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WHEN RIGHTS CONFLICT

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You and I are neighbors, with our houses situated closely together. You lead a group of rock musicians who can practice only in the evenings in your backyard; while I, on the other hand, enjoy nothing more than quiet evenings spent on my porch accompanied by the sounds of frogs and crickets. Presumably, you have a right to pursue your musical career, and I have a right quietly to enjoy my property. If we do indeed have these rights, however, then they seem to conflict with each other, in that your exercising your right is incompatible with my exercising mine.

Examples like this generate a number of questions. One is whether such cases do indeed represent conflicts of rights or, more fundamentally, whether there is any philosophically interesting sense in which rights *can* conflict. If the answer to this latter question is "yes," then the obvious next questions are whether conflicts of rights are philosophically problematic and, if so, how these problems should be avoided.

I propose to address all of these questions here, devoting most of my attention to moral rights. Doing so will require pursuing two distinct inquiries. The first focuses on the relations between rights and certain other concepts—especially the concepts of obligatoriness and of permissibility. The second inquiry concerns the relation between, on the one hand, general principles affirming the existence of rights (for example, the principle that people have a right of self-defense) and, on the other, propositions attributing rights to particular individuals in specific situations (for example, the proposition that Al has a right to defend himself against Brenda's attack now).

Although both of these inquiries pertain to the logical behavior of rights, they are worth pursuing separately. Moreover, determining how moral rights are related to concepts like moral obligatoriness and permissibility should be viewed as explaining the role played by rights in moral theory. It seems to me that some recent discussions of rights suffer greatly from their failure even to attempt such an explanation.[1]

1. Two writers who *do* offer such an explanation are L. W. Sumner and Carl Wellman. I will have more to say about both of their positions as the discussion proceeds.

I. THE CONSISTENCY PROBLEM

As Hillel Steiner points out, where matters of rights are concerned: "The beginning of wisdom . . . is widely agreed to be the classification of juridical positions as developed by Wesley N. Hohfeld."[2] The "classification of positions" to which Steiner refers here includes a distinction among four types of legal rights: claims, privileges, powers, and immunities. According to Hohfeld, the differences among these categories of rights must be recognized when attempting to analyze "the most complex legal interests, such as trusts, options, escrows, 'future interests,' corporate interests, etc."[3]

Hohfeld maintains that claims are legal rights "in the strictest sense," and that they are "correlated with" (equivalent to) legal duties. Moreover, legal duties are relational and so, therefore, are claims. If, for example, Cal has a legal duty to perform some action, then this is a duty "towards" some specific person—Dora, say—and correlated with Cal's duty is Dora's claim against Cal to his performance of the action in question. The relational character of legal duties is also inherited by legal privileges. A privilege regarding some specific person and action is the absence of a duty to that person to refrain from performing that action. Privileges are therefore relational permissions: If Ed has a privilege regarding Flo and action A, then he has a permission regarding Flo to perform A.

Suppose now that we translate Hohfeld's explanations of legal claims and privileges into parallel explanations of moral claims and privileges. We would then have two types of moral rights: moral claims, which are equivalent to relational moral duties, and moral privileges, which are relational moral permissions. With these moral analogues of Hohfeldian legal rights in mind, let us return to the example with which this discussion began. Recall that if you have a right to practice with your musical group and I have a right to enjoy quiet evenings on my porch, then our rights seem to conflict, in that your exercising your right is incompatible with my exercising mine.

If our respective rights are interpreted as claims, then it would appear that your right is a claim against me that I not interfere with your practice

2. HILLEL STEINER, AN ESSAY ON RIGHTS 59 (Oxford: Blackwell 1997). Hohfeld's account is contained in WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (Yale University Press 1919). Although Steiner is doubtless correct in what he says about how Hohfeld's account is regarded, I doubt that—at least with respect to its relation to moral rights—this account is in fact the beginning of wisdom. In any case, the view of moral rights that I present here is definitely not Hohfeldian in character.

Steiner, however, does rely heavily on Hohfeld's account; and, in various ways, so do Sumner, Wellman, and Judith Thomson in their books on rights. L. W. SUMNER, THE MORAL FOUNDATION OF RIGHTS (The Clarendon Press 1987); CARL WELLMAN, A THEORY OF RIGHTS (Rowman and Allanheld 1987) and REAL RIGHTS (New York: Oxford University Press 1995); JUDITH JARVIS THOMSON, THE REALM OF RIGHTS (Harvard University Press 1990).

3. HOHFELD, *supra* note 2, at 34. This remark suggests that Hohfeld's account applies to a rather restricted range of legal rights. In particular, it seems inapplicable to legal rights that concern what John Rawls calls "constitutional essentials and matters of basic justice."

sessions, and my right is a claim against you that you not interfere with my enjoying quiet evenings. It is at least unclear, however, whether such claims can be exercised—and it is therefore unclear how they can conflict with each other. Even assuming that sense can be made of exercising claims and of our claims' conflicting, however, it would seem that they actually conflict only if the duties to which they are respectively equivalent conflict; and these duties do not conflict with each other.[4] That is, your claim is evidently equivalent to a duty of noninterference on my part, and my claim is evidently equivalent to a duty of noninterference on your part. These duties do not conflict because your fulfilling yours is compatible with my fulfilling mine. And since our duties do not conflict, neither presumably do the claims to which they are respectively equivalent.[5]

To be sure, conflicts of claims might correspond to conflicts of duties in particular cases, but such conflicts would be quite uncommon. Moreover, the conflicts here would be *inter*personal rather than *intra*personal, and while the latter are notoriously problematic, the former are at least less obviously so.[6] If, therefore, moral rights are interpreted as claims, then philosophically interesting conflicts of rights are rare at best, and are not exemplified by many cases in which rights seem intuitively to conflict (cases like the one we have been discussing in particular).

Assume now that our respective rights are moral privileges or permissions. Then we can make perfectly good sense of what would count as exercising our rights, and also of the idea that our rights conflict in that your exercising yours is incompatible with my exercising mine. Given that each of our privileges to act is nothing more than the absence of any duty to refrain, however, the fact that our rights conflict seems even less philosophically interesting than is the case if our rights are interpreted as claims.

Since, in addition to legal claims and privileges, Hohfeld also regards legal powers and immunities as types of legal rights, it might seem appro-

4. It is sometimes suggested that right-holders are able to affect the duties implied by their rights (by canceling the duties, for example), and that exercising rights can take the form of utilizing this ability. If this interpretation of exercising rights is applied to the case under discussion, then our rights do not conflict, because your exercising your right is compatible with my exercising mine. This fact is irrelevant, however, to whether our rights conflict under the more natural interpretation of "exercise," according to which people exercise rights when they engage in activities in which they have rights to engage.

5. I can, of course, fulfill my duty while sitting on my porch, whereas you cannot fulfill your duty by practicing. This might seem to suggest that my claim takes precedence over yours, but such a conclusion should be resisted since it would be based on morally insignificant features of the case.

6. If X has a duty to do Y and a duty to refrain from doing Y, then X's duties *intra*personally conflict with each other. These conflicts generate contradictions if both members of at least one of two (very plausible) pairs of propositions are true. The first pair is: If X has a duty to do Y, then X is permitted to do Y; and if X has a duty to refrain from doing Y then X is not permitted to do Y. And the second pair is: If X has a duty to do Y and X has a duty to refrain from doing Y, then X has a duty both to do Y and to refrain from doing Y; and if X has a duty to do Y then X is able to do Y.

For an extremely interesting examination of interpersonal moral conflicts, see Heidi Hurd's discussion of what she calls the "correspondence thesis" in her book MORAL COMBAT (Cambridge University Press 1999).

priate at this point to consider whether there are analogous types of moral rights that can conflict with each other and whose conflicts are philosophically problematic. I will set this question aside until later, however.

Let us now examine conflicts of rights under an interpretation of rights that diverges significantly from the Hohfeldian model.

According to Joel Feinberg:

> When a person has a legal claim-right to X, it must be the case (i) that he is at liberty in respect to X, i.e. that he has no duty to refrain from or relinquish X, and also (ii) that his liberty is the ground of other people's *duties* to grant him X or not to interfere with him in respect to X.[7]

Feinberg cautions readers that his explanation concerns "only one of the four concepts of a right distinguished by Wesley Hohfeld, namely, that which Hohfeld called 'claim-rights.'"[8] He goes on to "concede that a full theory of rights would also deal with 'powers' and 'immunities.'"[9]

Feinberg appears to be suggesting that his claim-rights are Hohfeldian claims, which, along with powers and immunities, are types of legal rights identified by Hohfeld. In fact, however, Feinberg's claim-rights are very different from Hohfeld's claims in a number of respects. For one thing, Feinberg equates his claim-rights with "valid" claims and argues that valid claims are significantly different from mere claims. Additionally, whereas Feinberg defines claim-rights in terms of permissions on the part of right-holders and duties on the part of others, for Hohfeld an individual's claims are nothing more than others' duties. And finally, there is no hint in Feinberg's explication of legal rights that the duties to which it refers—and hence the rights themselves—are relational.

In virtue of these differences between Feinberg's and Hohfeld's explanations of legal rights, corresponding accounts of moral rights will also differ from each other. If we follow Feinberg, we equate an individual's moral rights not simply with moral duties on the part of others or with permissions on the part of right-holders, but with these duties and permissions in combination. Unlike a Hohfeldian interpretation of rights as claims, this alternative conception applies more naturally to rights to do things than to rights that others do things, leading to this equivalence: X has a right to do Y if and only if X is permitted to do Y and others have duties to refrain from interfering with X's doing Y.

If we now apply this equivalence to our example, we can reason as follows: since you have a right to practice with your group, you are permitted to do so; but since I have a right to enjoy quiet evenings and your practicing

7. Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 249 (1970), *reprinted in* Joel FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 143–158 (Princeton University Press 1980).

8. FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY, *supra* note 7, at xi.

9. *Id.*

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interferes with my enjoyment, you have a duty to refrain from practicing. But if you do indeed have such a duty, then you are not permitted to practice, and we have therefore derived the inconsistent proposition that you are permitted to practice and you are not permitted to practice.

This "consistency problem" arises from two assumptions. The first is that rights interpersonally conflict: There are situations in which one person's exercising her rights is incompatible with another person's exercising his.[10] The second assumption is that all of the following propositions are true: (a) if X has a right to do Y, then X is permitted to do Y; (b) if X has a right to do Y, then others have duties to refrain from interfering with X's doing Y; and (c) if X is permitted to do Y, then X has no duty to refrain from doing Y.[11] We cannot avoid the consistency problem by rejecting proposition (c), since it is surely unassailable. So a theory of moral rights can avoid the consistency problem in only one of two ways. The theory must either guarantee somehow that rights will not conflict, or it must contain no rights to act that imply both permissions on the part of right-holders and duties of noninterference in others.

Theories of moral rights that exactly parallel Hohfeld's account of legal rights will contain no rights of which both (a) and (b) are true. On these theories, proposition (a) will be true of the analogues of Hohfeldian privileges, but (b) will be false of these analogues. If, on the other hand, the rights to which (a) and (b) refer are interpreted as moral analogues of Hohfeldian claims, then (b) will be true but (a) will be false (because claims are nothing more than duties on the part of individuals other than the claimants). It is noteworthy that a number of theorists who closely follow Hohfeld in certain respects nevertheless endorse rights of which both (a) and (b) are true (henceforth "permission/duty rights"—or simply "PD rights"). These theorists run afoul of the consistency problem unless they can prevent rights from conflicting.

Judith Thomson falls into this category. She begins by rejecting Hohfeld's interpretation of privileges, according to which they are equivalent to liberties or permissions—which are in turn equivalent to the absence of duties. On Thomson's view, one is at liberty to perform some action only if she has claims against others not to be interfered with in certain ways and hence

10. According to Jeremy Waldron, conflicts of rights are conflicts of their corresponding duties. JEREMY WALDRON, *Rights in Conflict*, *in* LIBERAL RIGHTS (New York: Cambridge University Press 1993). On Waldron's view, then, your right to practice with your group would not conflict with my right quietly to enjoy my property, since our corresponding duties would not conflict. I see no reason to accept Waldron's narrow interpretation of conflicts of rights, however.

11. As I have stated the consistency problem, it arises in situations where individuals seem to have rights to perform incompatible actions. The problem also arises in cases like these: X has a right to do Y; Z has a right not to receive some treatment T; and X's doing Y is incompatible with Z's not receiving T. So, for example, suppose that X has a right of self-defense that cannot be exercised without killing Z. Suppose too that Z has a right not to be killed, and that Z's right implies that others have duties to refrain from killing him. Then, given the assumptions in the text, X is permitted to defend herself and has a duty not to; and this example therefore generates a consistency problem.

only if others have duties to refrain from interfering in those ways.[12] As Thomson interprets liberties, then, they are PD rights; and if they conflict in particular cases, then they generate the consistency problem. Thomson could avoid this problem if she could show that situations like this never arise: Some individual X has a claim against another individual Y that Y does not interfere with X in a certain way, and Y has a right to act in that way. In fact, Thomson's account does incorporate a version of this approach to the consistency problem, and I will examine it later.

L. W. Sumner and Carl Wellman also incorporate PD rights into their accounts, which in many other respects are Hohfeldian in character. In contrast to Thomson, Sumner and Wellman accept Hohfeld's construal of privileges. That is, they equate privileges with (relational) permissions or liberties and they deny that one's being permitted to act implies duties of noninterference on the part of others. They then introduce the notion of a "liberty right," which is associated in complex ways with both permissions on the right-holder's part and duties in others. Sumner and Wellman distinguish the "core" of a right from its "periphery" or "perimeter," and maintain that liberty rights have liberties at their cores and claims at their perimeters.[13] These claims are correlated with duties of noninterference with the core liberties. It is unnecessary to examine Sumner's and Wellman's explanations in detail in order to recognize that their liberty rights are PD rights and give rise to the consistency problem in conflict situations.[14]

As I noted above, theorists who endorse PD rights can avoid the consistency problem only by establishing that these rights cannot conflict in the manner described earlier. I will later examine attempts in this direction, but I first want to consider whether there are any good reasons for including PD rights in one's moral theory. The need to answer this question is particularly pressing for theorists whose accounts of moral rights are patterned after Hohfeld's explanation of legal rights but also include PD rights. Such accounts diverge from the Hohfeldian model in ways that give

12. THOMSON, *supra* note 2, at 52f. It seems to me that Thomson ignores an important distinction. Thus, suppose that I am permitted to look at my neighbor's house. Is this anything more than my having no duty to refrain from doing so? According to Thomson, others—including my neighbor, presumably—have duties not to interfere *in certain ways* with my looking at my neighbor's house. She is surely right about this. For example, others have duties not to prevent me from looking at my neighbor's house by killing me. But the fact that this is so does not imply the existence of duties of noninterference that are correlated with a particular permission on my part. Rather, the duty to refrain from killing me is implied by my right to life.

13. SUMNER, *supra* note 2, at 48–49; WELLMAN, A THEORY OF RIGHTS, *supra* note 2, at 63f.

14. In addition to liberty rights, Sumner's and Wellman's theories include "claim-rights" that are also related to claims and liberties. These claim-rights do not count as PD rights, however, since they do not conform to the general schema "X has a right to do Y only if X is permitted to do Y and others have duties to refrain from interfering with X's doing Y." Hence, Sumner's and Wellman's claim-rights do not generate the consistency problem as I have characterized it. Whether claim-rights give rise to some other sort of consistency problem need not be settled here.

rise to a serious philosophical difficulty. Why do these quasi-Hohfeldian theories contain PD rights—rights that have no Hohfeldian legal correlates and that generate contradictions in conflict situations?

II. MORAL RIGHTS AND INDIVIDUAL AUTONOMY

With few exceptions (perhaps the most notable being Thomas Hobbes), philosophers who claim to take rights seriously agree that the rights of individuals imply corresponding duties on the part of others. These philosophers generally agree that whereas one might have a genuine theory of rights that identifies all rights with Hohfeldian claims, one who identified all rights with Hohfeldian privileges would not really have a theory of rights at all. Some reasons in support of this way of thinking about rights will be offered later. For now, however, it will be accepted without argument. Hence, in asking why PD rights should be included in a theory of rights, we are asking why any rights that imply duties in others (henceforth "strong rights") should be interpreted as PD rights—that is, as implying permissions on the part of right-holders.

Both Sumner and Wellman argue against the idea that rights can be mere claims, and they therefore implicitly deny that strong rights are equivalent to duties on the part of others. Both argue that rights have complex structures composed of various intricate combinations of claims, privileges, powers, and immunities. As was pointed out above, moreover, both writers include liberty rights in their theories. These are rights to act that imply permissions to act and duties not to interfere with the exercise of those permissions. And, of course, it is in virtue of possessing these features that liberty rights give rise to the consistency problem in situations where they conflict with each other.

Before examining Sumner's and Wellman's arguments for the proposition that strong rights imply permissions, I should explain why I am ignoring powers and immunities in my discussion of moral rights.

According to Hohfeld, legal powers and legal immunities are types of legal rights, whereas both Sumner and Wellman view the former two concepts as components of the latter. I am not sure which of these views is correct, but I am far from being persuaded that the moral analogues of either should be accepted. That is, even assuming that there are such things as moral powers or moral immunities, I doubt that they should be regarded either as types of moral rights or as components of moral rights. Moreover, there are reasons for rejecting both of these latter interpretations of moral powers and immunities.

When discussed in connection with rights, powers are typically characterized as abilities of a sort. If some X has a certain right, then X has the power—the ability—to affect the duties implied by his right. Immunities can be explained in terms of powers: X's immunity relative to another

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person Y is the absence of a power in Y relative to X. Hence both powers and immunities are clearly properties of persons rather than of actions. And while there is nothing incoherent in the idea that explications of rights include references to properties of persons, neither is it obvious why such references should be included. An analogy might help explain my reservations here.

As everyone knows, "'ought' implies 'can'": if X is obligated to do Y, then X is able to do Y. Shall we interpret the abilities that are related to obligations in this way as constituents of the obligations? I do not think we should. It seems to me that we should follow common practice and regard obligations as (perhaps complex) properties of actions alone, while treating the abilities that are related to obligations as properties of those who bear the obligations. We can therefore agree that, if X is obligated to do Y, then X is able to do Y, while recognizing that this ability is a property of X rather than of Y, and while denying that X's ability is a component of X's obligation.

Similarly, we should treat moral powers and immunities as relevant to discussions of rights only by way of their being properties of right-holders. In this vein, we could agree that if X has a certain right, then X has corresponding powers and immunities, while recognizing that these powers and immunities are properties of X and while denying that powers and immunities are properties of rights. Rights themselves can then be interpreted as properties of actions alone. If, therefore, strong rights imply permissions, then strong rights are properties of the right-holders' actions (and perhaps the actions of others as well). If strong rights do not imply permissions, then strong rights are properties of the actions of individuals other than the right-holders.[15]

Let us now return to Sumner's and Wellman's arguments in support of the proposition that strong rights do indeed imply permissions.

As part of his argument in support of this proposition, Wellman proposes what he regards as a counterexample to the idea that strong legal rights are nothing more than duties in others. He imagines a legal system that prohibits interference with certain sorts of actions but that also prohibits the performance of those actions. He then asserts that "it would be a mockery to say that such a legal system confers upon the individual the liberty-right" to perform the prohibited actions.[16] As it applies to moral rights, Wellman's contention would presumably be that one lacks a moral right to perform an action if the

15. Sumner argues persuasively that moral rights are morally justified conventional rights. If his argument succeeds, and if Hohfeld's interpretation of powers and immunities as types of legal rights applies to conventional rights in general, then Sumner demonstrates that there are moral analogues of Hohfeldian legal powers and immunities. Sumner's argument is both complex and subtle, and if it has flaws, I certainly cannot point them out here. Let me simply emphasize that Sumner's interpretation of moral rights, while owing a great deal to Hohfeld's account of legal rights, also diverges from the latter in significant respects. It seems to me that Sumner's theory should differ from Hohfeld's in an additional respect, namely in not treating moral analogues of Hohfeldian powers and immunities as types of moral rights.

16. WELLMAN, A THEORY OF RIGHTS, *supra* note 2, at 64.

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action is morally prohibited—and this regardless of whether others have duties to refrain from interfering with that action's being performed.

Sumner's argument is more complex and his conclusion is more sweeping. He distinguishes between models of rights that interpret them as protected interests on the one hand, and as protected choices on the other. He argues in favor of the latter interpretation and states that "the choice conception requires every right to contain a full liberty."[17] Since a full liberty is a permission to act or to refrain, Sumner is arguing that strong rights to act imply permissions to act.

These arguments are closely related to Wellman's and Sumner's explanations of something much more fundamental—namely, the distinctive role played by moral rights in moral theory. According to Wellman:

> What is distinctive about rights is that they concern the distribution of freedom and control between the possessor of a right and one or more second parties against whom the right holds. The essential function of a right is to confer dominion on the right-holder. Accordingly, I have defined a right as a system of Hohfeldian positions that, if respected, confer dominion on one part in face of a second party in a potential confrontation over a specific domain and that are implied by the norm or norms that constitute that system.[18]

And, in Sumner's words, we can:

> assign a distinctive normative function both to rights and to those moral theories which, in one way or another, take rights seriously. We can say that to regard individuals as having certain moral rights is to regard them as being autonomous within the domains specified by the contents of the rights.[19]

Sumner goes on to state that his "notion of autonomy within a domain is essentially similar to the notion of dominion" in Wellman's theory.[20]

Assuming that this last remark of Sumner's is correct, then he and Wellman can be seen as advancing the following argument: (strong) rights play a distinctive role in moral theory—a role best explained in terms of the idea of autonomy (or dominion) within a domain of activity; and, in virtue of this role, rights to act must imply permissions both to act and to refrain from acting. I think that this argument is correct in two significant respects but mistaken in another. It is correct in emphasizing the importance of the role played by moral rights in more general moral theory, and in referring to this role in defense of the claim that strong rights to act imply permissions to act. I think that the argument is mistaken, however, in relating this last claim to the notion of autonomy.

The basic problem here is that the concept of permissibility is essentially

17. SUMNER, *supra* note 2, at 49.
18. WELLMAN, REAL RIGHTS, *supra* note 2, at 107.
19. SUMNER, *supra* note 2, at 98.
20. SUMNER, *supra* note 2, at 98, n. 4.

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unrelated to the concept of autonomy.[21] Permissibility is a feature of actions, and a theory concerned with the moral status of actions will specify considerations relevant to whether particular actions are permissible. Insofar as it applies to individuals (as opposed to political communities), autonomy is a feature of moral agents, whose presence in particular individuals is determined by considerations very different from those on which the permissibility of actions depends. Hence a moral theory might have little if any room for actions that are permissible but not required (and hence little if any room for rights as interpreted by Sumner and Wellman), and yet be completely compatible with a robust conception of individual autonomy.[22]

I am suggesting, then, that there is something seriously wrong with attempting to base the claim that strong rights imply permissions on claims about autonomy. I believe nevertheless that strong rights do imply permissions, and I propose now to argue for this proposition. While my argument is similar in certain respects to those advanced by Sumner and Wellman, it is also significantly different from theirs.

III. MORAL RIGHTS AS MORALLY SIGNIFICANT PERMISSIONS

Let me begin by emphasizing a distinction within the area of rights that is much the same as a certain distinction drawn by Sumner and Wellman, although my characterization of the distinction will differ from theirs.

Earlier, I referred to Hohfeldian relational duties—duties that are commonly interpreted as having what Sumner calls "directionality": an individual's duty is relational just in case it is a duty *towards* some other specific individual. Sumner describes two ways in which the directionality of relational duties might be interpreted, one corresponding to the "benefit" account of rights as protecting interests, the other to the "control" account of rights as protecting choices:

> On the benefit analysis a relational duty is owed to the party who is the intended beneficiary, while on the control analysis a relational duty is owed to the party who has the power to manipulate it (by annulling it, postponing performance of it, seeking remedies for non-performance, and so on).[23]

21. That is, unless autonomy is interpreted as a PD right to act in certain ways, in which case the argument under discussion would beg the question at issue.

22. Thus consider the following version of act-consequentialism: X has a duty to do Y if and only if Y produces greater intrinsic value than does X's refraining from doing Y; and X has a duty to refrain from doing Y if and only if X's refraining from Y produces greater intrinsic value than does X's doing Y. This theory has very little room for actions that are merely permissible—that is, actions whose performance and nonperformance are both permissible. Now consider a deontological theory like W. D. Ross's, although without his duty of beneficence. On this theory, most actions that people perform are merely permissible, since most actions are not duties of fidelity, nor of reparation, nor of gratitude, nor of justice, nor of nonmaleficence. Yet it would surely be a mistake to think that our act-consequentialist theory need be any less congenial to the concept of autonomy than is our deontological theory.

23. SUMNER, *supra* note 2, at 100.

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It seems to me, however, that relational duties can be explained without relying on claims about intended beneficiaries or about powers to manipulate them.

Note first of all that at least many of the duties typically classified as relational have this feature in common: They are incurred by the performance of certain types of actions. So, for example, duties to keep promises and to repay debts are regarded as paradigmatically relational; and people incur such duties by making promises and borrowing money respectively. Now, it is no accident that the duties that people incur by promising or by borrowing turn out to be relational, because acts of promising and borrowing are essentially relational in character. Using some familiar terminology, I will refer to duties that are incurred by performing actions that *are* essentially relational as "special" duties. All other duties (for example, duties to refrain from harming others and to refrain from invading their privacy) will be referred to here as "general." While there might be some sense in which general duties are relational, this would not be the sense in which special duties are; and it is at least unclear whether general duties are relational in any philosophically interesting way.[24]

Let us now say that, when people do incur special duties, they confer rights on others—rights which themselves will be referred to here as "special." For example, if X promises Y to do Z, then X thereby incurs a duty to do Z and confers a right on Y that X does Z; and if X borrows money from Y, then X thereby incurs a duty to repay Y and confers a right on Y to be repaid by X. No acts of conferral are required for the possession of "general" rights, however. For example, X can have a right not to be killed without anyone's having conferred that right on X; and the duty to refrain from killing X that is implied by X's right can be possessed by others without their having incurred that duty by acting in certain ways.

What I say about rights in the discussion that follows should be understood as applying to general rights but not necessarily to special rights. I am issuing this *caveat* because I am not at all certain that special rights occupy the same niche in moral theory as general rights do—or, indeed, that special rights play *any* really distinctive role in moral theory. I do not want to take a stand on this issue here, however, so I will leave open the question of whether my account of rights is inapplicable to special rights.[25]

24. I can imagine someone insisting that all duties are special and that "general duties" should be referred to as what people *ought* to do or what morality *requires* of them. I am quite sympathetic to this position, but I will stick with the term "duty" for simplicity's sake. It should be clear enough, I think, that nothing of importance to my discussion hangs on this choice of terminology.

25. I noted at the outset of this discussion that Hohfeld regards his analysis of legal rights as necessary for a proper understanding of legal notions such as "trusts, options, escrows, 'future interests,' [and] corporate interests," and that Hohfeld interprets these rights and their correlated duties as relational. Moral analogues of Hohfeld's account would therefore apply most naturally to special rights and might have no application at all to general rights. If this way of thinking about Hohfeld's account is correct, then we have an explanation of why writers who follow Hohfeld in developing their theories of moral rights typically produce theories that are only quasi-Hohfeldian in character.

Now consider a moral theory that contains duties of fidelity, reparation, gratitude, and nonmaleficence, and no others. Then whether an action is permissible or not depends on whether it falls within one or more of our theory's four duty-categories. Suppose that X's doing Y falls within none of these categories, so that X's doing Y and X's refraining from doing Y are permissible. Suppose further that Z has a duty not to interfere with X's doing Y. Then this is because Z's refraining from interfering is a duty of fidelity, or of reparation, or of gratitude, or of nonmaleficence. In other words, Z's duty has nothing to do with X or with Y or with X's being permitted to do Y.

Note that this result is independent of the nature of X's action. For example, X's doing Y might consist in X's concealing a piece of personal information about himself, or it might consist in X's looking at his neighbor's house. Assuming that our theory would not locate either of these actions (as described) in any of our duty-categories, they are morally indistinguishable from each other. Yet it seems plausible to say that people have strong rights to conceal personal information about themselves but no strong rights to look at their neighbors' houses. That is, people have no duties to refrain from interfering with others' actions *qua* their being instances of looking at their neighbor's houses; but people do have duties of noninterference with others' actions *qua* their being instances of concealing personal information about themselves.

There is no way in which to reflect this difference on any theory like the one we are now imagining—that is, on any theory that treats the descriptions "looking at one's neighbor's house" and "concealing personal information about oneself" as morally on a par. The most we can derive from such a theory are propositions like these: X is permitted to look at his neighbor's house and others have duties not to interfere with his doing so; X is permitted to conceal the information and others have duties to refrain from interfering with him. Even if both of these propositions are true, however, they fail to reflect the difference between mere permissions and strong rights. This difference resides in the fact that, in some cases, duties not to interfere with others' actions are simply conjoined with permissions to perform those actions; while in other cases, people have duties to refrain from interfering with others' actions *because* the actions are permissible.

I can explain what I have in mind here by returning to Feinberg's definition of a legal right—or rather a component of that definition whose significance even Feinberg seems to have overlooked.

Recall that, according to Feinberg:

> When a person has a legal claim-right to X, it must be the case (i) that he is at liberty in respect to X, i.e. that he has no duty to refrain from or relinquish X, and also (ii) that his liberty is the ground of other people's *duties* to grant him X or not to interfere with him in respect to X.

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Note that Feinberg interprets the liberties implied by rights as standard permissions—i.e., as the lack of duties; but that he regards these liberties as the *ground* of duties in others.

The problem, however, is that someone's being at liberty or permitted to act—that is, the mere absence of any duty to refrain—is incapable by itself of grounding duties in others (or anything else, for that matter). If there are permissions that can perform the task assigned to them by Feinberg, they must have a kind of moral significance that is completely lacking in *ordinary* permissions. But are there such things as morally significant permissions? Are there act-types that are morally significant even though neither required nor prohibited?

John Rawls answers this question affirmatively, although in a very different context:

> In studying permissions one wishes to single out those that are significant from a moral point of view and to explain their relation to duties and obligations. Many such actions are morally indifferent or trivial. But among permissions is the interesting class of supererogatory actions.[26]

Elsewhere, however, Rawls states that:

> once all the principles defining duties are chosen, no further acknowledgments are necessary to define permissions. This is because permissions are those acts which . . . violate no duty or natural duty.[27]

In these words, Rawls appears to be echoing the common view that permissions are the morally insignificant act-types that remain after moral theories divide morally significant act-types into those that are required and those that are prohibited. Yet if, as Rawls claims, there are such things as morally significant permissions, then their identification is no less a positive part of moral theorizing than is identifying requirements and prohibitions.

The existence of supererogatory acts is not at issue here, of course. Questions about supererogation aside, however, it seems to me that Rawls's remarks about morally significant permissions dovetail nicely with the idea (implicit in Feinberg's definition) that if some X has the right to do Y, then others have duties of noninterference *because* X is permitted to do Y. On this line of thinking, the concept of a strong right presupposes the concept of a morally significant permission. This latter concept provides a way (the best way, I think) in which to distinguish cases in which individuals have strong rights to act from cases in which they are permitted to act and others just happen to have duties to refrain from interfering.

If rights are to play a genuinely distinctive role in moral theory, then morally significant act-types cannot be limited to the required and the

26. JOHN RAWLS, A THEORY OF JUSTICE 117 (Harvard University Press 1971).
27. *Id.* at 116.

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prohibited. There must also be morally significant act-types that fall into neither of these two categories and hence whose performance and nonperformance are permissible. The moral significance of these permissions consists at least partly in their grounding—and explaining—various duties. While moral rights might be equated with certain morally significant permissions on the part of right-holders together with duties in others that are based on these permissions, I see no very good reason not to opt for the simpler alternative of equating moral rights with the morally significant permissions themselves.[28] While this interpretation of rights might seem to imply that all rights are rights to act, I will presently explain why this is not in fact the case.

We now have an answer to the question of why strong rights imply permissions. They do so because they *are* permissions—not ordinary permissions, but permissions that are morally significant in that they constitute the grounds of certain duties. Under this interpretation of strong rights, their conflicts with each other generate the consistency problem, and justifying their inclusion in moral theory therefore seems appropriate. To put this point another way: I have argued that if rights are to play a genuinely distinctive role in moral theory, they must be equated with (or understood as at least implying) morally significant permissions; and to justify this interpretation of rights, some reasons must be provided for thinking that they do indeed play a distinctive role in moral theory.

The reasons I shall propose here center on the claim that certain duties are best explained by moral theories that accommodate rights as I am characterizing them in this discussion.[29] These duties can be illustrated by means of an example.

Suppose you discover that I have been secretly spying on you by peeking beneath the drawn shade of your kitchen window. You are understandably outraged, even though I observe only quite ordinary activities and even though you know that there is no way for me to use the information I obtain against you, that I will never spy on you again, and that I will not reveal what I have seen to anyone else. Why are you outraged by my spying? Because in doing so I invade your privacy. More specifically, I make decisions regarding the disposition of personal information about you when these decisions are yours to make. If you want people to know that you eat hot fudge sundaes for breakfast behind the drawn shades of your kitchen, then you are free to divulge this information; but if you do not want it revealed, then you are free to keep it secret. Moreover, it

28. According to Feinberg, rights are definable in terms of permissions that are the grounds of duties in others. According to some other writers, rights themselves are the grounds of duties in others. *See, e.g.*, Joseph Raz, *On the Nature of Rights*, xciii MIND, 196 (1984). Feinberg's and Raz's positions turn out to be more similar than they might first appear if rights are indeed morally significant permissions.

29. Other moral theories might also contain explanations of the duties I have in mind, but I lack space here to argue that these explanations are inferior to mine. I will therefore leave comparisons with alternative explanations for another occasion.

is *because* the decisions in question are yours to make in this sense that I have a duty not to arrogate them to myself.

Determining the disposition of personal information about ourselves is an area of activity relative to which we have morally significant permissions. The significance of these permissions enables them to ground duties in others, including what I will call "duties of nonarrogation." These are duties to refrain from arrogating to oneself decisions regarding personal information about others that are properly theirs to make. Since I am equating moral rights with morally significant permissions, the preceding remarks help elucidate the right to privacy. This right consists in a permission to determine the disposition of personal information about ourselves, which permission grounds duties of nonarrogation in others.

Similarly, we have rights to determine what happens to our bodies—"rights to bodily autonomy," as they are sometimes called. In virtue of these rights, others have duties to refrain from arrogating to themselves decisions affecting our bodies that are properly ours to make. And, of course, these remarks apply *mutatis mutandis* to other areas, such as determining the courses of our lives and the disposition of our belongings. Note that in all of these areas, people can violate others' rights without interfering with any activities on the latters' part—which helps explain why equating rights with permissions of a sort does not imply that all rights are rights to act. Thus I violate your right to privacy in secretly spying on you not because I prevent you from doing something that you have a right to do, but because I arrogate to myself decisions that are yours to make. This is not, of course, to deny that rights to act imply duties of noninterference in others. Indeed, these latter duties constitute a subclass of duties of nonarrogation.

The idea that rights are morally significant permissions translates into claims about areas of activity within which individuals are permitted to act or to refrain, where these permissions are the grounds of duties of nonarrogation in others. This line of thinking is certainly similar in spirit to Wellman's "dominion" and to Sumner's "autonomy within a domain." As we have been constantly reminded in recent years, however, the devil is in the details; and the details of my account differ significantly from those of Wellman's and Sumner's.

IV. MATTERS OF PRINCIPLE

If you have a right to practice with your group, and if one's right to act implies that the act is permissible, then you are permitted to practice. If I have a right to quiet enjoyment of my property, and if one's right to act implies duties of noninterference in others, then since your practicing interferes with my quiet enjoyment, you have a duty not to practice. Hence, some of these conditionals or their antecedents must be false, since together they entail the implicitly inconsistent proposition that you are permitted to practice and yet have a duty to refrain.

This consistency problem would not arise if strong rights did not entail permissions. For reasons offered in the preceding section, however, I will assume that "X has a strong right to do Y" entails "X is permitted to do Y." Indeed, it seems to me that the best way in which to avoid the consistency problem is by somehow insuring that situations never arise in which each of two individuals has a strong right to perform actions that are incompatible with each other. As this line of thinking applies to our example, it implies that either you do not have a right to practice with your group or I do not have a right to enjoy quiet evenings on my porch.

Let us refer to propositions attributing rights to individuals in particular situations as "rights-attributions," and to general moral principles affirming the existence of rights as "rights-principles." Part of being justified in accepting rights-attributions consists in deriving them from rights-principles. If rights-principles are interpreted as very general and as *entailing* rights-attributions, however, then inconsistencies are inevitable. Thus, suppose we accept the principles that people have a right to pursue careers of their choice, and that people have a right quietly to enjoy their property. Suppose too that we interpret these principles as having the following forms respectively: If X's doing Y counts as X's pursuing the career of her choice, then X has a right to do Y; and if X's doing Y counts as X's quietly enjoying his property, then X has a right to do Y. Suppose, finally, that we accept these propositions: Your practicing with your group counts as pursuing the career of your choice; my spending quiet evenings on my porch counts as quietly enjoying my property. Then we can deduce the implicitly inconsistent proposition that I have a right to spend quiet evenings in my porch and you have a right to practice with your group.

The only plausible way in which to block this inference is by rejecting the two rights-principles under the assumed interpretations. There are two versions of this maneuver, however. One abandons the idea of very general rights-principles by adding exceptions, qualifications, conditions, and so on while retaining the idea that rights-principles have the form of universalized conditionals. On this interpretation, inferences from rights-principles to rights-attributions are deductive. Alternatively, rights-principles can be interpreted as very general but as having a logical form that prevents them from serving as major premises of valid deductive arguments whose conclusions are rights-attributions.

Judith Thomson evidently accepts a version of the deductive approach in claiming that no one has a very general right to not be killed, but:

> [one] has the right to not be killed if . . . [one is] not in process of trying to kill a person, where that person has every reason to believe he can preserve his life only by killing you.[30]

30. Thomson, *Self-Defense and Rights*, *in* FINDLEY LECTURE, 1976, 7 (University of Kansas Press 1977).

From the rights-principle implicit in this remark, together with an appropriate minor premise, one can presumably deduce that some individual has a right to not be killed in a particular situation. Thomson's rights-principle might, of course, be regarded as still insufficiently specific, but adding conditions to the ones she employs would not alter the general approach. According to this approach, rights-principles refer to conditions that are sufficient for individuals to possess rights in particular cases. Borrowing an expression from Thomson, I will refer to this interpretation of rights-principles as "Specification."

Specification, with its interpretation of rights-principles as referring to conditions that are *sufficient* for the possession of rights by individuals, must be kept separate from the view that rights-principles contain conditions that are *necessary* for individuals to possess rights. I mention this latter view for two reasons.

First of all, it would provide a very straightforward way in which one might attempt to avoid the consistency problem. It would allow rights-principles to contain grounds for concluding that in putative conflict situations, at least one party to the "conflict" does not actually have a right (conclusions which, by the way, are not countenanced by Specification). If this approach were applicable to our original conflict scenario, it would imply that either you lack a right to practice or I lack a right to peace and quiet, because at least one of us fails to satisfy a condition necessary for possessing one of the designated rights. Although this view differs importantly from Specification, it is like the latter in implying that no one has highly generic rights such as the right to pursue a career of one's choice or the right to use one's property as one wishes. Rather, individuals have rights to . . . only if. . . .[31]

A second reason for attending to this view here is that it is commonly employed by writers for a purpose related to that of avoiding the consistency problem. I refer to attempts at explaining the permissibility of treating people in ways that they seem to have rights not to be treated. The claim is that in certain situations people *forfeit* their rights by what they do—which is to say that by their actions, they violate conditions that are necessary for possessing rights. This line of thinking (call it "Forfeiture") is commonly relied on by writers attempting to justify capital punishment or homicide in self-defense.

For example, Suzanne Uniacke characterizes her justification of self-defense in a manner corresponding to Forfeiture, and she argues that:

> as an exception to the general prohibition of homicide, the use of force in self-defense does not violate its victim's right to life; as individuals we possess

31. Clearly, the only necessary conditions for possessing rights that are at issue in the present context are conditions that can fail to be satisfied by right-holders. Hence, even though a condition necessary for X to have a particular right is that others have corresponding duties, this condition cannot fail to be satisfied by X; and so the existence of this condition lends no support to the view under discussion.

this right only so far as we are not an unjust immediate threat to another person's life or proportionate interest.[32]

If the principle implicit in this last claim is compared with the one endorsed by Thomson, it is clear that they respectively specify conditions that are necessary and that are sufficient for possessing certain closely related rights.

Forfeiture, however, incorporates an entirely inadequate interpretation of rights-principles. Presumably the primary purpose of such principles is to provide reasons for believing that individuals possess rights in particular circumstances. Yet if rights-principles only specify conditions that are necessary for possessing rights, then they can only provide reasons for believing that individuals *lack* rights in particular situations. Because of this inadequacy in its interpretation of rights-principles, Forfeiture will not do as a general approach to avoiding the consistency problem. Let us now return to an examination of Specification.

We are considering whether Specification solves the consistency problem by delivering rights-principles that prevent situations from arising in which two individuals have rights to perform incompatible actions. Note that the idea here is not to construct rights-principles one by one, adding conditions to each as potential conflict situations are encountered or envisioned. In order for Specification to provide a general guarantee that conflict situations will not arise, the conditions its principles specify as sufficient for the possession of rights must be of a special sort. For example, Specification's rights-principles might have this form: If X's doing Y counts as . . . (concealing personal information about X, pursuing the career of X's choice, etc.), and *if X's doing Y has no other morally significant features*, then X has a right to do Y. Or, perhaps more familiarly: If X's doing Y is . . . and *if other things are equal*, then X has a right to do Y.

Formulated along these lines, Specification's rights-principles do indeed guarantee that situations will not arise in which individuals have rights to perform incompatible actions. This result is obtained at a very high cost, however. For the suggested interpretation of rights-principles renders them completely inapplicable to what might be called "morally complex" situations—situations in which "other things" are not equal because they contain a variety of morally significant features.

Consider our original example again, with the relevant rights-principles interpreted as follows: People have a right to pursue careers of their choice if the actions by which they do so have no other morally significant features; and people have a right quietly to enjoy their property if the actions by which they do so have no other morally significant features. Given these two principles, our example is morally complex in that each of its involved actions possesses a variety of morally significant features. Your practicing

32. SUZANNE UNIACKE, PERMISSIBLE KILLING 196 (Cambridge University Press 1994).

with your group has these morally significant features: It is an instance of pursuing the career of your choice, and it is incompatible with my quietly enjoying my property. And my spending quiet evenings on my porch has these morally significant features: It is an instance of quietly enjoying my property, and it is incompatible with your pursuing the career of your choice.

Rights-principles must surely be applicable to morally complex as well as to morally simple situations. Since the rights-principles by means of which Specification avoids the consistency problem do not satisfy this condition, these rights-principles must be rejected. Hence Specification does not provide a viable approach to avoiding the consistency problem.

V. AVOIDING THE CONSISTENCY PROBLEM

If rights-principles are interpreted as specifying very general sufficient conditions for the possession of rights by individuals, then they can be used to deduce implicitly inconsistent propositions. As I noted above, one might attempt to avoid these inferences either by way of Specification (which rejects very general formulations of rights-principles) or by denying that inferences from rights-principles to rights-attributions are deductive in character. This latter approach accommodates very general rights-principles, but it implies that these principles do not specify conditions that are sufficient for the possession of rights.

The most familiar version of this approach is rooted in W. D. Ross's writings on the nature of moral duties. The centerpiece of Ross's position is, of course, his distinction between "prima facie" and "actual" duties. According to Ross, general principles of duty refer to prima facie duties, and these principles cannot be used to deduce that individuals have actual duties (duties "all things considered") in particular situations. Analogously, rights-principles can be interpreted as referring to prima facie rights; and, so interpreted, these principles cannot be used to deduce rights-attributions when the latter refer to rights, all things considered.

The consistency problem is now avoidable if the duties implied by prima facie rights are themselves interpreted as prima facie. As it applies to our example, the line of reasoning here proceeds as follows.

People have prima facie rights to pursue the careers of their choice, and also prima facie rights quietly to enjoy their property. You therefore have a prima facie right to practice with your group, and I have a prima facie right to enjoy quiet evenings on my porch. My prima facie right is a prima facie permission that is the basis of a prima facie duty of noninterference on your part. Your prima facie right to practice is a prima facie permission that is entirely compatible with your prima facie duty of noninterference. Whether either of us has a right, all things considered, depends on whether our situation has other morally significant features and on the nature of any

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such features. In any case, no conclusion attributing a right, all things considered, to you or to me is deducible from any rights-principles (or other moral principles) that apply to our situation.

So you and I have prima facie rights that conflict with each other in that your exercising yours is incompatible with my exercising mine, but this sort of conflict does not generate a consistency problem. A conflict of rights, all things considered, would generate such a problem, but we cannot have rights, all things considered, to perform incompatible actions. That is, if one of us has a right relative to all the morally significant considerations present in our situation, then the other cannot have a conflicting right relative to those same considerations. The impossibility here follows from the meaning of "prima facie" as it is used in connection with moral principles and their role in moral reasoning.

Unlike Specification's rights-principles, prima facie rights-principles are applicable to morally complex situations. And unlike Forfeiture's rights-principles, which provide reasons for concluding only that individuals lack rights, prima facie rights-principles provide reasons for concluding that individuals have rights. To be sure, the notion of a prima facie right has its detractors, but it also has defenders; and numerous criticisms and defenses of it have appeared in print over the years. Needless to say, I will not rehearse any of this discussion here. What I will do is offer an explanation of rights-principles that has the advantages of principles employing the expression "prima facie," but which eliminates this woefully unilluminating expression.

The explanation of rights-principles to be proposed here centers on the relation "P is a reason for believing Q," where P and Q take propositions or propositional functions as values. So, for example, (that) residents of Rome speak Italian and Al is a resident of Rome is a reason for believing (that) Al speaks Italian. And (that) X is an instance of promise-keeping is a reason for believing (that) X is right. The principle that people have a right to choose careers of their choice can thus be formulated as follows: Given any person X and action Y, (that) X's doing Y is choosing a career of her choice is a reason for believing (that) X has a right (all things considered) to do Y. And, in general: the principle "People have a right to perform acts of kind K" is equivalent to "Given any person X and action Y, (that) X's doing Y is K is a reason for believing (that) X has a right (all things considered) to do Y."

Several points about the reason-for-believing relation are worth emphasizing.

First, the relation is *two*-place, and is therefore not equivalent to something like "P is a reason for believing Q *for person X*." So, for example, if P entails Q, then P is a reason for believing Q regardless of whether someone (or anyone) believes that P or believes that P entails Q. Secondly, "P is a reason for believing Q" is a relation that is assumed (at least implicitly) to obtain in a variety of familiar philosophical contexts. For example, if X

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(inferentially) knows that Q, then there is a proposition P such that X believes that P and P is a reason for believing Q. And thirdly, although the proposition that P is a reason for believing Q *can* express an evidential connection between P and Q, the relation is not limited to such connections.[33] Thus (as was pointed out above) P is a reason for believing Q if P entails Q. Thus the reason-for-believing relation is not itself epistemic in nature. Rather, it is logical in the same way that Carnap's confirmation relation is logical. Indeed, the former can be thought of as encompassing the latter, but as much broader in scope.

VI. SUMMARY

If there are situations in which individuals have rights to perform incompatible actions, then applying the following propositions to such situations generates a consistency problem:

(i) if X has a right to do Y, then X is permitted to do Y;
(ii) if X has a right to do Y, then others have duties to refrain from interfering with X's doing Y;
(iii) if X is permitted to do Y, then X has no duty to refrain from doing Y.

The consistency problem can most plausibly be avoided either by rejecting (i) or by demonstrating that situations cannot arise in which individuals have the right to perform incompatible actions. If rights are to play a distinctive role in moral theory, however, then there are good reasons for interpreting them as (implying) morally significant permissions. Hence (i) should not be rejected, and the consistency problem should be avoided by demonstrating that rights cannot conflict in particular situations.

One way in which to demonstrate this is by way of Specification. While this approach prevents conflict situations from arising, however, it also renders rights-principles inapplicable to morally complex situations. A very different approach interprets rights-principles as referring to prima facie rights. Under this interpretation, rights-principles cannot be used to deduce conclusions that individuals have rights, all things considered, to perform incompatible actions in particular situations. Rights-principles can be used to deduce conclusions regarding prima facie rights, but since conflicts of prima facie rights are not philosophically problematic, the consistency problem is avoided.

33. In this respect, my interpretation of the reason-for-believing relation differs from that presented by Judith Thomson (THOMSON, *supra* note 2, at 14).

34. *See* RUDOLPH CARNAP, THE LOGICAL FOUNDATIONS OF PROBABILITY (University of Chicago Press 1950).

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