions of a completed

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4 129 N.E. 889 (N.Y. 1921) 891-892.

5 Justice Cardozo’s ruling was captured by section 346 of the First Restatement of Contracts. And see RESTATEMENT (FIRST) of CONTRACTS s. 346 cmt. B (“Sometimes defects in a completed structure cannot be physically remedied without tearing down and rebuilding, at a cost that would be imprudent and unreasonable. The
structure in order to install pipe from the defendant’s preferred factory, it seems that Justice Cardozo justly prevented one person from being held hostage to the idiosyncratic whims of another.

Neither of the two theoretical frameworks for understanding private law that we have considered can account for the divergence in our intuitions about these cases. On the Kantian view, human dignity and freedom inhere in the abstract capacity for choice. This is a capacity for transcendence, for standing back from all my particular attachments, preferences, goals, and life plans and recognizing that although they are mine, they are not me. On this view, there is no commitment, attachment, or preference that I could not in principle disown. The capacity to stand back from and choose commitments or to adopt preferences from a position of detachment is just what it means to be a free and dignified human being.\(^6\) Thus, on the Kantian view, the litigant does not appear before the judge as a concrete individual with a system of desires and preferences, particular goals and life plans. He appears rather as an abstract agent, a “unit of freedom,”\(^7\) with rights to non-interference with his body or property, but no rights to the realization of his goals or to the satisfaction of his preferences. A judge who views the litigants in *Peevyhouse* and *Jacob & Youngs* in this way will think she does no wrong in awarding both litigants the difference in their property’s exchange value. Since their freedom and dignity

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\(^6\) Weinrib writes that free agency is the capacity to “rise above every determining circumstance” and that “the particular act is merely that which need not have been” in Weinrib, “Right and Advantage in Private Law,” (1989) 10 Cardozo Law Review 1283 at 1288.

\(^7\) Weinrib, “Right and Advantage in Private Law,” 1289.
inhere precisely in their capacity for transcending all particular attachments and desires, these attributes are fully respected if they are treated simply as generic property owners for whom one piece of land is as good as any other of equal value in the market. Thus in *Peevyhouse* as in *Jacob & Youngs*, an award reflecting the difference in the property’s market value fully compensates the parties for their losses.

On the feminist account we have been considering, the difference in the property’s market value appears to under-compensate for the losses sustained in both cases. For on the feminist account, we must consider the litigants’ subjective losses--their losses, not as abstract property owners, but as unique individuals with particular attachments, preferences, and life plans. And if we are committed to viewing the litigants in this way, then we must, as some have argued, take a “literary” approach to contracts. We must focus on “experience, details, back story and voice,” on the expanding context and lived human experience. The judge must therefore attend with care to the complaining parties’ stories. Indeed, outraged at the court’s cold indifference, scholars have unearthed the whole tale of the Peevyhouses’ suffering. The Peevyhouses’ loss is the loss of a particular family; it is the loss of the enjoyable use of their family homestead and the source of livelihood around which they had shaped their lives. It is a loss that can be compensated only by returning their land to usable condition.

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8 Judith Maute argues that the judge in *Peevyhouse* ought to have considered the plaintiffs’ “personal and idiosyncratic values” in “*Peevyhouse v. Garland Coal & Mining Revisited*,” 1388.


No one, on the other hand, has been outraged by the result in *Jacob & Youngs* and so no one has tried to tell the story of George Kent’s loss. We don’t know why he insisted upon pipe from this particular factory, but this, from the feminist perspective, is merely evidence of the way appellate decisions strip away the human narratives that lie behind the austere statements of fact. Of course there must be a story here. Perhaps Kent had a personal or historical attachment to this factory, or had personal reasons for wanting to support its business, or wanted the particular satisfaction and pride of having his dream-house built exactly to his design specifications. A judge attentive to his particular story and point of view, his particular preferences and attachments, would see that his loss, like that of the Peevyhouses, cannot be compensated by awarding him the difference in the property’s market value; it can be compensated only by giving him the materials he wanted.

These cases and the theoretical approaches we have considered raise the following questions: How should the judge view the legal subjects that come before her? Should she view them as generic free agents, units of freedom abstracted from their particular contexts, needs, and goals? Or should she view them as concrete individuals, each with a particular point of view and a story to tell, a story that comprises a unique set of circumstances, desires, and plan of life? Our intuitions about the cases suggest that there are deficiencies in each of these approaches, for the first approach seems to give us the wrong answer in *Peevyhouse* but the right answer in *Jacob & Youngs*, and the second approach has the same problem in reverse. Is there a view of the legal subject that can account for our intuitions here? These questions are a path into the novel *The Ambassadors*, for the novel, I hope to show, takes up these questions and the questions about human freedom and dignity that underlie them.
2 The Ambassadors as a Novel About Judgment

Lambert Strether of Woollett, Massachusetts is sent to Paris as the ambassador of his fiancée Mrs. Newsome’s judgment. Her judgment is that her son Chad has excessively prolonged his stay in Paris, that he has been distracted from his duty by a bad woman, and that he must come home to Woollett and oversee the family business. But something begins to go wrong with this ambassadorial mission as soon as Strether sets foot in Europe. We find that Strether is detached where Mrs. Newsome would have him zealous and curious where she would have him indifferent. In Paris, Strether allows the beauty of the city to wash over him. He lounges in a penny chair in the Luxembourg gardens, gazing at “terraces, alleys, vistas, fountains, little trees in green tubs, little women in white caps and shrill little girls at play” (59), conscious of the fact that “if he had seen Mrs. Newsome coming he would instinctively have jumped up to walk away a little” (60). When Strether finds Chad, he discovers that Chad is improved, refined; the woman, Madame de Vionnet, is magnificent. Strether, rather than delivering Mrs. Newsome’s judgment, finds himself pleading with Chad to stay in Paris. What has gone wrong?

Many critics have thought that the clash between Woollett and Paris is a dramatization of the clash between the rigorous moralism of New England and the relaxed manners of Europe and that Strether, in the end, rejects Woollett’s stringent moral categories in favour of his newly discovered freedom. But the novel, I think, is much more subtle than such a reading suggests.

11 Henry James, The Ambassadors (New York: W.W. Norton & Co. Inc., 1964) 18. All other references to the novel will be cited parenthetically in the text.

One difficulty with this reading is that it ignores the way Woollett’s rigorous conception of duty is itself a conception of freedom. Moreover, in thinking that Woollett is simply rejected, this reading ignores the way Strether insists to the end that Mrs. Newsome, Woollett’s chief representative, is “magnificent” (298), that she has a “perfection of her own” (298). More importantly, however, it ignores the centrality of judgment in the novel. The reader never sees Woollett, and so it is not quite right to say that it is presented as a place of moral rigor. We see Woollett only through Strether eyes as he tries to make sense of his own history and moral concepts. And Paris is not straightforwardly presented, with an authoritative narrative voice, as a place of freedom; we get only Strether’s judgments of Paris, his “consciousness” of personal freedom when he is there (17). Thus, the novel does not present a clash of cultures; for cultures are external to individual consciousness and everything that happens in The Ambassadors happens in Strether’s mind.

The Ambassadors is a novel about judgment. Although sent to Paris only as the ambassador of Mrs. Newsome’s already determined judgment, Strether cannot help but think and judge matters for himself. How, he must ask, should one judge the relationship between Chad and Madame de Vionnet? This is a question, not only about substance, but about method as well. Which features of their situation are salient for judgment? Should we attend to character, circumstance, and need, or should we focus only on choices? And which judicial posture is suitable for the judgment of these human beings—abstract detachment or sympathetic immersion? These are the novel’s questions. And its answers, though tentative in their awareness of the problem’s

describes the basic conflict in the novel as a “war between the sense of rectitude and the sense of beauty” in The Negative Imagination (Ithaca: Cornell University Press, 1968) 106.
complexity, are important for us, for they suggest the possibility of reconciling adherence to
moral principle with attention to particulars, of reconciling commitment to universal norms with
concern for what is happening in a concrete life.

3 Mrs. Newsome and the Philosophy of Woollett

Mrs. Newsome is at the centre of *The Ambassadors*’ moral drama and we can only understand
Strether’s moral development if we understand it as a reaction to Mrs. Newsome and her
philosophy of judgment. It is striking, then, that Mrs. Newsome never appears in the novel.
One way of trying to understand the character James has given us in Mrs. Newsome is to
understand why she never appears before us, why she is never presented to us as a concrete
human being, but only as an absent moral authority.

Judgment, “the faculty of thinking the particular under the universal,” Kant argued, is
determinant when the universal is given and the particular is to be subsumed under it.
Judgment for Mrs. Newsome is determinant in just this way. Thus one reason we might suggest
for Mrs. Newsome’s absence from the novel is that her philosophy of judgment does not require
the judge to actively engage with situational particulars or even with the particular human beings
whose case is under consideration. Whereas Strether’s friend Maria Gostrey insists that one can
never know anything “beforehand,” that “one can only judge on the facts” (45), judgment for
Mrs. Newsome is a matter of applying fixed principles of right to the case before her. She judges
from a perspective of detachment, not allowing the circumstances of the individual case to alter

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her universal and general conception of what is right and what is wrong, not allowing the particulars of the situation to tempt her to any “mitigation of rigour” (68). Strether thus tells Maria Gostrey that Mrs. Newsome has “worked the whole thing out in advance...Whenever she has done that, you see, there’s no room left; no margin, as it were, for any alteration” (298). Mrs. Newsome’s absence from the novel may therefore be understood as symbolic of a philosophy of judgment that requires nothing in the way of responsiveness to situational particulars, but just the subsumption of the particulars under antecedently fixed principles of right.

If this were all we could say about Mrs. Newsome, a reader coming from What Maisie Knew to The Ambassadors might think Mrs. Newsome another version of Mrs. Wix. Both treat judgment as a matter of applying universal principles to the facts before them. But there is an important difference between Mrs. Newsome and Mrs. Wix. Mrs. Wix appears to us as silly and needy—her hair is “a turbid sallow unvenerable white;” her straighteners testify to an “obliquity of vision” (49); she falls hopelessly in love with Sir Claude and is wholly dependent on Maisie for her well-being. But Strether thinks of Mrs. Newsome’s life as “extraordinarily admirable” (45), thinks her exalted (47), “a grand person” (179), someone “deep devoted delicate sensitive noble” (195). Indeed, Strether is most struck by Mrs. Newsome’s dignity. We must, however, be careful about our understanding of dignity here, if we are to understand the contrasts James intends to draw between Woollett and Paris. Whereas in Woollett there are only two “types,” male and female, in Europe, Strether notices that there are a variety of “types,” that each person has one of “a series of strong stamps” that have been applied “from without” (44). In Europe, one’s dignity is relative to one’s stamp, that is, to the role into which one has been born. But the Newsomes are American. They have none of the dignity of role or the honour of position. They have made their fortune in manufacturing a small article, an article so lacking in dignity that
Strether cannot bring himself to name it (47). And yet Strether insists upon Mrs. Newsome’s dignity.

Mrs. Newsome’s dignity, I think we are to understand, is the dignity of free moral agency.

Mrs. Newsome does not move through the world as a passive object of its forces, overtaken by emotion, hostage to circumstance and bodily needs. Strether, speaking of Woollett and so of Mrs. Newsome, tells Maria Gostrey: “Woollett isn’t sure it ought to enjoy. If it were, it would” (25). Comic though the description of Woollett philosophy is, it makes a serious point about moral agency. The point is that, for Mrs. Newsome and the people of Woollett, human beings are not passive before pleasure, victims of causal forces, helplessly pushed around by their whims and desires. They are thinking, judging, purposive agents who can always reject impulse, reject the pleasurable, and choose what is right.

Mrs. Newsome’s dignity is the dignity of the free moral agent, the independent chooser. This sheds further light on the question of why she never appears in the novel. For Mrs. Newsome, human neediness is a threat to dignity. Neediness is a sign of dependency, fragility, a sign that we are hostage to our bodies, circumstances, and other human beings. Mrs. Newsome thus refuses to be seen as an embodied, and therefore vulnerable and dependent, individual. When

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15 “Unmentionable? Oh no, we constantly talk of it; we are quite familiar and brazen about it. Only, as a small, trivial, rather ridiculous object of the commonest domestic use, it’s just wanting in—what shall I say? Well, dignity, or the least approach to distinction” (48).

16 Also see Martha Nussbaum, *Love’s Knowledge*, 178 for the view that Mrs. Newsome is an example of a dignified Kantian agent.

17 We can see the parallels between the descriptions of Woollett philosophy and the Kantian theory we have been considering. See, for example, the connections between the descriptions of Woollett and Susan F. Parsons’ description of Kantian liberal morality: “The liberal understanding of morality relies on the belief that each of us is capable of transcendent consciousness, that we can withdraw from the impulses of the body, the conditioning of our social milieu, and the limits of the natural environment in order to reflect upon what is the case and what ought to be done.” Susan F. Parsons, “Feminism and the Logic of Morality: A Consideration of Alternatives” in Elizabeth Frazer, Jennifer Hornsby, and Sabina Lovibond (eds), *Ethics: A Feminist Reader* (Oxford: Blackwell, 1992) 384.
Strether has dinner with Maria Gostrey before the opera, he notices that they are “face to face over a small table on which the lighted candles had rose-coloured shades,” notices “the rose-coloured shades and the small table and the soft fragrance of the lady” (42). Strether is struck by the fact that when he and Mrs. Newsome went to the opera in Boston, there was “no little confronted dinner, no pink lights, no whiff of vague sweetness, as a preliminary” (42). He notices too the difference in the way the two women dress. Unlike Maria “whose dress was ‘cut down’...in respect to shoulders and bosom,” “Mrs. Newsome’s dress was never in any degree ‘cut down,’ and she never wore round her throat a broad red velvet band” (42); she wore, rather, a black silk dress with a ruche that reminded Strether of Queen Elizabeth (43).

With Mrs. Newsome, there is no intimate conversation “face to face,” no dress that reveals her body, nothing that invites Strether to see her as a particular, embodied person, a physical and needy human being. Like Queen Elizabeth, the autonomous, inviolable Virgin Queen, Mrs. Newsome insists upon being viewed as an agent with a moral claim to respect for her self-sufficient dignity, not as a vulnerable person who is dependent on another’s care for her well-being. She is, Strether says, a person who “won’t be touched” (298). And just as Mrs. Newsome would never have an intimate “face to face” conversation with Strether, just as she would never appear before him with her dress “cut down,” so she never appears before us in the novel, never allows us to see her as a particular human being. She is for the reader, as she is for Strether, nothing more than a “moral swell” (52).

Mrs. Newsome not only insists that others treat her as a dignified moral agent rather than a needy human being; she treats others in this way as well. She is respectful of their self-sufficient dignity.

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18 Mrs. Newsome will marry Strether when he returns from his ambassadorial mission. But it is clear that she agrees to marry, not out of love, but out of a sense of justice, out of a sense of giving Strether his due.
dignity and holds them, as dignified moral agents capable of choice, responsible for their actions. Mrs. Newsome’s philosophy of judgment is thus importantly connected to her conception of dignity. Chad has a duty to Mrs. Newsome to return home—to return to the family business and add to the family fortune of which he has had the benefit—and that duty has been breached. The circumstances of the breach—the life of Paris and the woman with whom he is involved—are insignificant. To suggest otherwise—to suggest that there is something in Paris life that holds him there or something about the woman that makes it impossible for him to leave—is to suggest that Chad is not a free and responsible agent, but is rather hostage to circumstance and desire.

Moreover, I think it is clear that even if Mrs. Newsome could be made to see that Chad’s welfare is at stake in the matter—that Parisian life and Marie de Vionnet support his well-being—this would not alter her conception of his duty. The famous line I have already cited, “Woollet isn’t sure it ought to enjoy. If it were it would,” signals a conception of duty that sharply distinguishes matters of right from matters of well-being and subordinates the latter to the former. This too is connected to Mrs. Newsome’s conception of dignity. For if dignity inheres in the capacity for free choice alone, well-being is an arbitrary and contingent matter. It appears as a question of what a particular agent chooses for his or her private reasons, in other words, as a question of preference-satisfaction that can have no bearing on our dignity-based duties. This, I think, is why Strether describes Mrs. Newsome as “all...fine cold thought” (297), a magnificent “iceberg” (298). Her conception of duty and philosophy of judgment are fine but cold—fine

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19 Mrs. Newsome, in judging others, thus takes the standpoint of what Benhabib calls the “generalized other”: “The standpoint of the generalized other requires us to view each and every individual as a rational being entitled to the same rights and duties we would want to ascribe to ourselves.” Seyla Benhabib, “The Generalized and the Concrete Other” in Eva Feder Kittay and Diana T. Meyers (eds), Women and Moral Theory (Totowa, NJ: Rowman & Littlefield, 1987) 163.
because grounded in respect for human dignity, cold because purged of responsiveness to particular well-being.

The moral agent is free and capable of choice, not only in the sense that he is not determined by impulse, circumstance, or need, but also in the sense that he is not subject to the will of any other human being. But judgment from a personal point of view—from the point of view of the judge’s particular preferences and goals—unilaterally subordinates the one being judged to the judge’s subjective opinion and is therefore inconsistent with the dignity of free agency. Thus, for Mrs. Newsome, her judgment of Chad’s case is not to be understood as her private judgment for Chad, the opinion of a particular human being making claims upon another particular human being. Her judgment is to be understood as impartial, transcending all particular points of view, transcending considerations given by subjective preferences and goals, her own as well as Chad’s. Mrs. Newsome’s judgment is grounded in “excellent arguments and reasons” (94), “facts and figures” (104) that could be delivered by any thinking person and accepted by any other thinking person, whatever their particular preferences or goals. This is why, as Strether remarks to Maria Gostrey, Mrs. Newsome’s judgment can be delivered by another person without losing anything (296). Mrs. Newsome’s judgment is thus delivered from a viewpoint of abstract detachment from both the judge’s and the subject’s particular preferences, desires, ends, and needs. This viewpoint has been called the “view from nowhere” and in James’ novel, Mrs. Newsome is absent, nowhere to be found.

For a full understanding of James’ portrayal of Mrs. Newsome, we have to notice something further. Mrs. Newsome regards others as abstract moral agents and judges them from a

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perspective of impartial detachment, but her judgment nevertheless purports to be authoritative for concrete human beings. Her judgment, in other words, purports to be authoritative for a particular determinate person, that is, for Chad. Mrs. Newsome tries to resolve this problem of the gap between her abstract standpoint and the concrete human beings she claims to bind with a mediator. She sends an ambassador, Lambert Strether, to deliver her judgment to Chad and bring him home, thus enforcing her judgment in the particular case while maintaining her lofty distance.

But this, it becomes clear, is no solution to the problem. The difficulty is this. As Julie Rivkin has argued in her study of *The Ambassadors*, Strether is supposed to be Mrs. Newsome’s ambassador, her representative. He is not supposed to alter that for which he is a stand-in, or else he would cease to be a mere ambassador. Yet, the need for the ambassador suggests a lack in the principal. The need for the ambassador suggests that the principal is not complete in the very situation where an ambassador is required.²¹ Mrs. Newsome is respectfully detached from, and indifferent to, the concrete lives of actual human beings. But as her need for Strether’s assistance makes clear, judgment cannot be so detached and indifferent, for actual human beings are its subjects. Indeed, once in Paris, Strether cannot help but judge differently than Mrs. Newsome. This is because the terms of his ambassadorship—travelling to Paris to find Chad and deliver Mrs. Newsome’s judgment—mean that he will find himself immersed in all the particulars from which Mrs. Newsome’s judgment abstracts.

Once Strether immerses himself in the lives of the concrete human beings that are the subjects of judgment, the gap between those lives and the cold indifference of Mrs. Newsome’s principles

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resurfaces for him. He sees that actual human beings cannot regard their particular lives, their circumstances, needs, and ends, as morally insignificant; thus, from their point of view, judgment that abstracts from particulars is not universal but partial. A judgment that abstracts from their concrete lives abstracts from what matters to them. It is thus not a judgment acceptable to any thinking person, but rather a judgment that subordinates one to the moral viewpoint of another. We must therefore notice that while Strether constantly feels Mrs. Newsome’s “pressure” (276), feels that she “had followed on his heels while he moved” (59), he nevertheless does not accept her “excellent arguments and reasons” (94). Strether and Chad seem to fear Mrs. Newsome, but they do not accept her judgment’s authority. Chad is prepared to leave Paris because he himself is ready; Strether regards Mrs. Newsome’s views as “queer misconceptions and confusions” (277) and openly disobeys her. Mrs. Newsome is, in the end, hopelessly ineffective, her efforts at authority futile. Her abstract judgment never makes contact with the actual human beings that appear in the novel and this too is conveyed by her absence.

4 Lambert Strether and the Vision of Paris

During his first days in Paris, Strether finds that the city hangs before him as “some huge iridescent object, a jewel brilliant and hard, in which parts were not to be discriminated nor differences comfortably marked. It twinkled and trembled and melted together, and what seemed all surface one moment seemed all depth the next” (64). This passage is important for us. Strether comes to Paris armed with Woollett’s categories of right and wrong, categories fixed in advance and established independently of any engagement with the particular case. But Strether is first struck by Paris’ difference, its newness. For Mrs. Newsome, the universal categories of right and wrong contain everything that is worth noting about the universe and she therefore “doesn’t admit surprises” (297). Nothing could be new or surprising in a morally
significant way, for the categories capture everything that could be morally salient in a situation. But the above description of Paris suggests, I think, not that Mrs. Newsome has erred in her evaluation of the city, not that she has simply applied the wrong term, but that no abstract evaluative term could capture the value of that place, whose irreducibly particular specialness makes it altogether new and an object of wonder.

In the face of sharply drawn categories and distinctions like “right” and “wrong,” Paris resists; it “twinkle[s] and tremble[s] and melt[s] together.” “Right” doesn’t capture what is loveable in its scenery, history, and way of life; “wrong” shuts out its beauty and wonder. Moreover, Paris resists Mrs. Newsome’s categories, not only because it appears new and different, but also because it is a place where things seem to change depending on context, depending on one’s particular point of view. Thus, what seems “all surface one moment” may seem “all depth the next.” And something more is suggested. It is that Paris, its particular wonder and specialness, can only be understood from within, that is, from the perspective of one who is immersed in its particular way of life. For the outsider standing at a distance, Paris hangs before him, mysterious, hard, an impenetrable “surface.” But Paris also “twinkle[s] and tremble[s] and melt[s] together,” language that invites us to think of fluidity and so of immersion. And for the one immersed in the Parisian way of life, appreciative understanding is possible, for what seemed “all surface” to the outsider is, for the insider, “all depth.”

All this prefigures Strether’s judgment of Chad and the relationship between Chad and Madame de Vionnet. We said that for Mrs. Newsome, judgment did not require her to see Chad in person, for there could be nothing in his particular character or circumstance that could alter his duty. We saw that the perspective of abstract detachment shuts out considerations of particulars because it regards human beings as dignified moral agents capable of choice and responsibility.
They are self-determining, not determined by their circumstance, experience, or need. Accordingly, a rule or judgment adjusted to reflect their particular circumstances, experiences or needs would fail to treat them as the free and dignified beings that they are. But from the perspective that abstracts from the particulars of circumstance, experience, and need, difference disappears, for these are the particulars that differentiate human beings. There is therefore no room here for the sense of something’s newness, the feeling of its qualitative uniqueness. As abstract agents capable of choice and responsibility, individuals are generic bearers of a universal capacity and their interactions merely instances to be subsumed under a universal rule governing their conduct.

On his first meeting with Chad, however, Strether is completely taken by surprise, for Chad appears, not as the “brute” (109) that “Woollett had argued” (92) but as a Parisian gentleman. Chad’s character has somehow been “formed” (97) and the recognition of this difference depends upon Strether’s highly particular perception of the new smoothness of Chad’s face, the clarity of his eyes, the accent in his voice, and the quality of his smile (97). Most important, for Strether, is the changed colour of Chad’s hair—it is grey. The surprising colour of Chad’s hair is central to Strether’s judgment of Chad; he is overwhelmed by it “as if so very much more than he could have said had been involved in it” (93). But Strether realizes that it would be impossible to abstract a reason for judgment, a reason transparent to one who had not seen it for herself,

22 This is also what others have said of Rawls’ veil of ignorance. See Benhabib, “The Generalized and the Concrete Other,” 166; Iris Marion Young, “Impartiality and the Civic Republic” in Seyla Benhabib and Drucilla Cornell (eds), Feminism as Critique: On the Politics of Gender (Minneapolis: University of Minnesota Press, 1987) 61. Peter Benson makes this implication of the abstract point of view explicit: “Note that by abstracting from the particularity of purpose, interest, and so forth, the juridical analysis abstracts from just those factors that differentiate individuals. By implication, it views persons as identical.” See Peter Benson, “The Unity of Contract Law” in Peter Benson (ed), The Theory of Contract Law: New Essays (Cambridge: Cambridge University Press, 2001) 131. Similarly, Weinrib writes that private law views the litigants as “units of freedom” in Weinrib, “Right and Advantage in Private Law,” 1289.
from this complex perception. How can one explain the moral significance of this surprise? How could one devise a rule that incorporated it? Strether tries to imagine explaining the change to Mrs. Newsome in a telegraph: “Have at last seen him, but oh dear!” or “Awfully old—grey hair” (93). We see, in James’ comic presentation, how much of Strether’s subtle vision is lost in the effort to communicate it to one not present. And Strether’s attention to the colour of Chad’s hair and his imaginative interpretation of its significance is, of course, a symbol for a mode of judgment that views the other concretely, as a unique particular, an embodied human being with a history, an identity, and set of commitments, in other words, as an individual.

Similarly, Strether’s judgment of Madame de Vionnet begins by knowing her (142), by creating with her a “relation” (148). Expecting to find a “wretch,” a wrongdoer who has distracted Chad from his rightful obligations, Strether finds that Madame de Vionnet has “taken all his categories by surprise” (161), that she is “immeasurably new” (146). This, again, is connected to his careful perception of the particular. Sitting with Madame de Vionnet “face to face” (148), noticing her eyes and the “unbroken clasp of her hands in her lap” (148), Strether cannot see her as Mrs. Newsome would have him see her. He senses “her rare unlikeness to the women he had known” (146), and yet feels her “common humanity” (129). Strether realizes that her home and family have a history and a dignity that lingers and is inseparable from Madame de Vionnet’s identity; she has an “air of supreme respectability” and “private honour” (146). But sitting at lunch with Madame de Vionnet, Strether realizes that this judgment he has formed of her could

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23 Here we are reminded of the particularism that Robin West advocates in adjudication. West warns against generalizing from any judicial conclusion in a particular case since the judge’s moral response is a reaction to the particular circumstances before him and does not generate a general principle. See Robin West, “The Anti-Empathic Turn” (July 13, 2011) at 26. NOMOS, forthcoming; Georgetown Public Law Research Paper No. 11-97. Available at ssrn.com/abstract=1885079.
not be reduced to reasons or rules that could be communicated to anyone not part of their “relation” (148):

How could he wish it to be lucid for others, for any one, that he, for the hour, saw reasons
enough in the mere way the bright clean ordered water-side life came in at the open
window? --the mere way Madame de Vionnet, opposite him over their intensely white
table-linen, their omelette aux tomates, their bottle of straw-coloured Chablis, thanked
him for everything almost with the smile of a child, while her grey eyes moved in and out
of their talk, back to the quarter of the warm spring air, in which early summer had
already begun to throb, and then back again to his face and their human questions? (176)

Here we see that Strether’s judgments are not only essentially connected to his particular relation
with Madame de Vionnet, but also with this particular time and place, specifically with his vision
of Paris in the spring. This too is an essential part of his contextual sensitivity so that in another
setting, or at a different time, everything might be different.24

Strether’s judgments of Chad and Madame de Vionnet are thus inextricably bound up with his
personal relation to them and his particular perceptions of them in the context of that
relationship. He therefore finds it impossible to justify his judgment on the basis of impersonal,
public reasons that are transparent to all thinking persons and his judgments persistently
conclude with expressions such as “that is where I am” and “then there we are.” These
expressions are indexicals.25 They refer to the world from within a particular point of view and
their understanding requires the adoption of that viewpoint. To know their meaning is to know
the context of utterance, to know who said it to whom, when it was said, where and in what
manner.26 As the use of these expressions suggests, judgment for Strether is person- and

24 “…in these places such things were, and…if it was in them one elected to move about one had to make one’s account with what one lighted on” (306).
26 Thomas Nagel writes: “indexicals in general are untranslatable into objective terms, because they are used to refer to persons, things, places, and times from a particular position within the world, without depending on the
context-specific; it is based upon “all the indescribable—what one gets only on the spot” (236).^{27}

We have compared Mrs. Newsome to the dignified Kantian agent. We can compare Strether to Aristotle’s equitable man, the man who sees that “there are some things about which it is not possible to speak correctly in universal terms.”^{28} For Strether, a man of imagination, a man whose vision is “given over to uncontrolled perceptions” (42), particulars are “everything” (96). There is, of course, a sense in which all judgment is necessarily concerned with particulars.^{29}

Even the application of the most abstract rule will require that attention be paid to the particular case to determine whether or not it is a case that falls under the rule. What we see in Strether, however, is the increasing sense that good judgment of human beings is irreducibly particular and inseparable from its context, that the discernment of difference and complexity is necessarily felt “on the spot” (236). All this is to say that no fixed rule or abstract principle could be adequate to the judgment of Strether’s full, richly concrete vision of these particular individuals

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user’s objective knowledge of that position. It is elementary that one can’t translate a statement whose truth depends on its context of utterance into one whose truth does not.” *The View From Nowhere*, 59.

^{27} Strether’s mode of judging thus reminds us of the theory of judgment we have associated with feminist thought and the ethic of care. Carol Gilligan’s women embodying the ethic of care found it impossible to provide a categorical formulation for their moral judgments. Meyers writes that from the care perspective, “agents may be unable to specify the relevant distinction between two contexts; in other words, they may be unable to reduce their moral conclusions to general rules” in “The Socialized Individual and Individual Autonomy: An Intersection between Philosophy and Psychology” in *Women and Moral Theory*, 142. And Bartlett argues: “situations are unique, not anticipated in their detail, not generalizable in advance. Themselves generative, new situations give rise to ‘practical’ perceptions and inform decision makers about the desired ends of law.” Katherine T. Bartlett, “Feminist Legal Methods,” (1990) 103 Harvard Law Review 829 at 851.


and their moral situation. Thus Strether finds, not merely that his “usual landmarks and terms” require revision, but that they are “swept away” (119), have altogether “lost their authority” (205).

Strether’s attention to particularity involves, not just attention to situational particulars, but also sympathetic attention to the particular point of view of the one he is to judge. We find Strether asking himself a question that Mrs. Newsome would never ask, and that is, what is it like to live in Chad’s world? He must meet the people that surround Chad, must witness their form of life. Moreover, he must see those people as Chad sees them, must see their form of life from within. Strether’s immersion in Chad’s point of view begins before he meets Chad, by passively allowing the beauty of Paris to wash over him, falling under the city’s “sharp spell” (76), being charmed by Chad’s friends and their way of life. Although Strether begins by merely “watching Chad” (108) from a detached distance, he soon finds that he and Chad are part of an “inclusive relation” (108), a relation the narrator describes as Strether’s “deep immersion” (108) in an “eddy,” a “fathomless medium” (108). In this inclusive relation, Strether feels that he and Chad


31 In this respect, Strether’s judgment is guided by empathy—the effort to understand not just the situation, but the perspective of the one being judged. This again reminds us of the style of judgment advocated by feminists such as Robin West: “The judge imaginatively assumes the party’s life situation as her own and then renders a judgment that reflects that sympathetic knowledge.” Robin West, “Taking Preferences Seriously,” (1989-90) 64 Tulane Law Review 659 at 676.

32 Some critics have thought of this as Strether’s effort to live vicariously through Chad. See, for example, Julie Rivkin, “The Logic of Delegation in The Ambassadors,” 827. Here I argue that this is really an effort to take up Chad’s perspective so as to arrive at a sympathetic judgment.

33 Righter, American Memory in Henry James, 53.
understand one another, communicate with one another, without even having to speak (211). This, of course, is most evident in Strether’s relationship with Madame de Vionnet, in the way he seems to fall in love with her himself. Thus, the water imagery, suggesting immersion in another’s point of view, multiplies when Strether speaks with Madame de Vionnet. He has a sense of himself “plunging” (174), of “letting himself go...diving deep,” (176), of “melting, liquefying” (305). Falling under the spell of Paris, falling in love with Madame de Vionnet, Strether seeks judgment by sympathetically immersing himself in Chad’s point of view, by thinking as Chad thinks, feeling as Chad feels.

The immersed, particular, contextual, “on the spot” (192) judgment that Strether initially comes to is this. Chad and Madame de Vionnet have a relationship that is unlike any other. It is a “virtuous attachment” (165), “a high fine friendship” (166). In this friendship, Madame de Vionnet has “saved” Chad, saved him with regard to “his manners and morals, his character and life...as a person to deal with and talk with and live with...as a social animal” (167). Strether’s judgment is thus that the obligation to return home that Chad owes his family, though prima facie binding, is not binding in the particular case. For the relationship between Chad and Madame de Vionnet is a moral relationship, and it therefore has its own obligations. Thus if

34 Strether’s immersion in Chad’s perspective is signalled also in the syntactical presentation of Chad’s first spoken words. “Do I strike you as improved?” Strether was to recall that Chad had at this point enquired” (95). As Holland points out in his analysis of James’ novel, in this sentence, the subject of the question “I” initially merges with the subject of the larger sentence, Strether, before the subject of the question is distinguished as Chad. Laurence Holland, The Expense of Vision: Essays on the Craft of Henry James (Princeton: Princeton University Press, 1964) 229.

35 Berland writes: “with generous sympathy he senses much in the inner lives of others so strongly that it becomes part of his own experience.” See Culture and Conduct in the Novels of Henry James, 218.

36 Pippin also notes that Strether realizes that the relationship between Chad and Madame de Vionnet is “a moral issue in its own right, an issue of what they owe each other because of what good they have done for each other, and not a question of adultery, betrayal of his mother, or irresponsibility.” Robert Pippin, Henry James and Modern Moral Life (Cambridge: Cambridge University Press, 2000) 163.
Chad were to give her up, “he ought to be ashamed of himself” (170). But, we must notice, there is no general principle—such as ‘obligations to friends take precedence over obligations to parents’ or ‘personal fulfillment trumps duties to family’—to be drawn from Strether’s moral conclusion. Strether’s judgment is highly contextual, based upon features of the case that he regards as irreducibly particular and non-repeatable. The whole judgment rests upon Strether’s “on the spot”, immediate impressions of Chad and Madame de Vionnet. It rests upon Strether’s view of the value of the particular, non-repeatable relationship between two particular, non-repeatable human beings. It rests upon this relationship’s particular history and on a vision of the moral salience of the relationship’s features that may not be salient in any other context. Moreover, the value of the relationship, the moral salience of its features, and the significance of its history only emerge for one who is inside the relationship or for the one who, a man of imagination and careful perception, sympathetically takes up the insider’s point of view.

Just as Mrs. Newsome’s mode of judgment is connected to her conception of freedom, Strether’s vision of the beauty and goodness of Chad and Madame de Vionnet’s relationship is connected to the view of freedom that emerges from his immersion in Paris life. Strether lives in Woollett, Massachusetts, a community dedicated to freedom as the freedom to choose, and yet he regards his life as a “wreck of hopes and ambitions,” a “refuse-heap of disappointments and failures” (51), regards his work for Mrs. Newsome as work in a “prison-house” (51). What is for Mrs. Newsome a dignified self-sufficiency is for Strether a “solitude of...choice” (61), a deep loneliness: “though there had been people enough all round [his life] there had been but three or four persons in it” (61). In Paris, Strether comes to the sad realization that he has failed to live up to the person he once thought he could be. He has failed to live a life devoted to culture, to great literature and art (62), failed to sustain meaningful relationships, and so has failed to live a life in accordance with his own sense of what makes life worth living. He is Mrs. Newsome’s
ambassador, the ambassador of her projects and interests, living a life that reflects none of his own. All this, for Strether, means that his life has been without “positive dignity” (63). But dignity here must mean, not just the dignity of free choice that distinguishes persons from things, but the dignity of autonomy, of a life that reflects one’s own sense of what matters. Thus Strether, realizing that his life has not really been his own, asks: “what am I to myself?” (133).

It is the achievement of this kind of life, a life of one’s own, that Strether finds in Chad and it is why Strether wishes he were Chad (133). In Chad’s Paris home, among Chad’s things, Strether finds that “freedom was what was most in the place” (281) and that “everything represented the substance of his loss, put it within reach, within touch, made it, to a degree it had never been, an affair of the senses” (282). Strether is most struck by Chad’s freedom: “His changed state, his lovely home, his beautiful things, his easy talk...what were such marked matters all but the notes of his freedom?” (104). This, of course, may seem perplexing, for Strether also thinks that Chad has been “formed” by Madame de Vionnet. But this suggests that Strether, unlike Mrs. Newsome, does not regard freedom as the dignified self-sufficiency of the Virgin Queen. He understands the “positive dignity” (63) of a “high fine friendship” (166) with a woman such as Madame de Vionnet, a friendship that may shape one’s identity and give purpose to one’s life.  

37 He tells Chad’s friend Miss Barrace: “Well, he thinks, you know, that I’ve a life of my own. And I haven’t!” (160).
38 This is also what Strether admires in Little Bilham’s bohemian life: “…the faraway makeshift life, with its jokes and its gaps, its delicate daubs and its three or four chairs, its overflow of taste and conviction and its lack of nearly all else—these things wove round the occasion a spell to which our hero unreservedly surrendered” (84).
39 This conception of freedom thus reminds us of the idea of relational autonomy elaborated by Jennifer Nedelsky: “What makes autonomy possible is not being independent of all others, but constructive relationships—with parents, teachers, friends, colleagues and officials of the state. Autonomy is thus also not a characteristic we simply achieve with adulthood; its flourishing depends on the kinds of relationships, both intimate and social, of which we are a part.” See Jennifer Nedelsky, “Judgment, Diversity, and Relational Autonomy” in Judgment, Imagination, and Politics, 111.
Freedom, for Strether, is found in such “a relation,” a relation of mutual care for one another’s irreplaceable worth, mutual support of one another’s “positive dignity.”

This conception of freedom leads us back to the mode of judgment we have seen in Strether. For once freedom is understood, not simply as a capacity for choice universally and identically present in human beings, but as the realization of that capacity in a life of one’s own, freedom becomes a human good, an achievement. This is why Strether admires Chad, finds him awe-inspiring, enviable. But freedom understood as a good to be achieved means that freedom is something that can fail or flourish in a human life, depending on the individual’s particular circumstances and particular needs. Freedom of this kind depends on the positive support and care of other human beings. But the question of what care for human flourishing requires cannot be stated as an abstract, antecedently fixed rule. The requirements of care for human flourishing are context-dependent and person-specific. The question of what counts as a life of one’s own will depend on the point of view of the individual whose life it is. The mode of judgment suitable to this understanding of freedom is just the highly contextual, immersed, on the spot mode of judgment we find in Strether.

5 The Disillusionment with Immersion

Martha Nussbaum has argued that in The Ambassadors, Strether begins as an ambassador of Mrs. Newsome’s antecedently fixed judgment and ends “as a child ‘toddling’ alone,” “taking things as they come,” carefully perceiving particular objects and people, open to newness,

40 But Madame de Vionnet’s arranged marriage for her daughter and her failure to divorce her husband who is a “brute” (137) also warn us of the close connections between the idea that our constitutive relationships make us who are and the idea that our roles and relationships are beyond our free choice.
willing to be surprised. She argues that the novel, in end, insists upon a norm of perception, a morality of awareness, where good judgment consists, not in obedience to antecedently fixed general rules, but in immersed, particularized improvisation in response to the often bewildering complexity and newness of particular situations. \(^{41}\) This, I think, is a mistaken reading of the novel and of the norm with which it finally rests.\(^ {42}\) For as I shall now argue, in his free-floating attention to the particular, in his immersion in Chad’s point of view, Strether does not seem to be judging well at all.

Strether’s mode of judgment is most often associated with water imagery. The narrator tells us that Strether is “so often at sea” (78), that he is “float[ing]” (88) “in the current” (192), “dip[ping]” (109), “diving deep” (176), “touch[ing] bottom” (176), that his relation with Chad constitutes a “deep immersion” in a “fathomless medium” (108). And although Nussbaum is right to suggest that the water imagery is sometimes presented with a feeling of joyful spontaneity, it more often, I think, sounds a note of warning. For Strether is not merely “drawn into the eddy”; he is “swallowed...down” (108); he is not merely a “swimmer” but a “sinking swimmer” (108). We find that he is moving “on ground not of the firmest” (158), is “plunging” and needs to get out into the air (174). What this suggests, I will argue, is not the joyful, spontaneous awareness and perceptiveness of the good judge, but Strether’s loss of objective

\(^{41}\) Martha Nussbaum, *Love’s Knowledge*, 181-182. Others have taken a similar view. Wegelin argues that Strether, in the end, becomes a pragmatist in Christof Wegelin, “The Lesson of Social Beauty,” 450; Hutchison argues that Strether accepts the world’s “morally indistinctness,” accepts that there is “a bewildering range of possible perspectives” in Hazel Hutchison, “James’s Spectacles: Distorted Vision in *The Ambassadors*,” (2005) 26 The Henry James Review 39 at 48; Sallie Sears writes that “what happens in the book is a great swing from a public to a private conscience, from an established, predetermined, black and white, fixed code of conduct to a personal, flexible, more relativist code in which each case is judged by its own merits” in *The Negative Imagination*, 116.

\(^{42}\) Cora Diamond also disagrees with Nussbaum on this point and suggests that *The Ambassadors* develops a critical perspective on Paris, one that is distinct from the critical perspective of Woollett. See “Henry James, Moral Philosophers, Moralism,” (1997) 18 The Henry James Review 243 at n. 16.
evaluative terms and the objective point of view, the very things that distinguish judgment from private opinion.

The problem of the objective meaning of evaluative terms arises as soon as Strether meets Chad and is bewildered by his miraculous transformation. We see it first in Strether’s exchange with Maria Gostrey.

‘There must, behind every appearance to the contrary, still be somebody—somebody who’s not a mere wretch, since we accept the miracle. What else but such a somebody can such a miracle be?’

He took it in. ‘Because the fact itself is the woman?’

‘A woman. Some woman or other. It’s one of the things that have to be.’

‘But you mean then at least a good one.’

‘A good woman?’ She threw up her arms with a laugh. ‘I should call her excellent.’

(107)

Here Strether speaks the language of Woollett. His use of the term ‘good’ denotes a standard derived from a general conception of what it is to be a good human being. It denotes a system of judgment for which evaluative terms have stable meanings fixed independently of the situation or person under consideration; they are universal criteria of judgment independent of the preferences of the speaker. But Maria laughs at the term and responds, “I should call her excellent.” There are two things to notice here. The first is that “excellent” is used contextually. The woman in question is excellent with respect to this particular accomplishment. And the criteria of excellence are derived from, not independently of, the context. The second is that Maria does not say, ‘she is excellent,’ but only “I should call her excellent,” suggesting that even Maria’s judgment of the woman’s excellence with respect to this accomplishment is nothing more than Maria’s personal view of the matter.
The same issues resurface when Strether accepts the suggestion of Chad’s friend, Little Bilham that the relationship between Chad and Madame de Vionnet constitutes a “virtuous attachment” (112). Many readers have assumed that in telling Strether that the attachment between Chad and Madame de Vionnet is “virtuous,” Little Bilham simply tells a lie. But it is not quite so straightforward. Little Bilham’s claim is a lie only if the speaker and listener are part of a community that accepts the authority of the Christian conception of virtue where virtue has fixed and objective criteria that govern its application. But in Paris, there appears to be no context in which the term virtue could have its Christian significance. Little Bilham, we know, looks out “at a world in respect to which he hadn’t a prejudice” (83) and Paris is a place of “softness, vagueness” (76), where Strether finds that his usual landmarks and terms have been swept away. So we might say that Bilham’s use of the term virtuous is not a lie; it is, rather, without meaning in that it adds nothing to what Strether already knows about Bilham’s personal feelings about the relationship. If judgment dispenses with abstract standing terms in favour of context-specific determinations based upon personal perceptions, what more can Bilham’s use of the term “virtuous” indicate than his personal approval of some particular thing in a particular context, a subjective assertion inseparable from his individual tastes and desires? Any other meaning assumes the fixed standards that Strether finds inadequate to the situation before him. But the absence of those standing moral principles undermines the ground of moral judgment and leaves us with nothing but personal preference and private opinion.43 This, I think, is why Strether treads on “ground not of the firmest” (158), why he feels drawn into a “fathomless eddy.”

43 The idea that in the absence of fixed moral principles, moral judgment becomes meaningless parallels James’ view, expressed in his criticism of Harriet Prescott for inventing new words, that language must be stable and public if it is to have any meaning: “If the dictionary were a palette of colors, and a goose-quill a brush, Miss Prescott would be a very clever painter. But as words possess a certain inherent dignity, value, and independence, language being rather the stamped and authorized coinage which expresses the value of thought than the brute metal out of
Although I have suggested that Little Bilham does not *lie* when he tells Strether that Chad and Madame de Vionnet have formed a “virtuous attachment,” it is clear that Strether is being manipulated here. For Little Bilham knows that Strether will take the term virtuous to mean something that Little Bilham does not mean—that Chad and Madame de Vionnet are upholding an impersonal moral standard—and so he expresses his merely personal attitude toward their relationship in a manipulative way. He cloaks his personal approval in the language of objectivity, language designed to get Strether to share his approval. This is manipulative, for it tries to get Strether to accept something he would not accept if he were able to step back from the influence of this language.

Mrs. Newsome, by contrast, does not manipulate. She presents “excellent arguments and reasons” (94) for her judgment whose function is to persuade other rational persons. She submits her judgment to the independent minds of other human beings, respecting their freedom and risking their disagreement. But if, as Strether begins to feel in his interactions with Chad and Madame de Vionnet, moral judgment is highly contextual, necessarily immersed and on the spot, and inseparable from the person whose judgment it is, if excellent arguments and impersonal reasons for our moral judgments are not possible, then the distinction between manipulation and persuasion falls away. But the collapse of this distinction is the collapse of the distinction between treating a human being as an end and treating a human being as a thing. For to treat a

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44 Though, of course, she would not acknowledge the reasonableness of their disagreement, for her judgment is to be understood as nothing but the dictates of impersonal reason. Thus she submits her judgment to their independent minds, confident that they, as rational beings, will agree.
human being as an end is to offer him reasons for belief and action, to submit those reasons to his independent mind, not to summon influences that will shape his thoughts and behaviour in ways conducive to one’s own purposes. In telling Strether that Chad and Madame de Vionnet have formed a virtuous attachment, Little Bilham, no doubt under Chad’s direction, tries to influence Strether in just this way, in the way that treats Strether as an instrument of his purpose. This is why, in his interactions with Chad, Strether has the persistent feeling that he is being “used” (152), why he feels that he is the sinking swimmer swallowed down.

My argument thus far has been that in rejecting standing terms in favour of a free-floating perceptivity that is person- and context- specific, Strether loses the very grounds of judgment, the grounds that distinguish judgment from private opinion and persuasion from manipulation. There is a further difficulty with Strether’s mode of judgment that is highlighted by the way the narrator makes clear to the reader that Strether is not seeing Chad well. Strether is determined that Chad is “magnificent” (212) and that he and Marie de Vionnet have a high fine friendship, governed by “a very high ideal of conduct” (169). But Maria warns Strether that Chad wants to “sink” the woman he’s with (107), to “shake her off,” and that Chad is not as good as Strether now thinks (108). Little Bilham tells Strether very early on that Chad is not happy and wants to go back home and take up the family business (111), and that Chad cares less for Madame de Vionnet than she cares for him (168). We see Strether’s obtuseness particularly when Madame de Vionnet tells Strether that Chad is “capable of anything” and Strether responds, “Oh he’s excellent” (231). She is trying to tell Strether that she is vulnerable, that Chad will hurt her, but Strether does not hear it. So immersed in the point of view of the one he is to judge, Strether loses the perspective that makes judgment possible.

The difference between the judge and the person being judged must be their respective points of view. We can call the point of view of the one judged a purely personal point of view. The consciousness of the individual whose viewpoint it is stands at its centre; the world I look at from this viewpoint is my world. This point of view on the world is determined by my physical and mental makeup, my circumstances, experiences, needs, my system of preferences and desires. As I look out at the world from within this point of view, certain things will seem to me to be good and valuable; certain things will seem to give me reasons to do things. As I formulate ends and goals and try to realize them, as I reflect upon the way the realization of those ends and goals may conflict with the ends and goals of others, it will make a difference to me that my ends and goals, my needs and commitments, are mine. This will seem to give them a special importance in the world, for from the personal point of view, I occupy a special place in the world.

If judgment is to be distinguished from private opinion, the point of view of the judge must step back from this purely personal point of view and take as its object the relationship between that personal perspective and the world of which it is merely a part. From the judge’s point of view, no single individual stands at the world’s centre; the individual appears as one person among many and counts as one and not more than one. What seemed good from the purely personal perspective may or may not seem good from this more objective viewpoint; what seemed to give reasons may or may not give reasons from the objective point of view. But contact with Chad “elbowed out of Strether’s consciousness everything but itself” (108) and Strether, immersed in Chad’s point of view, cedes the external perspective, the perspective that

treats the individual as one among others, and makes possible the distinction between judgment and private opinion.

It might be argued that I am mistaken in thinking that Strether’s failure to see Chad properly when immersed in his point of view indicates the need for a standpoint outside any particular human being’s personal perspective. Perhaps Strether’s problem is not his perspectival immersion, but his judging from within the perspective of just one person. The problem, it might be said, is that Strether views the matter from within Chad’s point of view alone and never considers the point of view of Madame de Vionnet. But multiplying the personal perspectives under consideration will not help us. We will simply find ourselves awash in a sea of purely personal perspectives and will have no rational grounds for choosing among them. If we have any grounds for sifting through these perspectives, those grounds cannot themselves be generated from within a perspective. For if they were, what could be the basis of their authority? If judgment is to be distinguished from private opinion, there must be a place where

47 Nedelsky suggests that we transcend the limitations of our own experience, interests, and inclinations by considering the perspectives of others: “The more angles of vision we are capable of taking into account in our judgment, the more we can free ourselves of the limitations of our private conditions.” Nedelsky, “Judgment, Diversity, and Relational Autonomy,” in Judgment, Imagination, and Politics, 111. Similarly, Benhabib argues that “[j]udgment involves the capacity to represent to oneself the multiplicity of viewpoints, the variety of perspectives, the layers of meaning which constitute a situation.” Seyla Benhabib, Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics (New York: Routledge, 1992) 54.

48 This, I think, is why Benhabib, who thinks of the moral point of view as “a reversing of perspectives and the willingness to reason from the other’s (others’) point of view,” thinks of moral reasoning as an “open-ended moral conversation.” See Situating the Self, 9.

49 Nedelsky disagrees. In her work on judgment, she says that we can avoid judgment on the basis of personal idiosyncrasies by asking ourselves how we would judge if we were in the position of the one being judged. “Judgment, Diversity, and Relational Autonomy” in Judgment, Imagination, and Politics, 109. But whether or not this succeeds depends on what we include in the idea “in that person’s position.” If we ask how we would judge given everything that there is in another person’s position, then it is difficult to see why we would not simply be judging as that person privately judges. If, on the other hand, there is some principle for sifting what, for the purposes of good judgment, is legitimately included in the concept “that person’s position,” this opens up a gap between the subjective judgment of the individual and the judgment of the good judge. Yet, this principle for sifting implies a non-perspectival view of the object of judgment, for without such a view, how could we know which features of a person’s situation were relevant to good judgment and which were not?
we can stand and recognize the various personal perspectives, including our own, as perspectives on something—something whose nature is independent of the view we happen to take of it.\(^{50}\) And it is only by comparing various personal perspectives with that on which they are perspectives that we can judge them and have any reason to choose among them.\(^{51}\) This is not to say that we can ever fully escape our own personal point of view, but it is to say that judgment must be the effort to stand apart from that point of view, and that some distance of this kind must be possible if human beings are to be conceived as free agents, capable of moral judgment and responsibility.

That judgment requires distance rather than perspectival immersion is suggested, not only by the novel’s substance, but also by its method. Much is often made of the fact that Strether’s consciousness is at the centre of *The Ambassadors*, that the whole story is told from his point of view and his point of view alone.\(^{52}\) There is a sense in which this is true, for it is true that the reader sees only what Strether sees and knows only what Strether knows. We see the novel’s characters only in their relation to Strether; we never see them apart from their interactions with

\(^{50}\) That there is a reality that is independent of the view any particular human being happens to take of it is a claim with which many disagree and I cannot defend that claim here. For arguments in support of this view see, for example, Nagel, *The View From Nowhere*, 138-163; Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) 175-183; Charles Larmore, *The Autonomy of Morality* (Cambridge: Cambridge University Press, 2008).

\(^{51}\) Iris Marion Young writes: “The concept of enlarged thought is supposed to explain how a person moves from a narrowly subjective, self-regarding perspective on action to a more objective and socially inclusive view. Interpreting enlarged thought as occupying the standpoints of each of the others affected, however, does not yet move from a subjective point of view to a more objective one. When we try to represent a multiplicity of viewpoints to ourselves, we have merely aggregated a series of subjective and self-regarding perspectives, rather than adopting a new, more objective thinking derived from them all. If we represent to ourselves all the perspectives, we still have not represented that upon which these are perspectives.” Iris Marion Young, “Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought” in *Judgment, Imagination, and Politics*, 223.

Strether and so never acquire knowledge about them that Strether does not share. We see Paris as Strether sees Paris; his vision is never placed alongside the narrator’s own view of that city. In this sense, the sense of what we are allowed to see and know, the reader’s viewpoint is identical with Strether’s own. But when it comes to the presentation of Strether’s judgments of what he sees, the reader’s viewpoint is no longer identical with Strether’s. For example, the narrator allows the reader to register surprise at Strether’s acceptance of Little Bilham’s claim that the attachment between Chad and Madame de Vionnet is virtuous; the narrator invites the reader to wonder why Strether makes nothing of the fact that Chad and Madame de Vionnet are out of town at the same time. The reader, like Strether, is a judge and the soundness of Strether’s judgments is among the things she must judge. But we cannot judge from within the viewpoint we are judging. Thus the narrator creates distance between Strether’s consciousness and the reader, providing a place to stand outside Strether’s point of view—one from which the reader may ask whether or not Strether is judging well.

There is a final difficulty with Strether’s mode of judgment. Strether thinks that he is taking up Chad’s perspective; he thinks that he is seeing Madame de Vionnet through Chad’s eyes. But in fact he is not. Strether’s vision of Chad and Madame de Vionnet’s relationship as a fine friendship governed by a high ideal of conduct is not the correct view of their relationship at all; and it is not Chad’s view of their relationship. Not only is the relationship adulterous, but more

53 These points are made by Lubbock in “Point of View in The Ambassadors,” 416.

54 Tilford also makes the point that we are not, in fact, fully immersed in Strether’s point of view because although we do see things through his eyes, we always maintain a critical distance; but Tilford treats this as “slips,” as inconsistencies in James’ method. See John E. Tilford, Jr., “James the Old Intruder,” (1958) 4 Modern Fiction Studies 157 at 163. Berland also notes several “slips” where the narrator gives us information or impressions which Strether’s own point of view could not. See Berland, Culture and Conduct in the Novels of Henry James, 217.

55 The very inclusion in the narrative of the fact that Chad and Marie de Vionnet are out of town at the same time creates distance between Strether’s point of view and ours, for Strether, who makes nothing of their absence, would not count this fact as a detail worth including in this story.
importantly, Chad is growing tired of Madame de Vionnet and is willing to cast her aside despite the sacrifices she has made for him. To all this, Strether is blind. He is blind, I think, for two reasons. The first is that if, in order to understand and judge another human being, we try to access their inner lives by asking “how would I feel in that person’s situation?”, we risk putting too much of ourselves into our answer. Strether thinks Madame de Vionnet the most admirable, magnificent woman he has ever met. In Chad’s situation, Strether would form a friendship intrinsically beautiful and governed by a high ideal of conduct. This shapes his view of the relationship between Chad and Madame de Vionnet and clouds his vision of its nature.

In Strether we see that the effort to imaginatively put oneself in another’s position may be the key to a deeper self-understanding, but it is not the key to understanding other human beings.

Of course, Strether is blind to what is happening around him for a second reason and that is that people are lying to him. But the fact that people lie to him and are able to deceive him points to the fact that human beings are not transparent to one another. And if they are not transparent to one another, then we must question whether or not they can really occupy one another’s point of view. Moreover, the separateness of human minds and their opacity to one another is a feature of our interactions even if we do not set out to deceive one another. When Strether finally realizes that Chad and Marie de Vionnet are lovers and not merely friends, he notices that intimacy is “so much like lying” (313). Intimates retreat into privacy and secrecy; they do not let

56 Many have suggested that this is the question judges should ask themselves. See, for example, Nedelsky, “Judgment, Diversity, and Relational Autonomy” in Judgment, Imagination and Politics, 109. West argues that “the judge discerns the individual’s true interest by sympathetically ‘placing herself in the individual’s shoes’ and seeing how it would feel to live with the choices that person has made” in “Taking Preferences Seriously,” 676. Iris Marion Young also makes the point that this question includes too much of the subjective attitudes and opinions of the one asking the question in “Asymmetrical Reciprocity” in Judgment, Imagination, and Politics, 214.

57 Strether later admits to Maria that his own impression of Marie de Vionnet’s “beauty of person,” “beauty of everything” made it impossible for him to imagine that Chad was not treating her well: “But somehow I couldn’t think of her as down in the dust. And as put there by our little Chad!” (330-331).
others in. “Intimacy,” Strether realizes, “was like that” (313). In this language, style and substance are united. For the language’s refusal of descriptive specificity—“intimacy...was like that”—mirrors the idea that intimacy and transparency are opposed, that intimacy is a relationship unknowable to those not a part of it.58 The realization of Chad and Marie’s intimacy is, for Strether, the realization of their separateness from him, a realization that makes him feel “lonely and cold” (313).

If it seems that intimacy itself belies the suggestion that human beings can never fully know one another, and so can never perfectly occupy one another’s viewpoint, we must remember that intimates are also necessarily separate and often opaque to one another. It is because of their separateness that despite their love and care for one another, they remain beyond one another’s control; it is because of their opacity that their love and care also makes them vulnerable to one another. This we see in the relationship between Chad and Madame de Vionnet as well. For although Chad is “transcendently prized” (322) by Marie de Vionnet, he is nevertheless finite—a concrete, bounded human being. And although she has made him the person he is, he is nevertheless still “only Chad” (322), that is, separate from her and so beyond her control. This is why “the strange strength” of Marie de Vionnet’s passion is “the very strength of her fear.” When Marie de Vionnet tells Strether that Chad is “capable of anything” (231), we are first struck by how well she knows Chad compared to Strether’s knowledge of him. But now the language reminds us that even Marie de Vionnet’s knowledge of Chad is limited by the separateness of his mind and body, a separateness that makes him always partly unknowable, “capable of anything.”

58 Levenson, Modernism and the Fate of the Individual, 70.
Our reading of *The Ambassadors* so far suggests an opposition between Woollett and Paris, between judgment as the application of universal norms from an impersonal point of view and judgment as a context and person-specific determination in light of the viewpoint of the one judged. Our reading also suggests the deficiencies of both modes of judgment. Mrs. Newsome’s abstract, detached judgment never makes contact with its subjects, the concrete individuals it claims to bind; Strether, immersed in the subjects’ concrete lives and minds, gives up the detachment that makes possible a meaningful distinction between judgment and subjective opinion. Moreover, Mrs. Newsome’s judgment evinces a cold respect for the individual’s moral self-sufficiency that is indifferent to individual well-being. It rests on a conception of dignity as the bare capacity for free choice that is perfectly compatible with Strether’s living a life that reflects nothing of what he thinks makes life worth living. Strether’s immersed, context- and person-specific judgment is a refusal of an abstract conception of the responsible moral subject. But the refusal of this abstraction leaves us without the idea that human beings are equal despite their differences, that no human being, whatever her talents or abilities, occupies a privileged place in the world. Moreover, we saw that Strether’s mode of judgment is connected to a conception of positive dignity as the achievement of a certain kind of life, a kind of life that can only be achieved by a certain kind of person, a person like Chad. But this must make us wonder whether such a conception of dignity would permit the sacrifices of those not capable of achieving such a life for the sake of those who are, whether it would permit the unilateral sacrifices of Madame de Vionnet for the sake of Chad’s magnificent transformation.
6 The Reciprocal Illumination of the Universal and the Particular

In the novel’s final sections, Mrs. Newsome dispatches to Paris a second set of ambassadors, her daughter Sarah Pocock, her son-in-law Jim, and Jim’s beautiful young sister Mamie whom it is hoped Chad will marry. In his last conversation with Sarah, Strether makes final his break with Woollett. Sarah’s talk of Chad’s duty to his mother and her failure to see the changes in Chad’s character prompt in Strether “a low vague sound, a sound which was perhaps the nearest approach his vocal chords had ever known to a growl” (277). He insists on the beauty of Chad’s life, on Madame de Vionnet’s charm and beneficence, and on the obligations that flow from their relation. He insists that Mrs. Newsome has been wrong and her mode of judgment deficient: “[o]ur general state of mind had proceeded, on its side, from our queer ignorance, our queer misconceptions and confusions—from which, since then, an inexorable tide of light seems to have floated us into our perhaps still queerer knowledge” (277). Strether, immersed in Chad’s point of view and improvising in the light of each new concrete particular, thinks that he floats on a tide of light, that he sees the strange but beautiful truth about the relationship between Chad and Madame de Vionnet.

A few days after his final confrontation with Sarah, Strether spends a day by himself in the French countryside. As Strether sits preparing to have a meal at a country inn overlooking the river, a boat comes into view. There is a couple in the boat; they are happy and familiar with the place. As they approach the landing spot at the inn, Strether realizes with a shock that he knows the couple: it is Chad and Madame de Vionnet. It is clear that they are not out of Paris just for the day, and so Strether realizes that they have been lying: they are lovers and not merely friends. This is the novel’s famous recognition scene. But if, as many have thought, Strether’s moral transformation is the swing from an impersonal rule-based mode of judgment to an
immersing contextual mode of judgment, then Strether’s transformation is complete before his discovery of Chad and Madame de Vionnet together in this way; it is complete in his final words (quoted above) to Sarah Pocock. If this is right, then the discovery of Chad and Madame de Vionnet is just a twist of plot, one that has no significance for the development of Strether’s moral vision. But *The Ambassadors* is about Strether’s moral vision, and an understanding of that vision that makes the novel’s conclusion extraneous cannot be the best understanding.

The sudden recognition that the couple before him are lovers forces upon Strether the recognition of two other things to which he has thus far been blind. The first is, as I have already noted above, his separateness from Chad and Madame de Vionnet. The discovery of their intimacy and their deceit is the discovery that he has not really been a part of their relationship, has not really shared their perspective; he has been an outsider all along. This is suggested in the narrator’s presentation of the scene. For Chad and Marie de Vionnet sit in the boat facing one another, their faces hidden to others, while Strether looks out at them from afar, from a pavilion that overhangs the water. But this discovery of the couple’s separateness, though felt as a loss by Strether, nevertheless provides something that we have so far found missing. It provides a spot outside the relationship from which to view it; it provides the distance that judgment requires. Strether’s mode of judgment, we have seen, has thus far been associated with water imagery, particularly with immersion. It is therefore important for us that at this moment of recognition we find him, not in the water, but in

> a small and primitive pavilion that, at the garden’s edge, almost overhung the water, testifying, in its somewhat battered state, to much fond frequentation. It consisted of little more than a platform, slightly raised, with a couple of benches and a table, a protecting rail and a projecting roof; but it raked the full grey-blue stream... (307)

No longer swimming in the current, Strether sits in a pavilion that overhangs the water, on a raised platform that has a view of the stream and the couple in the boat. The image suggests, of
course, the distance and detachment Strether has until now repudiated. Yet it is here that Strether finally begins to see the truth about the relationship between Chad and Madame de Vionnet.

The recognition of Chad and Madame Vionnet’s intimacy forces upon Strether the recognition, not only of their separateness, but also of their commonness. Strether, we have seen, once saw Chad as an “absolutely new quantity” (95), a “miracle” (107) and Madame de Vionnet as “immeasurably new” (146), and thought of their relationship as one unlike any other, “the very finest” and “most distinguished” friendship he could have imagined (166). The relationship between Chad and Madame de Vionnet was, for Strether, a unique particular, rooted in specificity and unknowable to anyone whose gaze was general and detached. We now find, however, a change in Strether’s vision, a change that is first suggested by his view of the couple in the boat and then pervades the novel’s concluding pages. From the high raised platform above the river, the couple in the boat appear as types, as “a man who held the paddles and a lady, at the stern, with a pink parasol” (307); when later reflecting on the encounter, Strether realizes that he has been mixed up in a “typical tale of Paris” (315). At the awkward meal at the inn following their surprise meeting, Strether notices that whereas Madame de Vionnet usually spoke in “an English...unlike any other he had ever heard” (127), which made her seem “a creature, among all the millions, with a language quite to herself” (310), she now lapses wholly into French, “fairly veiling her identity, shifting her back into a mere voluble class or race” (310). And Strether sees Chad’s ordinariness as well:

She had made him better, she had made him best, she had made him anything one would; but it came to our friend with supreme queerness that he was none the less only Chad. ...The work, however admirable, was nevertheless of the strict human order, and in short it was marvellous that the companion of mere earthly joys, of comforts aberrations (however one classed them) within the common experience, should be so transcendently prized. (322)
Strether once thought Chad’s transformation miraculous. But what was once a miracle is now admirable work of the human order. And where Strether once thought Chad was miraculously, mysteriously “other than Chad,” he now sees that Chad is only Chad, a human being like any other. Chad was for Strether transcendent; he is now merely transcendently prized, prized by Marie de Vionnet as though he were transcendent.

This shift from the vision of Chad and Madame de Vionnet as unique, non-repeatable persons to the vision of their commonness is connected to Strether’s shift in point of view. For the view of another as unique and non-repeatable, unlike anyone else in the world, is the lover’s view. It is this view that makes love exclusive rather than inclusive and particular rather than universal. It is this view that prevents the lover from seeing the beloved as equal to all other human beings. But the judge, we have seen, must see the individual as one among others, must allow each individual to count for one and not more than one. This is what we now see in Strether.

Once Chad is seen as one individual among others, however, his moral failings are illuminated. For Strether now sees that Chad is acting as though he occupies a privileged place in the world; he is treating Marie de Vionnet as a tool of his purposes. No longer immersed in Chad’s own point of view, Strether is horrified at Chad’s reference to “satiety as a thinkable motive” for leaving Marie de Vionnet (337). Chad’s protest that he’s “not a bit tired of her” makes Strether “stare,” makes him wonder at the fact that Chad “spoke of being ‘tired’ of her almost as he might have spoken of being tired of roast mutton” (337). Now an outsider, “detached and deliberate,” Strether insists: “You owe her everything...You’ve in other words duties to her, of the most positive sort; and I don’t see what other duties—as the others are presented to you—can be held to go before them” (338). Leaving Madame de Vionnet, Strether now argues, will make Chad a “criminal of the deepest dye” (336). Here, Strether acknowledges and insists upon an absolute
principle regarding the ultimate worth and proper treatment of human beings—the inviolable worth of each individual and the duty to treat each as an end in herself—a principle that applies categorically, not merely contextually.

I have now offered a picture of Strether as a distant judge, detached and deliberate, equalizing and objective, insisting upon moral principle and inviolable duty. Is Strether, in the end, an ambassador of Woollett? I do not think so. The meeting during which Strether tells Chad that leaving Marie de Vionnet will make him “a criminal of the deepest dye” is preceded by a meeting with Marie de Vionnet herself. Strether’s perceptions and judgments at this meeting, I hope to show, offer an exemplar of judgment as the reciprocal illumination of the universal principle and the particular case. The concern for particular human worth that is consistent with objectivity and the form of objectivity that is consistent with concern for the individual are, I think, what we see in Strether’s final conversation with Madame de Vionnet.

The meeting with Madame de Vionnet begins with Strether’s final, full vision of the nature of her relationship with Chad.

What was at bottom the matter with her, embroider as she might and disclaim as she might—what was at bottom the matter with her was simply Chad himself. It was of Chad she was after all renewedly afraid; the strange strength of her passion was the very strength of her fear...With this sharpest perception yet, it was like a chill in the air to him, it was almost appalling, that a creature so fine could be, by mysterious forces, a creature so exploited. ...He presently found himself taking a long look from her, and the next thing he knew he had uttered all his thought. “You’re afraid for your life!”

It drew out her long look, and he soon enough saw why. A spasm came into her face, the tears she had already been unable to hide overflowed at first in silence, and then, as the sound suddenly comes from a child, quickened into gasps, to sobs. She sat and covered her face with her hands, giving up all attempt at a manner. “It’s how you see me, it’s how you see me”—she caught her breath with it—“and it’s as I am, and as I must take myself, and of course it’s no matter.” ...He couldn’t say it was not no matter; for he was serving her to the end, he now knew, anyway—quite as if what he thought of her had nothing to do with it. It was actually moreover as if he didn’t think of her at all, as if he could think of nothing but the passion, mature, abysmal, pitiful, she represented, and the
possibilities she betrayed. She was older for him tonight, visibly less exempt from the touch of time; but she was as much as ever the finest and subtlest creature, the happiest apparition, it had been given him, in all his years, to meet; and yet he could see her there as vulgarly troubled, in very truth, as a maidservant crying for her young man. (322-323).

We should notice, first, that Strether occupies the standpoint of the outsider; there is no merger of perspectives here, no effort to occupy Madame de Vionnet’s point of view. The description emphasizes the separateness of Madame de Vionnet’s pain. We see it in the way she covers her face; we see it in the way the language of her suffering—“and it’s as I am, and as I must take myself”—abandons meaningful description and so lacks a shareable understanding. Moreover, there is detachment and distance in the narrator’s description of Strether’s perceptions and responses. The lovers’ particular history is “mysterious” to the outsider, the distant judge. And not only is it mysterious, but bound up as it is with their personal points of view, with their personal preferences and desires, their particular love and history is also a matter of indifference. Thus it is as if Strether doesn’t “think of her at all,” doesn’t think of the agony of Marie de Vionnet’s romantic love; rather, he thinks of her abstractly, as a “creature exploited.”

If this mode of judgment seems to look very much like Mrs. Newsome’s, I would now like to suggest an important difference. In his meeting with Madame de Vionnet, Strether abstracts, as we have seen, from her particular history with Chad and from her particular agony in the context of that history. He views her relationship as an instance of something more general; Madame de Vionnet is “a creature exploited.” But although he distances himself from the passion and the agony that constitute Madame de Vionnet’s particular point of view, Strether remains deeply concerned with her suffering. Madame de Vionnet has trusted her dignity and the shape of her life to one who treats her as a tool of his purposes; she has cared for Chad’s well-being and special worth one-sidedly. Strether’s response to her despair, “You’re afraid for your life,” seems at first out of place, for it calls to mind bodily human needs such as life, health, or bodily
integrity. But in Strether’s language, a relationship in which one finds the recognition of one’s individual worth is connected as a need of dignity to these common human needs, thus suggesting its universality. Strether sees that Madame de Vionnet’s suffering is neither subjective nor arbitrary; it is an instance of the frustration in a particular life of the potential for human flourishing. Strether therefore thinks, not only of Madame de Vionnet, but of the human “possibilities she betrayed.”

Perhaps this account makes Strether’s judgment still sound very much like Mrs. Newsome’s. For although we have here a richer view of what human beings have in common, a view that includes a certain conception of human needs, Strether nevertheless views Madame de Vionnet’s suffering as an instance of something general—he thinks, not of her, but of the human possibilities her life betrays—and so perhaps does not seem to show concern for the particular human being. There is, I think, some truth here, for Strether’s judgment of particulars now seems to be guided by a universal principle. Yet, as I think the novels shows us, the universal principle—the conception of what is non-contingently shared by human beings—must be our guide to what is salient for judgment in the particular. Without such a guide, we would be like The Ambassadors’ early Strether, awash in a sea of subjective preferences, desires, and needs with nothing firm to stand upon, no ground for authoritative moral judgment and no basis for equal moral responsibility. There is an early exchange between Strether and Madame de Vionnet that is significant here.

‘Because I’m made so—I think of everything.’

‘Ah one must never do that,’ she smiled. ‘One must think of as few things as possible.’

‘Then,’ he answered, ‘one must pick them out right.’ (229)
Dignity’s realization in a concrete life is, I suggest, Strether’s guide to “pick[ing] them out right.” The requirements of realized dignity allow us to distinguish between universal human needs and subjective preferences and desires. Dignity’s failure to flourish in a particular life allows us to distinguish Madame de Vionnet’s suffering at the one-sidedness of her sacrifices for Chad from the private agony of her romantic love; it is the failure of dignity that makes Madame de Vionnet’s pain the pain of a “creature exploited” and not only the pain of “a maidservant crying for her young man.” In that his judgment of particulars is guided by a universal principle, there is something in Strether that ought to remind us of Mrs. Newsome.

But now we must say something further. Because realized dignity is a question of making something real in the determinate lives of unique individuals, its requirements cannot be fixed in advance. We discover them by attending to concrete lives and the ways in which freedom and dignity flourish or are frustrated within them. Thus, thinking of the place he should select for his talk with Madame de Vionnet following their awkward meeting in the countryside, Strether acknowledges that the “cold hospitality of his own salon de lecture” or a “stone bench in the dusty Tuileries” might have more in common with “the penal form,” but he chooses to go to see her in her own home (315), signalling his attention to her individual history and circumstance.

Moreover, Strether is attuned to Madame de Vionnet’s suffering as it is expressed in gesture,

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59 This is the principle that most feminist scholars have failed to articulate in their insistence upon attention to particularity. Held argues that moral judgments ought to be the “particular judgments of embodied persons, persons with feelings for others and for themselves, with interests shared and unshared with others...” in Virginia Held, Feminist Morality: Transforming Culture, Society, and Politics (Chicago: Chicago University Press, 1993) 36. Minow and Spelman say that a judge must learn to grasp “the self-understandings” of the parties before her and should attend to “narratives of the parties’ experiences, perspectives, needs, and hopes.” See Martha Minow and Elizabeth Spelman, “Passion for Justice,” (1988-89) 10 Cardozo Law Review 37 at 52-53. And as I noted earlier, Judith Maute argues that the judge in Peevyhouse should have attended to the plaintiffs’ “personal and idiosyncratic values” in “Peevyhouse v. Garland Coal & Mining Revisited,” 1388.
facial expression, and tone of voice. It is because of this careful perception that Strether sees that she is in pain “embroider as she might and disclaim as she might.” More importantly, however, it is because of his attention to her embodied suffering that he connects her pain to the pain of one who is literally “afraid for her life,” and is thus able to see that what is at stake here is her dignity. These things suggest a contrast with Mrs. Newsome’s cold but respectful detachment. They suggest that Strether is concerned, not just with the subsumption of particular facts under a universal principle, but with the realization of the principle in Marie de Vionnet’s determinate life. They suggest that although the principle of equal human worth is our guide to what is salient in the particular, particulars are our guide to how that principle is or is not realized in individual human lives.

We might now notice that in his judgment of Madame de Vionnet at the novel’s end, Strether forms a relationship with Madame de Vionnet that evinces the recognition missing in her relationship with Chad. Madame de Vionnet is seeking the confirmation of her worth in Strether. “How can I be indifferent to how I appear to you?” (320), she asks him, and we see how dependent her own sense of worth is upon Strether’s view of her. Her suffering is not only over the failure of mutuality in her relationship with Chad, but also over her fear that Strether no longer sees her as the dignified human being he once did. When she breaks down into tears, her words are about Strether, not Chad: “It’s how you see me, it’s how you see me...and it’s as I am, and as I must take myself...” (322). In acknowledging her own need for Strether’s recognition, Marie de Vionnet recognizes Strether as a separate, thinking, feeling, dignified human being; indeed, this is what he must be if his recognition can have the importance that Marie de Vionnet

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60 Iris Marion Young points out that Habermas’s model of discourse abstracts from these things in “Impartiality and the Civic Public” in Feminism as Critique, 71.
attributes to it. Moreover, Strether sees that Madame de Vionnet is dependent upon him for her worth, “she clung to him, Lambert Strether, as to a source of safety she had tested” (322), and gives the recognition she seeks. For Strether acknowledges Madame de Vionnet’s dignity—“she was as much as ever the finest and subtlest creature, the happiest apparition, it had been given him, in all his years, to meet”—and her vulnerability—“she was older for him tonight, visibly less exempt from the touch of time” (323). And unlike Chad, Strether acknowledges the obligations of respect for dignity and concern for vulnerability that flow from his relation with Madame de Vionnet. Most importantly, he acknowledges that he has obligations here, that his commitment to Madame de Vionnet is not revocable at his whim, that his private feelings have no bearing upon his duty: “he was serving her to the end, he now knew anyway—quite as if what he thought of her had nothing to do with it” (323). What we see here, I think, is the connection between recognition and judgment. We see that the good judgment of a human being will be an instance of the judge’s recognition of that individual as a dignified, responsible agent who is nevertheless touched by circumstance, vulnerable to others, and whose flourishing requires support and concern.

The respect for dignity and concern for vulnerability that constitute Strether’s recognition of Madame de Vionnet’s particular human worth mediate between Mrs. Newsome’s cold respect for abstract agency and Strether’s earlier particularized care for subjective well-being. Moreover, this form of recognition suggests a judicial posture that mediates between Mrs. Newsome’s abstract detachment from everything but individual choice and Strether’s earlier effort at sympathetic immersion in the other’s subjective point of view. A judge who understands that his role is to recognize and vindicate the equal realized worth of the concrete individual will neither simply abstract from, nor immerse himself in, the particular individual’s needs, circumstances, and preferences. For if our concern is the realized dignity of the
determinate individual, we have a principle for sifting the forms of particularity suitable for judgment’s concern from those that are not. The needs and material conditions of dignity appear, not as the idiosyncratic or subjective needs of a particular person, but as universal particulars, as that which determinate human beings have in common. Judgment’s concern for these needs and the ways they are affected by circumstance and other human beings is therefore consistent with the equality of human worth. Preferences, on the other hand, vary from person to person, vary even within the same person over time. Moreover, the question of whether or not an individual’s preferences are satisfied depends, not only on what the particular preferences happen to be, but also on the psychological constitution of the particular person who holds them. Preferences are thus contingent particulars, and their fulfillment is a question of private happiness. Not only would their recognition in judgment collapse the distinction between judgment and private opinion; it would involve the unilateral subordination of some to the personal satisfaction of others.

7 Peevyhouse and Jacob & Youngs Revisited

We can now return to the puzzle of our divergent intuitions in the cases with which we began. We saw that in their theories of judgment, neither the Kantian nor the feminist account can distinguish between Peevyhouse and Jacob & Youngs. A Kantian interpretation of Peevyhouse and Jacob & Youngs must view the claims for the cost of performance as claims that express a subjective preference or desire for a particular object, claims that judgment cannot recognize without losing its objectivity. Feminist scholars, by contrast, have argued that law should not be a closed system where we simply reason from rules and principles to conclusions, disregarding
the law’s human consequences. Accordingly, they have called for attention to “stories of emotion, pain, and pleasure,” to the litigant’s “sense of injury, needs, values, and feelings,” and for perspective-taking in courtrooms. On this view, we must remedy the parties’ subjective losses in both cases.

The Kantian view is, like Mrs. Newsome’s philosophy of judgment, grounded in the self-sufficient, invulnerable dignity of the choosing moral agent. Both abstract from individual preferences, desires, and needs, for all are viewed as contingent—unconnected to the self-sufficient dignity of the free agent—and so irrelevant to duty and to judgment. The feminist account, by contrast, reminds us of Strether’s early immersion in Chad’s point of view. In advocating attention to back story and context, feminist scholars have drawn no distinctions between those aspects of human particularity that are suitable for legal concern and those that are not; preferences, desires, needs, and feelings are all a part of the particular individual’s point of view, all a part of the expanding context of the human situation.

But judgment, as we have seen in the mature Strether, cannot be a case-by-case response to the life story and private perspective of a particular individual. We have seen the legitimacy of judgment’s abstraction from a personal point of view that includes the individual’s preferences and desires. Individual preferences and desires are various, contingent, and unshareable. A judgment adjusted to the individual’s private and changing preferences and desires would allow that individual a privileged place in the world. It would disable moral criticism of someone who treated others as a means to his own satisfaction.

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But not only do the Kantians and Mrs. Newsome abstract from preference and desire; they abstract also from human need. The total abstraction from need, however, is based upon two connected ideas that we, with Strether, have now seen to be false. The first is that the dignity of the independent chooser is self-sufficient, dependent on nothing outside it. The second is that need, because unconnected to human dignity, is arbitrary and subjective. Now, there is a core understanding of dignity—dignity as the abstract capacity for choice—that is indeed self-sufficient. It is this capacity that distinguishes human beings from things—that endows human beings, however much they differ in character and ability, with an equal intrinsic and ultimate worth commanding respect from all and making it wrong for anyone to be subordinated to the private ends or moral opinions of another. The dignity of free will is self-sufficient because, as a capacity innate in human beings it cannot be threatened or degraded; the capacity for free choice is invulnerable and therefore requires no one’s support or concern. It is because this understanding of dignity is a necessary part of a full conception of dignity that Mrs. Newsome is, to the end, “magnificent” (298).

Yet the partiality of this conception of human dignity has been suggested all along. Although Strether at first over-broadly rejected fixed abstract principles of right in favour of a free-floating contextualism, he was not wrong in thinking that the abstract principles were deficient. For the abstract principles were concerned solely with protecting the abstract dignity of the generic free agent, and as Strether learned in Paris, it is the concrete dignity of real human lives that we care about. The realized dignity of concrete human beings is not, however, self-sufficient. In *The Portrait of a Lady* and *What Maisie Knew* we saw that it depends upon a minimum amount of money, on freedom from exploitation by others, on others’ care for one’s well-being and positive concern for the way their actions affect one’s life plans. In *The Ambassadors* we see, in Strether’s reflections upon his own failures and in Madame de Vionnet’s suffering, that it
depends also on the objective confirmation of one’s particular worth that one finds in relationships of mutual recognition.\textsuperscript{64}

Need and well-being are thus normative and make claims to recognition insofar as they are connected to the realization of human dignity. But their connection with the realized dignity of the individual human being means that we cannot regard them as either subjective or contingent. They must be distinguished from preference and desire and cannot be excluded from judgment on the grounds of their moral arbitrariness. The understanding and recognition of these needs as needs of dignity requires the careful attention to and concern for the circumstances of individual lives that we saw in Strether’s final meeting with Marie de Vionnet. But their understanding does not require access to the inner lives of human beings, and their recognition does not require an effort to defer to each individual’s subjective conception of well-being; for we are not here concerned with psychological happiness. We are concerned rather with human welfare, with realized human dignity and its needs. Concern for these needs, for this form of well-being, is fully compatible with the objectivity that judgment requires.

The question to ask about *Peevyhouse* and *Jacobs & Young* is thus whether or not the claim for the cost of performing the remedial work to their properties can be interpreted as a claim based upon the requirements of their realized dignity. Here, I think, the cases suggest different answers. In *Peevyhouse*, what appeared from the Kantian perspective as an irrational attachment

\textsuperscript{64} That these relationships are a common human need is suggested also by James’ style. As Michael Levenson points out, James persistently uses the abstract term “relation.” A relation is something highly particular, a unique, non-repeatable feature in a human life. Yet the term “relation” tells us so little about what is going on between the people under consideration; it does not tell us whether they are family or friends, lovers or enemies. The term “relation,” in its abstractness, insists that this highly particular non-repeatable thing is nevertheless an instance of a type, a type that is persistent and non-contingent. Levenson writes, relation is a general term that denotes “the most individual phenomena;” “it denotes a typical singularity and a generic particular.” Michael Levenson, *Modernism and the Fate of Individuality*, 24.
to a particular piece of land is, from the perspective of the realized dignity of the determinate individual, a legitimate interest in the reasonable security of a life plan. To shape a life of one’s own is deliberatively to commit to particulars, to form commitments and attachments, and to organize one’s life around them. The Peevyhouses organized their lives around a family farmstead; it was their family home and their livelihood. To show concern for freedom and dignity realized in a plan of life is to show concern for the efforts of determinate individuals to shape lives of their own and to attend to the ways those efforts may be frustrated by the carelessness of others. A judge concerned with the realized dignity of the free human being would see that what is at stake in *Peevyhouse* is not the land’s abstract value but the way this particular piece of land figures in the Peevyhouse’s plan of life; she would accordingly award the Peevyhouses the cost of returning their land to usable farmland and pasture.

Can we say something similar about the case of *Jacob & Youngs*? There is no doubt, as I suggested earlier, that we could tell a story about Kent’s loss in *Jacob & Youngs* that is likely to elicit sympathy and make us feel that his loss is real. But I think we now see that not just any sympathy-evoking story will do here. We need a story that connects Kent’s loss to his realized dignity, to his ability to see his life as his own and not one that has been manipulated and shaped by others. In this case, the possibility of such a story seems unlikely. Kent’s disappointment at not receiving the exact pipe he wanted is undoubtedly a setback from the perspective of his private preferences and desires. But this, we have seen, is not the kind of story that is worthy of legal concern. For it is a story about subjective happiness, not human well-being.

Dori Kimel says something similar about this case: “The question that should be asked in analysing such a case from the perspective of personal autonomy is just how significant an expression of autonomy is a person’s wish to have his house equipped with ‘Reading’ pipes rather than with virtually identical pipes of a different make.” That question, he says, has a “rather obvious answer” and I think he is right about this. See Dori Kimel, “Neutrality, Autonomy, and Freedom of Contract,” (2001) 21 Oxford Journal of Legal Studies 473 at 484-485.
The divergence in our intuitions about *Peevyhouse* and *Jacob & Youngs* thus reflects an important distinction, and it is just the distinction Strether discovers at *The Ambassadors*’ conclusion. Whereas the Kantian account excludes from judgment everything that pertains to individual welfare and the feminist account of judgment treats as salient all aspects of individual happiness, we have drawn a distinction that these accounts fail to recognize. The distinction between the needs of realized dignity on the one hand and private preferences on the other gives us a conception of well-being as the realized dignity of the determinate individual. This conception is neither abstract nor subjective. It does not abstract from the concrete circumstances and suffering of determinate individuals; indeed, its realization will require careful judicial attention to these matters. Yet it remains distinct from, and independent of, the individual’s purely personal point of view. Judicial concern for this form of human well-being is thus adequate to the concrete human beings that law’s judgment claims to bind, for it treats them as individuals with determinate lives that matter. But concern for their concrete lives is no threat to law’s objective universality, for it is a concern for needs that, as freedom’s needs, determinate human beings have in common.
Chapter 5
Conclusion

Let us recall Lambert Strether’s muddled and contradictory speech with which we began.

Live all you can; it’s a mistake not to. It doesn’t so much matter what you do in particular, so long as you have your life. If you haven’t had that what have you had? This place and these impressions—mild as you may find them to wind a man up so; all my impressions of Chad and of people I’ve seen at his place—well, have had their abundant message for me, have just dropped that into my mind. ...And it’s as if the train had fairly waited at the station for me without my having had the gumption to know it was there. Now I hear its faint receding whistle miles and miles down the line. What one loses one loses; make no mistake about that. The affair—I mean the affair of life—couldn’t, no doubt, have been different for me; for it’s at the best a tin mould, either fluted and embossed, with ornamental excrescences, or else smooth and dreadfully plain, into which, a helpless jelly, one’s consciousness is poured—so that one ‘takes’ the form, as the great cook says, and is more or less compactly held by it: one lives in fine as one can. Still, one has the illusion of freedom; therefore don’t be, like me, without the memory of that illusion. ...Do what you like so long as you don’t make my mistake. For it was a mistake. Live!

Here, in Strether’s outburst of advice to his friend Little Bilham, we find two competing images of human life. They are the images of the train and the jelly. The image of the train enjoins Little Bilham to “Live!” Reminding us of the conception of freedom we find in the contemporary Kantian theory of private law, the speeding train is an image of spontaneous freedom. It signifies indeterminacy, endless possibility, and the refusal of dependence. It suggests that we can free ourselves from place and circumstance, from the confines of a particular role or moral code, and choose for ourselves an identity, a set of commitments, a plan of life. But in Strether’s speech, this exuberant picture of human freedom and spontaneity is suddenly undermined. Life is not the speeding train but the tin mould, and human consciousness is “the helpless jelly” that takes the mould’s form. We are reminded of the conception of

personhood and freedom we have associated with feminist legal thought. The helpless jelly is a picture of human neediness and dependency. Here “one lives in fine as one can;” freedom is the struggle to shape a sense of self within a mould—a body, a role, a moral community—that is given. “The affair of life” can’t be different for human beings, for they are victims of fate, shaped by experience, vulnerable to circumstance and other human beings. The images of the speeding train and the helpless jelly provide a unifying thread for the novels we have considered; and the conceptions of freedom of which they are images, I have suggested, illuminate much of private law.

The speeding train is an image of movement, not destination. It thus recalls *The Portrait of a Lady*’s images for Isabel’s early conception of freedom. Freedom, for Isabel, was like the ship at sea or the bird in flight. These, like Strether’s train, are images of independence and detachment. We connected these images to a conception of freedom as the bare capacity for choice, the abstract possibility of always choosing something else; and we connected this conception of freedom to a way of understanding private law advocated by contemporary Kantians.

But *The Portrait of a Lady* put before us the limits of such a conception of freedom. We saw that if freedom is understood as nothing but the abstract possibility of choice, freedom is consistent with a life whose content is given entirely by the whims and impulses that are presented to us by our natures, for this content is compatible with the idea that any particular whim or impulse could in principle have been rejected. This was captured in Isabel’s words to her friend Henrietta: “A swift carriage, of a dark night, rattling with four horses over road that one can’t see—that’s my idea of happiness” (144). We saw that the image, like the image of the train whisking its passengers miles and miles down the line, is an image of open possibility and
indeterminacy, but it is certainly not an image for a thinking agent shaping a life that reflects ends deliberatively chosen. It is, rather, an image for one blindly pulled along by impulse, and so an image for a life in which the capacity for choice, though present as a capacity, has not been realized. This foreshadows a deeper problem. In Isabel’s marriage to Osmond, we saw that the agent’s capacity for choice is consistent, not only with a life lived in accordance with impulse, but also with a life in which one’s most important choices are manipulated by others. For although we must acknowledge that Isabel freely chooses Osmond, that there is no sense in which her will is coerced, we must also see that the marriage is nevertheless contrived by others who manipulate Isabel to serve their own ends.

In Portrait, we also began to see the problematic relationship between freedom as unfettered choice and the idea of obligations to others. There is a natural connection between the idea that freedom is the freedom to choose and the idea that value is just a question of what I happen to find choice-worthy. For if value presented itself as objectively given, it would make a claim to my recognition that was independent of my choice and would thus mean that I am not in all cases perfectly free to choose. We saw this most forcefully in the character of Gilbert Osmond. Value for Osmond is a question of something’s value for him, which makes him incapable of recognizing the intrinsic, non-contingent value that inheres in other human beings. In Osmond’s treatment of others as objects ministering to his preferences and desires, we see that without the idea that others have an objective value that has authority for us regardless of our subjective wants, we cannot have the idea that others make unconditional claims to our respect, claims that

\[2 \text{ We see this also in Isabel’s hostility to Lord Warburton, for he seems to demand the objective recognition Isabel insists that she is free to withhold. We see it again in What Maisie Knew in the character of Sir Claude, though in Sir Claude the refusal of obligation is connected to the joyfulness of the free conscience and is associated with a carefree frivolity rather than deliberate evil.} \]
may legitimately curtail our freedom to pursue our preferences and desires, and that are binding upon us even though not chosen by us.

In our discussion of What Maisie Knew, we considered whether we could, after all, derive a conception of obligation from the idea of the freedom to choose, thinking that perhaps some of the traditional moral constraints on action could be generated from purely self-interested choice. But we saw that this will not succeed. The contingent nature of self-interest means that it cannot produce a non-contingent obligation and a non-contingent obligation is just what we are looking for. There is, however, another possibility. We might try to generate an obligation, not simply from the idea of the freedom to choose, but from the idea of its consistent assertion by a rational human being. This seems to be a more promising strategy. For in asserting my own entitlement to free choice, I must acknowledge a like entitlement in everyone else. I must, in other words, acknowledge a duty of non-interference with the free choice of others. But if non-interference with free choice exhausts the content of our obligations to one another, we arrive at the same problem we have just seen in Portrait and that appears as well in the watershed cases of private law we have considered. Non-interference with the agent’s freedom to choose is an obligation insufficiently robust to protect the individual from manipulation. It is insufficient to protect the individual from those who make her a tool of their purposes, not by coercing her will, but by exploiting her vulnerability. Non-interference, as we have seen in the adults’ treatment of Maisie, is consistent with complete indifference to how one’s words or actions influence the life of another human being and shape it in a way that makes it unrecognizable as a life of her own.

It may now be clear that the above interpretation of the train image makes its appearance in Strether’s speech to Little Bilham very odd. For on the reading of The Ambassadors that I have presented, Woollett is a community dedicated to freedom as choice. Yet it is his life in Woollett
that has made Strether feel that he is the jelly in the cook’s mould and it is Parisian life that awakens him to the possibility of living a life of his own. But this reversal is, after all, fitting. For the bare capacity for choice is compatible with a life in which one, out of desperation or ignorance, chooses to minister to the ends of another. We see this in the way Strether lives his life as Mrs. Newsome’s ambassador, a life that reflects Mrs. Newsome’s goals and values and none of Strether’s own sense of what makes life worth living. We see it again when Isabel resigns herself to a life in which Osmond is her “appointed and inscribed master.”

The reversal of abstract freedom depicted in the novels appears also in the legal cases we have considered. It appears when Herbert Bundy freely chooses to mortgage his only means of subsistence in exchange for his son’s brief respite from creditors out of concern for his son’s well-being and without obtaining independent advice; it appears when Williams freely signs a contract risking her family’s necessities for a stereo in ignorance of the contract’s meaning; and it appears again when Becker freely labours and sacrifices for the sole benefit of her partner thinking that she is contributing to a common enterprise. We would not be surprised if these central cases of the common law came to the same conclusion as did Strether in The Ambassadors: that one can succeed in freely choosing one’s obligations and yet fail to live a life one can regard as one’s own.

We can summarize all this by saying that the novels we have considered put before us the insufficiency of the train image as an image for human freedom and so the inadequacy of the Kantian conception of freedom as the abstract capacity for choice. For the novels illuminate the normative significance of realized freedom; they show us that what is important for human beings is whether they have succeeded in shaping determinate lives that they can regard as their
own or whether their lives have rather been hostage to need and circumstance and manipulated and exploited by other human beings.

Once we see that realized freedom is what matters to human beings, the helpless jelly that takes the mould’s form seems a more fitting image for human life than the open possibility of the speeding train. For, as we saw in Portrait, the determinate individual shaping a life for herself cannot stand aloof from all ends, values, attachments, and circumstances. To shape a life for oneself is deliberatively to commit to particulars. It is to commit to ends and values chosen upon reflection, to form attachments to other human beings, and to embrace these ends, values, and attachments in a plan of life that becomes a part of one’s identity. Moreover, once we turn our attention to lived human lives, we must see that even the idea of choosing ends, values, and attachments is an illusion. For we each find ourselves in this world already inhabiting a particular body, with a certain set of talents and abilities and a psychological makeup, part of a particular family and a member of a particular moral community. Our attachments, commitments, and plans of life are not something we choose as if from a menu; we rather struggle to find a sense of who we are and what matters to us within a body, a set of circumstances, and a moral order that are given. To shape a life one can regard as one’s own is thus an achievement, a goal. It is a goal that may be realized imperfectly or not at all. It may be frustrated by circumstance or the actions of others. Our ability to realize this goal thus has material conditions, such as health, bodily integrity, a minimum amount of money and the positive concern and support of our fellow human beings. We are, it seems, the “helpless jelly”—needy and dependent, victims of circumstance and hostage to fate.
If we take this view of human beings and the nature of their freedom, we can generate a robust conception of the duties human beings owe another. This is so for two reasons. First, as we saw in *Portrait*, this understanding of freedom allows for the possibility that the proper relation between my agency and the reasons or values that determine my duties is a relation of recognition rather than a relation of choice. If free agency is an exercise in self-understanding through the acknowledgment of the constituent features of my identity, the idea that my duties are acknowledged by me but not chosen by me does not contradict my freedom. Second, as we saw in our discussion of *Maisie*, once we conceive of human beings, not as self-sufficient loners, but as interdependent members of a moral community struggling to shape lives of their own, we can generate obligations of positive mutual support and concern out of the requirements of the flourishing autonomy of all.

But the problems with simply replacing the thin, abstract conception of freedom with the more robust conception are suggested in Strether’s imagery. The jelly, fluid and lacking differentiation, warns of the effacement of human separateness. Its easy conformity to the great cook’s mould warns of the individual’s inability to make claims on her own, claims against the moral community, and of her consequent subordination to a moral authority she can only regard as despotic. This too we have seen in the novels.

In *The Portrait of a Lady*, Madame Merle held a porous, fluid conception of the person that opposed Isabel’s early bounded conception of human personhood: “What shall we call our ‘self’? Where does it begin? Where does it end? It overflows into everything that belongs to us—and then it flows back again.” Osmond says that Madame Merle’s self “includes so many other selves—so much of every one else and of everything” (201). But in Madame Merle we see
that where human personality is conceived as inseparable from its circumstances and relations, we lose the idea of a dignified human being that commands respect for its agency and makes claims to inviolability. Thus, rather than shaping a life of her own, Madame Merle allows herself to function as the tool of Osmond’s purposes. And just as she asserts no claims on behalf of her own dignity, Madame Merle’s conception of the self gives her no reason to regard others as dignified, inviolable subjects. Willing to be treated as a means to others’ ends, she finds no reason not to treat others as means to her own ends. Madame Merle is the “roundest and smoothest bead” (332); like the jelly, she lacks the angularity, the sharpness, that would suggest the possibility of making claims against others, claims that may conflict with their preferences and require them to recognize her as an independent human being.

At *The Portrait of a Lady*’s conclusion we see that just as Madame Merle’s fluid conception of the self gave her no basis for making claims against her use by others, so Isabel’s final self-conception gives her no basis for making claims against the moral order she now regards as an inseparable part of who she is. Repudiating her early understanding of freedom as the capacity for choice, as the capacity for detachment from all one’s values and commitments, Isabel embraces a conception of duty as deference to the moral law that she, in the end, regards as constitutive of her nature. But that law makes Osmond Isabel’s master and would have her remain in a marriage in which her role is to minister to the wishes of a despot. Thus Isabel defers to a moral law that is indifferent to her independent mind and that denies her separate, inviolable worth.

Moreover, the moral order that is implicitly oppressive at the conclusion of *The Portrait of a Lady* is explicitly oppressive in *What Maisie Knew*. In her insistence that Sir Claude make his duty his life—that he love whomever his moral duty prescribes—we saw that Mrs. Wix’s moral
code views its subjects as nothing more than instances of God’s purposeful creation. Its fixed rules leave no room for interaction between the moral law and the independent mind; its abstract and categorical conception of the human good is indifferent to the individual’s conception of his own good. Mrs. Wix is thus associated with enclosure, with closed hands and stifling embraces, thus reminding us of the cook’s mould, an external imposition that shapes and contains.

The moral order to which Isabel and Mrs. Wix defer is the Christian one. Maisie’s conclusion suggests, however, that the danger of oppression exists, not only when the authoritative moral order expresses a religious worldview, but whenever a common good—even the secular good of the flourishing autonomy of all—is elevated as the single sovereign norm of a community.

At the end of What Maisie Knew, Maisie insists, not on Mrs. Wix’s Christian conception of duty, but on a conception of duty derived from the mutual interdependence of individual autonomy. She insists that she and Sir Claude owe one another, not merely duties of non-interference with one another’s freedom to choose, but the positive duties of care and support for well-being we said are necessary for the flourishing of realized freedom. But although its foundation is the autonomous flourishing of the individual human being, Maisie recognizes that even this moral order threatens to swallow up the freedom that is its foundation. It is clear that Mrs. Wix’s autonomy and well-being depend upon the material support she would find in a life with Sir Claude. But although Maisie recognizes this, I have argued, she also recognizes the oppressive quality of any obligation that is indifferent to the separate lives and independent minds of individual human beings. In her willingness to give up Mrs. Wix, in her refusal to demand that Sir Claude devote his life to Mrs. Wix’s well-being, Maisie acknowledges the simple significance of the fact that he does not love her; a life with Mrs. Wix would not be a life Sir Claude could recognize as his own. Maisie thus acknowledges that there is a limit to what we
can require of one human being for the sake of another’s flourishing autonomy; the separateness of human lives and minds means that the requirements of mutual concern must be limited by the requirements of mutual respect.

We must notice, however, that the respect-based limit that Maisie acknowledges cannot be derived from the common good itself. An account of entitlement and obligation derived wholly from the requirements of autonomy’s flourishing has no resources from which to generate the limit that Maisie insists upon. Entitlements and obligations will simply fall out of the requirements of the flourishing of all and will therefore treat human beings as units of a collectivity rather than separate bearers of independent worth. Thus, in our discussion of *The Ambassadors*, we wondered whether the more robust conception of freedom would permit the unilateral sacrifices of Madame de Vionnet—who is older, steeped in the aristocratic tradition, and so unlikely to realize the ideal of autonomy herself—for the sake of Chad’s autonomous flourishing. Indeed, the unilateral subordination of one to the realized autonomy of another is just what we discovered in the feminist interpretations of the legal cases we have considered.

For example, we saw that if care for flourishing autonomy is the fundamental norm of the legal community, *Pettkus v. Becker*, which transferred title in property in order to fulfill Becker’s reasonable expectation and protect her security in a life plan, is not an exception to the usual rules of private property where title is independent of need; it is, rather, an instance of the general rule that property must be redistributed in accordance with the requirements of the flourishing of all. Moreover, if the individual has no separate standing to make claims against the community, we have no basis for individual compensation in cases of such property takings. Similarly, unconscionability cannot, on the feminist view, be understood as an exception to the usual rule that parties are free to set the terms of their interaction; contract must always be
subject to the question of whether the arrangement promotes or detracts from the realized autonomy of the parties. And as we have seen, there is no basis for an exception for the one who, with full understanding and independent advice, chooses to do what the authoritative conception of her well-being thinks harmful to her real interests. Finally, we have seen that if tort law’s fundamental norm is mutual care for one another’s security in the conditions of an autonomous life, Lord Atkin’s neighbour principle is incoherently circumscribed. For without the idea that the individual has entitlements that legitimately limit the pursuit of the common good, what basis have we for limiting the duty of care for others to a duty of avoiding harm? Why would we not have a duty of positive support? And why have an objective standard of care rather than a requirement of care tailored to need and ability? The limits that tort law recognizes are based upon respect for the free activity of the separate, dignified human being; but where the flourishing autonomy of all replaces the free choice of each as the authoritative conception of freedom, the freedom of the separate and independent agent commands no respect. The replacement of the freedom of the independent chooser with the flourishing autonomy of the member of the moral community will thus make human beings the helpless jelly in the cook’s mould; it will efface the distinctions between persons and subordinate them to a moral law that recognizes no limits to its pursuit of the common good.

This leaves us with the following difficulty. The freedom we have associated with the spontaneity and open possibility of the speeding train gives us a picture of human beings as dignified, independent choosers and separate centres of self-determining activity. Human beings are ends in themselves, making claims to respect that are good against one another and the community as a whole. But in its singular focus on the abstract capacity for choice, this conception of freedom abstracts from the concrete lives of human beings. It is a conception of
freedom that is perfectly compatible with a life that is hostage to impulse and need, or that has been wholly shaped by circumstance, or manipulated and exploited (but not coerced) for the purposes and ends of other human beings. The jelly image presents a contrasting picture. It signifies a conception of freedom that acknowledges that human beings are touched by circumstance and vulnerable to others, that they are importantly constituted by relations and values they acknowledge rather than choose, and that the freedom of human beings is meaningful only if it is freedom realized in a determinate life. But it forgets that human beings are also separate centres of value and self-determining activity, with a dignity that simply inheres in their person and entitles them to respect as distinct human beings with lives of their own to lead. Each image, each conception of freedom, captures a truth about human beings that the other misses.

In the first chapter, I suggested that Strether’s advice to Little Bilham hints at an answer to this difficulty. We noticed that what is most striking about Strether’s speech is the way the contradictory images of human freedom are presented by Strether without any acknowledgment of their contradiction. He moves seamlessly from the train image to the jelly image, somehow bridging the gap between them in his conclusion: “[s]till, one has the illusion of freedom; therefore don’t be, like me, without the memory of that illusion.” But what can this mean? If the freedom associated with the speeding train is as an illusion, why is the absence of that illusion a loss? What value can there be in preserving the memory of something that is not real? We can make sense of these puzzles, I suggested, if we understand that Strether is saying that one conception of freedom requires for its completeness the memory of the other, which, if taken on its own, is an illusion. Thus the seamless move from one conception of human freedom to the
other suggests the possibility that both are true but incomplete, that each is a part of the full story of what it means for a human being to be free.

Strether’s advice to Little Bihlham thus suggests that the complete story of human freedom is a story of the particular, determinate individual, whose capacity for self-determination gives her an inherent and separate dignity that makes claims to respect on its own and whose realization of this capacity in a life she can regard as her own requires the care and support of other human beings. But how, we must now ask, can law show concern for well-being while respecting the separateness and inviolability of individual persons? How can we take up Strether’s advice, the advice that enjoins us to preserve the truth implicit in the train image while simultaneously acknowledging the truth contained in the image of the jelly? I think an answer has emerged from our consideration of James’ novels and that this answer is legally reflected in such private law doctrines as unjust enrichment, unconscionability, and the neighbour principle.

We have seen in Portrait and Maisie that where a moral law is asserted in complete indifference to the independent minds of its subjects, its rule is despotie and therefore inconsistent with the separate and inviolable worth of the individual. We saw something else in Portrait that is important for us here. We saw that Osmond’s conviction of his superior worth lacked “solid actuality” (253), for it went unrecognized by others. But so long as Osmond failed to acknowledge the independent, objective worth of other human beings, he could not find the recognition he was seeking. For how could something without independent worth provide a meaningful form of recognition? In Maisie, we saw that the same is true of the authority of the moral law. Authority depends upon the recognition of its subjects, for otherwise it is a mere unilateral assertion that has no concrete reality. Its claims to authority, like Mrs. Wix’s claims,
will be hollow and dismissed as “silly superstition” (104). But if the law’s subjects are to provide a meaningful form of recognition, they must be understood and respected as separate bearers of worth, with minds and lives of their own. The authority of the moral law thus depends upon its deference to the independent minds of its subjects, on its acknowledgment of and respect for their separate and independent worth.

We have also seen, however, that the law of a moral community cannot defer to the independent individual’s pure freedom to choose without sacrificing its authority; for we saw in the early Isabel, in Osmond, and in all of Maisie’s parents and step-parents that the priority of choice makes the individual chooser the sovereign authority and so holds obligation hostage to the contingencies of individual preference and desire. We suggested in our discussion of Portrait, however, that while the moral law cannot coherently defer to unfettered individual choice, it can defer to the individual’s ability to recognize the law as a law of her own. Now we must try to say something more about what this entails.

Strether’s realization of the inadequacy of Mrs. Newsome’s detached judgment showed us that a law that is indifferent to the circumstances of individual lives will not be a law that concrete individuals can recognize as their own. Individual human beings each have a single life to lead, the shape of which matters a great deal to them. They form and embrace plans of life and whether they fail or succeed in realizing their plans cannot be, from their individual perspectives, a matter of indifference. A law that neglects their determinate well-being will thus confront them as an external imposition. Thus we saw in The Ambassadors that Mrs. Newsome’s efforts at authoritative judgment did not succeed. In her failure to show concern for the actual human beings she purported to bind, her judgment was merely asserted despotically against them. Chad
and Strether, we noticed, feared Mrs. Newsome, but they did not accept her judgment’s authority. A law for human beings, if it is to be recognizable as a law of their own, must show concern for the concrete human beings that they are and for the actual lives that they lead.

But now we arrive at a difficulty. How can law show concern for concrete human beings, who differ in their subjective needs and ends, their idiosyncratic dreams and disappointments, without compromising its universality and therefore its legitimacy? We have seen that the Kantian account says that it cannot. On this account, the capacity for free choice is the only non-contingently shared thing among human beings and so the only principle capable of legitimately coercing equal bearers of worth. As we saw in *The Ambassadors*, in the problems with Strether’s immersion in Chad’s point of view, Kantians are right in thinking that the law cannot concern itself with the subjective needs, ends, and desires of individual human beings without making some a means to the subjective happiness of others. But we need not move from this idea to the idea that the abstract capacity for choice is therefore the only principle capable of coercing free and equal human beings. This move depends on the further idea that there is no conception of well-being other than the subjective one. In our readings of James’ novels, however, a shareable conception of well-being, a conception of human well-being, has come forward.

In *Portrait* we saw that the capacity for free choice must culminate in a choice of something, and that if one’s concrete choices are to reflect one’s own values and commitments, one requires material wealth and freedom from manipulation by others. In *Maisie* we saw that freedom’s reality depends upon the positive care and concern of others; in particular, it requires promises from those who are in a position to influence our lives, so that we can form life plans upon which we can reasonably rely. In *The Ambassadors* we saw that for the dignity that simply inheres in
our person to become an individual’s sense of her own worth, she must find the confirmation of her particular dignity in relationships of mutual recognition.

In *The Ambassadors*, in our discussion of Strether’s final meeting with Madame de Vionnet, we arrived at an idea that ties these instances of individual need together and articulates our sense of their universal, as opposed to merely idiosyncratic, significance. In Strether’s recognition of the inadequacy of Mrs. Newsome’s abstraction from everything but individual choice and his subsequent disenchantment with immersion in the subjective point of view, he arrived at a principle capable of sifting the aspects of individual welfare suitable for legal concern from those that are not. That principle was the realized freedom and dignity of the determinate human being. Realized freedom and realized dignity and their material conditions are not merely the subjective and idiosyncratic ends and preferences of particular characters; they are, rather, freedom and dignity’s own ends and needs, the ends and needs of any human life. The realization of freedom and dignity in the lives of individual human beings thus gives us a shareable conception of well-being, capable of grounding obligations of concern between persons without wrongfully subordinating some to the subjective ends, wants, or needs of others.

Yet even if we have a conception of well-being that is capable of grounding a good that is truly common, we know from *Maisie* that the actualization of that common good may nevertheless be oppressive. In Maisie’s proposal to Sir Claude, we saw that although the law of a moral community must show positive concern for the autonomous flourishing of its members, the citizens’ obligations of concern for one another must be limited by the requirements of respect for the citizen as a private individual with a separate life to lead. The individual cannot regard her own life as an indistinguishable unit of a collectivity; she cannot regard her own dreams and
disappointments as mere aspects of our common humanity. If the law is to be recognizable as a law of one’s own, what each individual is required to do for the sake of others’ well-being must be limited by the recognition that each individual has a life of her own and a special interest in, and responsibility for, how that life goes. This limit is discernible as well in the cases we have considered, particularly in those invoking unjust enrichment, unconscionability, and the neighbour principle.

In *Pettkus v. Becker*, Justice Dickson’s ruling that Becker was entitled to a one half interest in the land and the business was not based on the simple fact of her need or of her having formed an expectation. The ruling, rather, was based on the fact that Becker’s expectation was encouraged by Pettkus, which meant that her expectation was not merely subjective but was reasonable as between the parties to the relationship. Under these circumstances, requiring Pettkus to fulfill the expectation that he encouraged and from which he benefitted demonstrates concern for Becker’s interest in the security of her life plan, but it is also wholly consistent with the idea that Pettkus has a separate life that is fundamentally his own, and that he has no obligations of unilateral service to another human being.

Unconscionability is an exception to the usual rule that a voluntary agreement between two persons is sufficient to determine their positive obligations to one another. *Lloyds Bank v. Bundy* and *Walker Thomas* show that it is an exception for one who, because of ignorance or desperation, is in a position of unequal bargaining power and agrees to contractual terms wherein she alienates the material conditions of her well-being. But unconscionability includes its own exception for the one who makes what appears to be an improvident bargain with independent advice and full knowledge and understanding of what she is doing. This, we saw, is the exception that acknowledges each individual’s freedom to shape a life of her own, even if
everyone else thinks her mistaken about whether the choices she is making will be good for her. It is an exception that reflects, not a failure of care, but the recognition that the person we care about is a person, a dignified human being, capable of self-determination and responsibility.

Finally, we said that Lord Atkin’s neighbour principle—“[y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour”—insists that the community governed by private law is not the Christian community of unselfish brotherly love. Yet, the neighbour principle is nevertheless a principle of community and not merely a principle that governs the contingent interactions between self-sufficient agents who owe one another nothing but respectful non-interference. We said that Lord Atkin’s principle, like Maisie’s, may be described as a principle of mutual concern limited by mutual respect. It says that the interdependent members of a community must positively care for one another’s well-being, for the conditions of one another’s realized autonomy. Yet the obligation of care is limited to the avoidance of harm and is circumscribed by concepts such as foreseeability and reasonableness as between the parties, concepts that allow each individual to give reasonable priority to her own ends. These limits ensure that the community of private law is a community in which the lived acknowledgment of mutual interdependence is consistent with the distinctness of individual persons leading lives that are fundamentally their own.

In these novels, I have tried to show, James has put before us the complex idea that human beings are fundamentally separate centres of self-determining activity of equal and inviolable worth and at the same time needy beings whose freedom and dignity require material support for their realization and relationships of mutual recognition for their validation; that although we are separate from others, and our minds opaque to one another, our connections with others in
relationships of mutual recognition are nevertheless an essential part of who we are and an essential ingredient of our well-being; that although human dignity is intrinsic and untouchable, our sense of our own worth depends upon others and can be degraded; that although we are beings capable of choice and therefore with the dignity of responsibility, it is nevertheless also the case that things happen to us and that these happenings effect our ability to shape lives we can regard as our own. This quality of human existence, I have argued, is just what is captured in Strether’s complicated piece of advice to Little Bilham: “One lives in fine as one can...Still, one has the illusion of freedom, therefore don’t be like me without the memory of the illusion...Live!”

This means that the vindication of the inviolable worth of the concrete individual, and so the individual’s ability to regard the law as a law of her own, requires a law that both respects the abstract agent’s separateness and freedom to choose and shows concern for the determinate, dependent individual’s well-being and autonomous flourishing, for these two ideas are complementary parts of a complete understanding of human dignity and freedom. This, moreover, is just what was implicit in our discussion of the Kantian and feminist conceptions of personhood and freedom. We saw that respect for the abstract capacity for choice could not vindicate the individual’s inviolable worth without recognizing the normative significance of the realized freedom and dignity of the determinate and dependent human being. We saw that care for well-being and flourishing autonomy could not vindicate the individual’s inviolable worth without acknowledging human separateness and without an understanding of dignity sufficiently abstract to include all human beings. The deficiencies in each of these conceptions indicated the need for a conception of care for well-being consistent with the equal and inviolable worth of the separate individual. *The Portrait of a Lady, What Maisie Knew*, and *The Ambassadors*, in
illuminating a shareable understanding of human well-being and pointing to the respect-based limits to its pursuit, suggest a way in which such a conception might be developed.

In response to the claim that law finds its justification simply in its own coherence, I have argued that law’s claim to legitimate authority must find its validation in an external point of view. I have argued that this external point of view must be the point of view of the subjects it purports to bind, since only they can validate law’s claim to be authoritative for them. This raises again the difficulty we have just seen. How can the law defer to the validation of the determinate human subject without undermining its universality? On the other hand, how can a law that defers only to the validation of an abstract moral personality legitimate its claim to be authoritative for actual human beings? I think the novels we have considered have put before us a conception of the person that suggests a way out of this dilemma, a conception that reconciles law’s universality with its deference to concrete subjects. The person to whom law must defer for the validation of its authority is neither the abstract free agent nor the idiosyncratic subjective character. It is the separate, dignified human being capable of choice and self-determination who is nevertheless vulnerable to circumstance and dependent upon others in her effort to shape a determinate life she can regard as her own.