

CONFLICTS OF RIGHTS:

Typology, Methodology, and Nonconsequentialism

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In this article, I shall first try to examine the ways in which rights may conflict (or at least seem to conflict). This will be a sketchy survey at best, but I believe it may be helpful. I shall also consider how the resolution of the conflicts is not solely a function of the weight of the interest (as ordinarily understood) involved and consider what this suggests about the correct theory of rights. Finally, I will discuss how we might measure the relative strength of rights.¹

I. TYPES OF CONFLICTS

If rights can conflict among themselves, this would imply that even when a right cannot be granted, it was nevertheless a real right, not just a factor that had to be considered in determining what right there is. According to Jeremy

For comments I thank my audience at the conference on Conflicts of Rights (held by the Institute of Law and Philosophy at the University of Pennsylvania Law School) and Alon Harel and David Enoch.

1. When an attacker who threatens to cut off someone's leg is killed by his potential victim in self-defense, it is sometimes said that there is a conflict between the right of the attacker not to be killed and the right of a person not to be harmed. However, this is a pseudo-conflict of rights, since the attacker's right not to be killed is in some way weakened by his being a threat, at least for the purpose of eliminating the threat he presents. Considered alone and not weakened, how would we rank the rights involved in this case? How does the right not to have one's leg be cut off compare with the right not to be killed? If I heard of two people, one of whom was threatened with violation of the first right and one who was threatened with violation of the second, I would think it right to help the second. This is some indication that I believe the second right is stronger. But this need not determine how we resolve all problems involving such rights, since in some cases the right may be weakened. For example, we may help the person attacked in the case I described rather than the attacker. Henceforth, I shall try to consider conflicts among unweakened rights. In this article, I draw on past work of mine in which I go into much greater detail about how conflicts to get scarce resources should be resolved and when it is permissible to harm some to save others. These more detailed discussions can be found in 1 *MORALITY, MORTALITY, DEATH AND WHOM TO SAVE FROM IT* and 2 *MORALITY, MORTALITY, RIGHTS, DUTIES, AND STATUS* (Oxford University Press 1993 and 1996); and in *Toward the Essence of Nonconsequentialism*, in *FACT AND VALUE: ESSAYS ON ETHICS AND METAPHYSICS FOR JUDITH JARVIS THOMSON* (A. Byrne et al., eds., M.I.T. Press 2001).

Waldron, when rights conflict, it is because the *duties correlated with them* conflict.² But suppose two people have been granted rights to medicine, however there is scarcity, and only one indivisible bottle of medicine is available. It seems the rights each has to the medicine conflict, but no one need have a duty that conflicts with any other duty since no one need have a duty to provide either one with medicine just because each has a right to medicine. The conflict arises because each grantee is at liberty to take the medicine in virtue of his right to it, and yet each has a duty to abstain from taking it (correlative to the right each has, as part of his right to the medicine, to exclude the other from taking it). These duties to abstain are not in conflict, since both can abstain. Rather, the liberty and the duty that each has are in conflict.

Now I shall supply some more detailed typology of cases in which rights conflict because duties correlated with them do. I do not claim it is exhaustive. We can divide rights into negative and positive rights. Insofar as this is possible, negative and positive rights may protect the same interests. (For example, a negative and a positive right can protect life, as in a right not to be killed and a right against a lifeguard to be saved.) They may protect different interests, as when a negative right protects the interest in not having one's leg broken, and a positive right protects one's life. The positive rights may derive from a violation of a negative right, as when we must give help to someone we have harmed. I shall call these "derived positive rights." Alternatively, the positive right may be "pure" positive, for example, the right to aid that stems from a promise to aid. What about positive rights that help *prevent* the violation of negative rights? If they involve P having a duty to prevent P's violating a negative right, they are like the derived positive rights already described. If they involve P preventing R from violating negative rights, they come closer, I think, to pure positives, but only if we take a so-called "agent relative" perspective, treating the rights violations of others differently from our own. Even if we take this perspective, we may think positive rights that prevent a violation of another's *right* might fall into a different category from simply a right to be provided with something. So I shall call this category of positive right "mixed." (Notice that the right whose violation we prevent may be either negative or positive, so there might be a mixed positive right against P to prevent the failure of R to fulfill a pure positive right.)

We can put these distinctions together in the following way to represent possible conflicts of rights.

1. Negative versus Negative
 - (a) same interests
 - (b) different interests
2. Negative versus Positive
 - (a) same interests

2. See J. Waldron, *Rights in Conflict*, reprinted in his *LIBERAL RIGHTS* (Cambridge University Press 1993).

- (i) positive derived
- (ii) positive pure
- (iii) positive mixed
- (b) different interests
 - (i) positive derived
 - (ii) positive pure
 - (iii) positive mixed
- 3. Positive versus Positive
 - (a) same interests
 - (i) positive derived versus positive derived
 - (ii) positive derived versus positive pure
 - (iii) positive derived versus positive mixed
 - (iv) positive pure versus positive pure
 - (v) positive pure versus positive mixed
 - (vi) positive mixed versus positive mixed
 - (b) different interests
 - (i) positive derived versus positive derived
 - (ii) positive derived versus positive pure
 - (iii) positive derived versus positive mixed
 - (iv) positive pure versus positive pure
 - (v) positive pure versus positive mixed
 - (vi) positive mixed versus positive mixed

But now there are also two different senses of conflict stemming from the two different perspectives upon which we have already touched: the agent-relative (A) and the agent-neutral perspective (B). (A) states that the relevant conflicts are in rights that give conflicting duties to one agent or otherwise create internal conflict in one agent. (B) states that the relevant conflicts are in rights that give *different agents* duties or liberties. For example, when there is a conflict of rights from an agent-neutral perspective, it can be that either rightholder (1) has his right infringed (permissibly or impermissibly)³ or rightholder (2) has his right infringed (permissibly or impermissibly), but they *will not* both have their rights respected. If agent (1) does abide by his duty, agent (2) *will not*, and so rightholder (2) will suffer an infringement. If agent (1) does not abide by his duty to rightholder (1), agent (2) will at least not infringe a right in rightholder (2). (He may fail in his duty but be prevented from succeeding in infringing the right.) In virtue of this sort of conflict, agent (1) may believe she is under a duty (not strictly correlated to the right that may be infringed in rightholder (2)) to prevent the other agent's failure to abide by a duty correlated with right (2). If there is this sort of conflict of rights from the agent-neutral perspective, it will then follow that agent (1) will himself (i.e.,

3. Judith Thomson distinguished between . . . infringing a right (permissible) and violating a right (impermissible). I shall also distinguish between permissibly transgressing a right (infringing) and impermissibly transgressing a right (violating). So "transgressing" is neutral as between the permissible and the impermissible. For Thomson's view see her *Ruminations on Rights*, reprinted in the collection of her essays, *RIGHTS, RESTITUTION AND RISK: ESSAYS IN MORAL THEORY* (W. A. Parent ed., Harvard University Press 1986).

even from an agent-relative perspective) face a conflict of duties (between some duty he originally had to rightholder (1) and a mixed positive duty to rightholder (2)). (We shall consider examples of this shortly.)

In using our previously listed categories, we should consider each in its agent-relative (A) and agent-neutral (B) form.

II. SPECIFIC CONFLICTS

A. Negative versus Negative

I shall now consider selected types of conflicts generated by combining our categories. Can negative rights conflict with negative rights covering the same interest, giving a particular agent conflicting duties? (This is (A) (1) (a).) Waldron says that making all rights negative and agent-relative rules out conflicts of rights.⁴ He means by this that agent-neutral conflicts, as I described them above, do not generate duties for other agents that conflict with duties they come by in other ways. So agent (1) has no duty to violate a negative right to stop the violation of negative rights by agent (2). If this were so, would it mean that there could be no conflicts of negative rights for an agent? Suppose an agent has to send a deadly trolley either down track A or down track B. Joe is on one track and Jim on the other. It seems that each has a negative right not to be killed, and the agent has to decide whether to do what will certainly kill Joe or certainly kill Jim. Hence, even a system that has only agent-relative negative rights seems able to give rise to conflict of rights.

What if Jim and Susan are on track B, while only Joe is on track A? How should this conflict be resolved? We may, I think, send the trolley toward the one person. In resolving this sort of a case, each person has a right only to be balanced against his equal and opposite number, and the remaining person on one side helps determine the outcome.

Within the category (A) (1) (a) there is a slightly different case worth considering, because it bears on the balancing explanation just given. Consider Trolley Scenario (2), just like our previous case, except that while Joe and Jim would be killed by the trolley, we know that Susan would only be slightly bruised. She has a negative right not to be bruised, but should this play any role in deciding how to turn the trolley? In conflict cases, if Joe has a right to be balanced against Jim, and the remainder provided by Susan helps determine the outcome, then the agent should choose to send the trolley to Joe. But my sense is that Susan's right is a *morally irrelevant right* in this context. This is because what she would suffer is much less than what Jim has at stake, and from Jim's and Joe's partial points of view it is not irrelevant whether Jim or Joe is the one to survive. To deprive Joe of an equal chance he would have in a random decision procedure in order to prevent the additional rights infringement to Susan is a moral mistake. What if Susan stood to lose a leg? Here her negative right protects some-

4. Waldron, *supra* note 2.

thing much more important to her and it may, I think, at least weigh in favor of sending the trolley to Joe. Why this is so requires much explanation that I shall not provide now. My point here is to show that an agent faced with a conflict of negative rights, where rights protecting the same interest lie on either side, should not necessarily always minimize violations of negative rights, in particular when other rights at stake protect lesser interests.

Now consider (B) (1) (a), that is, the same negative rights in conflict from an agent-neutral perspective. We can imagine that unless agent (1) kills Joe, agent (2) will kill Jim and Susan. Waldron claims⁵ that if we have an interest-derived theory of rights⁶ and we are concerned about rights, then this sort of conflict of negative rights should lead agent (1) to consider killing Joe. If we say that agent (1) must not kill Joe despite what the other agent will do, this will be, according to Waldron, because we have a duty-based rather than a rights-based theory (or at least rather than a rights-based theory derived from interests). The theory will be duty-based because we focus on the significance of the act of killing for an agent and see it as something he must not do; we do not focus on the interests of the potential victims protected by rights.

This model attempts to derive a constraint on the agent from “inside (the agent) out (to the victim)” rather than from “outside (the agent in the victim’s right) in (to the agent).”⁷ I think it is wrong. First, note that it is not clear that a duty-based account that focuses on what it means for an agent to kill would always tell agent (1) not to kill when (intuitively) he should not. For if agent (1) had set a bomb that will kill Jim and Susan unless he now kills Joe, an agent’s concern for his killing might recommend that he prevent more of his killings by killing Joe. (In this case, at the very time the agent faces the choice of killing Joe, he is in a conflict between a negative right and a derived positive right that Susan and Jim have to his help. But still his violating their negative rights as well as their derived positive rights is at stake.)

Second, consider the Art Works Case: If someone loves beauty, he will be disposed to preserve and not destroy art works. What should this person do if he must destroy one art work to preserve several equally good ones? Presumably it is permissible for him to destroy one to save two. This suggests that the constraint on harming persons is not derived from inside the agent out, but from *outside* her in, since the constraint reflects the kind of entity she would act on—a person, not a work of art.

Third, there are, I believe, duty-based views which, while they focus on the quality of an agent’s act or state of mind rather than on a victim’s right, do not take note of the “agent’s mark” on the act, victim, or outcome. For example, the quality of the act or state of mind in which an agent must engage if he kills the one person is found repellent. The act would be the agent’s if he did it, but it is not essentially its being *his* rather than what it is

5. In his introduction to *THEORIES OF RIGHTS* (Oxford University Press 1985).

6. For example, Joseph Raz claims that when we think someone’s interest is important enough to give someone a duty, we say the first person has a right.

7. As in Stephen Darwall, *Agent-Centered Restrictions from the Inside Out*, *PHIL. STUD.* (1982); and ELIZABETH ANDERSON, *ETHICS AND ECONOMICS* (Cambridge University Press 1993).

in itself that repels him. Advocates of this view might claim that it explains why someone should not kill one person now to save a greater number of people even from her *own* past or future bad acts. However, notice that the explanatory structure of this duty-based constraint is essentially the same as a rights-based constraint. In both, one instance of either an act-type or right-type stands in the way of minimizing misconduct involving many instances of the same act-type or right-type. If the logic of concern for the duty does not require that we minimize its transgression but simply not transgress it, why does the logic of the concern for the right require that we minimize its transgression?

A rights-based theory that focuses on the potential victims of rights transgressions could require agent (1) not to kill Joe. If it were permissible for agent (1) to kill Joe to save Jim and Susan, this would have to mean that Joe has a weaker negative right not to be killed than if it were impermissible to kill him. (This will be true even if we were infringing his right permissibly; one that could not be permissibly infringed would be stronger.) Since what is true of him is true of everyone else—as we must universalize moral properties—Jim and Susan also would have weaker negative rights. To be protected by weaker negative rights indicates, I believe, that one's moral status is lower than if one has a stronger negative right. The stronger one's negative right, the more inviolable one is. This inviolability is a *status* (that is, it tells us what it is permissible to do to a person); it has nothing necessarily to do with what *happens* to a person. If Jim and Susan are killed because Joe is not killed, they are violated but they are no less inviolable than Joe. This is because morality did not endorse (that is, say it is permissible) to kill them; they are wrongfully killed. By contrast, if it had been permissible to kill Joe to save them, morality would endorse a form of killing and hence endorse reduced inviolability for everyone.

If there is a strong negative right, agent (1) could be required not to kill Joe, not because he should be more concerned with his agency than with the agency of others (or more concerned with his agency *now* than with his earlier or future agency). Rather he will be required not to kill Joe for an agent-neutral reason (i.e., a reason each agent must be concerned about) of the high inviolability of any person he comes up against expressed by a strong negative right protecting that person. Agent (1) should be stopped by the right of any person he would kill, but not because there is anything special about that person or because there is anything special for the agent in its being his act that kills.

The analysis of rights I have here provided distinguishes between someone's status and what happens to someone, not between what one agent does as opposed to what another agent does. Notice that this analysis implies that, at a higher level, the conflict between the rights not to be killed of Joe and the tandem of Jim and Susan disappears to some extent. Insofar as it is significant for each one of them that he or she has a certain status, that is high inviolability, Jim and Susan are the "beneficiaries" of the imper-

missibility of killing Jim. But, of course, they do not benefit in being alive, as he does, and “being alive” is presumably the interest that the interest theory of rights sees the negative right as protecting. The conflict in rights disappears at a higher level, consistent with an interest theory of rights, only if it is in a person’s interest to have a more inviolable status, given that he is the sort of entity who truly merits this status.

An alternative account of the right (and other fundamental human rights) is that the status it expresses is not so much in a person’s interests as it is a status that makes his interests worth protecting. It may make the world a better place to have in it entities who deserve this status; it may be an honor to those who have the status to have it. But the status is not important primarily because it serves the other interests of the person, if it does. Fundamental human rights are not concerned with protecting a person’s interests, but with expressing his status as a being whose interests are worth protecting. They express the *worth of the person* rather than the *worth of what is in the interests of that person*, and it is not unimaginable that it will be harder to protect the other interests of a person just because of the worth of his person. (Below we will consider another reason to think rights do not merely protect interests.)

Another way of putting the point I have been making is in terms of what rights exclude as reasons for overriding them. If people have high inviolability in certain respects, then the rights expressing that inviolability will specifically exclude certain factors as reasons for infringing the rights. For example, a right expressing high inviolability of life could say “the person’s right not to be killed will not be overridden even for the sake of saving more people from being killed.” This is what Joseph Raz would call a right functioning as an exclusionary reason.⁸ If Jim, Joe, and Susan each has this right, it would be self-defeating for it to be permissible to maximize *protection of the right* by violating Joe for their sake, since the right specifically says not to do this. We could not protect the right by making it permissible to do what the right denies that it is permissible to do.

I have said that if one takes an agent-neutral perspective on the conflict of negative rights, it might be that a new conflict arises for any particular agent. This is the conflict between his duty to respect a negative right and his mixed positive duty (corresponding to a mixed positive right) to stop negative rights violations. I have also said that one can understand a rights theory that would prevent the transgression of the negative duty to satisfy the mixed positive duty. But I do not want to claim that the correct rights theory would always do so. I shall try to provide the details of when it would and would not, and why, when I specifically discuss negative versus positive rights conflicts below.

The analysis I have provided here of negative versus negative conflicts can be applied to other rights (e.g., the right to free speech) when transgressing

8. In his *THE MORALITY OF FREEDOM*.

the right in one person would prevent its transgression in others. Indeed, we can see a contrast in the outcome my analysis yields from the outcome of the analysis Waldron provides of conflicts of free speech.⁹ Waldron considers the case of a conflict in the rights of free speech of the Nazis and the Communists. The Nazis want to speak freely with the effect that the Communists will lose their right to speak freely. May we interfere with Nazi free speech *for the sake of the right of free speech itself*? Waldron gives three reasons for saying yes: (1) The speeches they claim the right to make would bring an end to the form of life (i.e., all having free speech) in which the idea of free speech is conceived; (2) The content and tendency of the speech is incompatible with the very right asserted; and (3) To count as a genuine instance of free speech, a person's contribution must be related to his opponent in a way that makes room for both.

Waldron's views, it seems to me, are in favor of a weaker form of the right to free speech that is required if we are to achieve a goal of maintaining some free speech overall. A stronger right to free speech on the model I presented above would, I think, exclude as a reason to limit it protection of free speech itself. That is, the right expresses the idea of a status that each has to speak freely, even if respecting this status results in some people who also still have such a status being prevented from actually speaking freely because they improperly have their right violated. While it might be wrong to exercise this right—there is a well-worn distinction between exercising a right and doing the right thing—and *while we might permissibly infringe it for the sake of a particular good, namely more people actually exercising their weaker rights to speak, this is not the same as justifying infringement out of concern for the stronger right to free speech itself*.

Now we come to (A)(1)(b), cases where an individual agent faces a conflict between a negative right that involves different interests. For example, suppose he must direct a trolley so that it either kills Joe or breaks Jim's leg. Other things equal, he should avoid violating the right that protects the more important interest. Suppose next to Jim are five other people, each of whom would also suffer a broken leg. I believe that if each of them as an individual would suffer a far smaller loss than Joe would, it would be wrong to prevent the large aggregate of all their losses. The principle that would justify this is giving preference to the person who will be worst off. Suppose each of Jim and the five would be totally paralyzed and assume this is not as bad as death. If Jim alone were to face that prospect, we would still turn the trolley to him rather than Joe. Yet it is possible that when each of many would suffer a somewhat smaller loss than Joe, but still very significant, the fact that a large number would suffer that loss makes it correct to turn the threat toward Joe.

If this is the correct solution to this conflict of rights, we must be wary of its implications. Where x , y , and z are decreasing losses, and n and m

9. Waldron, *supra* note 2.

represent number of such losses, $m > n$: if $n(y) > x$, and $m(z) > n(y)$, transitivity implies that $m(z) > x$. It should be obvious that using this argument repeatedly would, if transitivity holds, lead to the conclusion that we should turn the trolley to where it would kill Joe rather than toward a billion (or more) people each of whom would suffer a headache that they have a right not to be caused. This is obviously (I believe) the wrong conclusion. The only way to hold that $n(y) > x$, but not $m(z) > x$, I believe, is to insist on comparing the size of x with the size of z to make sure they are not too far apart. If they are too far apart, the aggregate cannot outweigh x , even if it can outweigh $n(y)$, which outweighs x . In sum, aggregation of rights protecting lesser interests may matter even where there would be negative rights infringements to prevent them, but qualitative considerations constrain the quantitative ones. That is, the size of the interest involved in each person matters. This is only one case in moral mathematics where transitivity is not preserved.¹⁰

B. Negative versus Positive

Skipping to the case of negative versus positive right conflicts, consider (A) (2) (a). The conclusions for which I shall argue are general and apply to any negative rights and positive rights related in the same way. I shall use the right not to be killed and to have one's life saved for purposes of illustration.

Suppose I must kill Joe in connection with saving Jim and Susan from a threat that I presented to them. I have a positive duty derived from a (potential) negative rights violation in conflict with a negative right of the same sort. It is illuminating to consider various ways in which the death of Joe would come about and how what we may do varies with them. Two general claims I shall argue for based on what these cases reveal are: (1) the interests involved will stay constant in all variations on the killing of Joe to save Jim and Susan, and yet sometimes the killing will be permissible and sometimes not. (2) The fact that it is sometimes impermissible to kill Joe shows that there is a negative right not to be killed that is stronger than the positive right derived from the negative right protecting the same interest even in one's own potential victims. Both (1) and (2) suggest that the strength of a right is not solely a function of the interest it most obviously protects (i.e., life for everybody in all these cases) but of the manner in which the interest is affected (to the same degree). (This assumes that there is no other reason why it is (im)permissible to kill besides the rights involved.)¹¹ This may be a further reflection of our concern with the worth of the person rather than

10. On others, see ch. 12 of my 2 MORALITY, MORTALITY.

11. It might also be said that whether a right exists at all is not solely a function of the strength of the interest, but the manner in which the interest is affected. I take this and what is said in the text to be considerations weighing against an interest theory of rights. For more on this, see my chapter "Rights" in THE OXFORD HANDBOOK OF JURISPRUDENCE (eds. Jules Coleman and Scott Shapiro).

with what is important *to* him. I believe it is also a reflection of a principle which reveals an important characteristic of nonconsequentialism; that is, a principle which reveals the essence of nonconsequentialism helps account for the strength of rights.

Consider five ways in which Joe might be killed in connection with saving Susan's and Jim's lives in (A) (2) (a) (i) with a derived positive right: (a) We have to kill Joe for his organs and provide them for Jim and Susan. (b) In order to divert a trolley on its way to kill Jim and Susan, we must set a bomb that, as a foreseen side effect, will kill bystander Joe. (c) We have to push Joe into the trolley headed for Susan and Jim to stop it, as only his being hit will stop the trolley and this will kill him. (d) We have to turn a trolley headed to Jim and Susan onto a track where Joe will be killed. (e) If we save Jim and Susan from the trolley headed to them, they will breathe normally (by contrast to their not breathing at all if dead), and this will foreseeably result in air currents moving in a way that moves germs in the air in Joe's direction, killing him.

I believe killing Jim in (a), (b), and (c) is impermissible and killing him in (d) and (e) is permissible and this is due to the rights Jim has in each case. The interest in life in all the cases is the same amongst all the people. Hence, we cannot attribute the fact that Joe's right not to be killed in two cases is strong enough to stand in the way of the rights of Jim and Susan to the fact that the right is stronger due to the interest it protects. There is, I suggest, a difference in the strength (or perhaps even existence) of rights not to be killed, and it is not a function of the interest it protects but of manner of killing.

Many theories have been offered that bear on accounting for the difference in permissibility of killing to aid in cases (a) to (e). I shall not discuss them here. Suffice it to say that I believe that a nonconsequentialist principle which might account for the difference is (roughly put) as follows: (1) We may permissibly infringe someone's right as an effect of our producing a greater good, even when his right being infringed plays a causally useful role in sustaining the greater good by dealing with new threats that arise from our efforts to produce the greater good. (2) It is impermissible to transgress someone's right as an effect of or as part of what we do to produce the greater good. (That does not mean this right is absolute.) I call this the Doctrine of Initial Justification.

This implies that the *right not to be killed* that Joe has and that conflicts with the rights to be saved of Jim and Susan may be permissibly infringed in (d) in particular, but not in (a). Notice, however, that this does not mean that Joe is not at liberty to try to stop the trolley from hitting him by turning it back onto the one who turns it on him or onto those who would have been hit if it had not been turned. (He is at liberty to do this, but others may try to interfere with his doing it.)

The results for (A) (2) (a) (i) which we have considered apply as well, I think, to (ii), (iii), (B) (2) (a) (i), (ii), and (iii). So, for example, if someone

has a pure positive duty correlative to others' rights to save two lives, someone else should not facilitate this by killing Joe in manners (a) to (c). However, if someone has such a duty to save two lives, someone else might facilitate this by redirecting a threat away from killing the two even if it kills Joe.

Under the category of negative conflicting with positive protecting the same interests are cases where a side (or sides) in conflict, in addition to having rights at stake protecting the same interest, has rights protecting lesser interests. For example, Joe's negative right not to be killed conflicts with Jim's contractual right to have his life saved and Susan's contractual right to be saved from a broken leg. Or the right of Jim not to be killed and Susan not to be bruised conflicts with Joe's contractual right to have his life saved. The first question these cases raise is whether, when an equal number of *equal* interests protected by rights is present in either side, there is something to be said for giving equal chances to each side, even if this means killing n people to save n people. The second issue is whether anything but the major interest (i.e., life) should determine whether we cause death in manners (d) and (e) when we could refuse to save life instead. Suppose we should not kill merely to provide to conflicting sides an equal chance of living. Then the question is whether a smaller interest (or set of such smaller interests) that would be relevant when negative rights conflict with negative rights would also be relevant when negative rights conflict with positive rights. I suggest that it would be permissible to turn a trolley away from Jim and Susan to save him from death and her from being completely paralyzed, even though we foresee Joe will be killed.

Now we must consider cases where the negative and positive rights protect different interests. There are two possibilities: the negative protects the stronger interest or the positive does. Consider cases of the first type first. For example, suppose I must kill someone to fulfill a contractual obligation to save each of many people from being completely paralyzed. This case might raise at least two issues we have already discussed, that is, how large the smaller losses have to be for aggregation to be permitted, and whether the manner of causing death makes a difference. Only manners (d) and (e) are eligible, and I suggest that it would be permissible to redirect a threat making it possible for many people to avoid total paralysis, even assuming total paralysis is not as bad as death.

What if the negative right protects a weaker interest than the positive one? For example, may one break Joe's leg in order to save Jim from death? If we break his leg in manner (d) and (e), it seems clear this is permissible. Permissible infringements of the negative right are intuitively plausible, even in manner (a) to (c), though my sense is that, unlike what is true if we use manners (d) and (e), compensation is owed for this use made of another or for the bad effects on someone of our means of helping Jim.¹²

12. Possibly this indicates that there is no right that is infringed in (d) and (e) at all, because there is no right not to have one's interest set back in these particular ways.

C. Positive versus Positive

Finally, we must consider the conflicts of positive versus positive rights. I shall consider only some of the many possible cases that raise interesting issues. First, when the interest protected by each positive right is the same, I should fulfill the one that derives from my violation of a negative right rather than satisfy a pure positive right I owe. (This is (A) (3) (a) (ii)). (So, Joe's bodyguard should forgo saving Joe from paralysis in order to stop or (somehow) undo his (the bodyguard's) impermissibly paralyzing Jim.) Preventing oneself from having taken away from someone what he has quite independently of us takes precedence, I think, over a promise to someone else to provide that sort of thing. I think this is interesting because when I face a conflict of positive duties (correlative to rights) (a) to save Joe from *someone else's* failure to abide by Joe's negative right and (b) to save Susan from a natural disaster, (a) does not necessarily take precedence over (b).¹³ In the latter case, Joe has a right to my help because he is a victim of someone else's violations of his negative rights (mixed right) and Susan merely as a result of a natural disaster (pure positive right). Here the fact that there is a rights violation in one case is not a factor that helps determine whom to help if the interests are the same.

(If this conclusion is taken to a social level, it implies that if there are positive rights to medical care and police protection, the latter (given protection of equal interests) would not necessarily take precedence over the former, even though the latter involves aid to prevent or undo violation of negative rights. This is the view of an agent neutral perspective. However, if social institutions exist to share the burdens of each individual's greater duty to prevent his violation of the negative rights than to fulfill the positive rights (given equal interests at stake), perhaps we could justify a night-watchman state before a welfare state.) Furthermore, suppose no one had any pure positive welfare rights. We might still justify police protection of one's negative rights at the social level by reducing all mixed positive rights to derived positive rights. We do this by invoking individuals sharing their obligation to fulfill derived positive rights to prevent or undo violation of negative rights.¹⁴

When conflicts are between pure positive rights and the interests are the same, the issues of balancing and aggregation that we discussed before return. In addition, there is a question of whether it matters what sort of pure positive right is at issue: a contractual right or a human right to aid

13. Samuel Scheffler noted this. See Scheffler's *THE REJECTION OF CONSEQUENTIALISM* (Oxford 1982), p. 109.

14. Some (e.g., Stephen Holmes and Cass Sunstein in *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (Norton 2000) argue that justifying (what I call) pure positive welfare rights at the social level is no more (or less) difficult than justifying positive rights to police protection to prevent violations of one's negative rights. It is true that both are positive rights, but I have suggested that arguments for derived positives could be separate from arguments for pure positives.

(assuming there are such). Suppose Joe and Jim each contracted and paid for a portion of a life-saving drug to which no one has an equal right simply as a person. They are on two separate islands and we can only get to one in time to save him. I believe each has a right to an equal chance to the drug. What if Susan is near Jim, also needs the drug for life, and could successfully share it with Jim but did not contract for it. Could her need count in determining to which island to go? It seems to me that it should *not*, though if Jim wins in a random choice between him and Joe, he *and* Susan should be helped if possible. Joe should not be deprived of his right to an equal chance to have what he has as much of a property right to as Jim, given its importance to him.

Positive rights protecting lesser interests may be combined with weightier rights, on one side, or positive rights protecting lesser interests may be alone against positive rights protecting weightier interests, on the other side. Then the issues of whether to show preference for the worst off and whether to aggregate arise again.

III. MEASURING THE STRENGTHS OF RIGHTS

So far, I have relied on intuitions concerning the strength of certain rights. Let us consider in more detail whether we can measure strength and what this shows about rights.

Consider what Waldron says about this issue:¹⁵ (1) He takes it that we might measure the strength of the right not to be tortured relative to the right to free speech by noting that we would not torture someone no matter how much free speech we would lose. This is evidence that the right not to be tortured is much stronger than the right to free speech. (2) But, he says, if we take a right seriously, we must take it to generate associated duties in addition to the primary duty not to torture. For example, the duty to punish torturers, the duty to educate against torturing, etc. (3) But surely, he says, all the duties associated with the right not to be tortured are not stronger than any duties associated with free speech. For example, duties to punish violations of free speech might be stronger than the duties to educate against torture, as measured by, for example, how much of our resources we should spend on each. (4) But if some duties associated with the stronger right can be outweighed by duties associated with the weaker right, then this suggests the stronger right is not so strong after all, and might, after all, be outweighed by sufficiently important considerations stemming from the weaker right. (Here he moves backward from the weakness of some duties associated with it to the weakness of the original right. The argument has a *reductio* form. That is, if we assume a right has great strength, we can show it does not have such great strength.)

15. Waldron, *supra* note 2.

There are, I believe, significant problems with each of the steps in this argument, combined with an important truth. First, the conclusion in (1) relies on an improper procedure to measure the strength of rights. We cannot compare the strength of two rights, R_1 and R_2 , per se, by comparing (a) the strength of the prohibition on intentionally causing the infringement of R_1 with (b) the foreseen, unintended letting happen of infringement of R_2 (if we do not infringe R_1). The variation in the contextual features associated with R_1 and R_2 (intended versus foreseen, causing versus letting happen) may account for the impermissibility of infringing R_1 to stop infringements of R_2 . This would not be to measure the weight of R_1 versus R_2 per se. Yet this is how the procedure Waldron uses works. Using this procedure, one could even prove that *R_1 is stronger than R_2* , for it may be impermissible to intentionally transgress one person's right not to be tortured in order to stop any number of other people being tortured. Yet it is clear that R_1 cannot be stronger than itself. The procedure could also "show" that R_1 is stronger than R_2 and R_2 is stronger than R_1 . For one may have a right not to be tortured to death (R_1) to save n people from having their right not to be killed (without being tortured) (R_2) infringed, and one may also have a right not to be intentionally killed (R_2) to save n people from having their right not to be tortured to death (R_1) violated. But it would entail a contradiction to say R_1 is stronger than R_2 and R_2 is stronger than R_1 .

The correct way to test for the relative strength of R_1 and R_2 is to test them in cases that equalize all factors in the contexts of the two rights. Here are some tests—all in agent relative contexts—that at least satisfy this principle of equalization: (1) The Choice Test. If the only way to achieve a certain goal is to transgress R_1 or to transgress R_2 , which would one sooner do, given that one had to do one of them? (This test allows that we do something wrong whatever we do.) The suggestion is that one would sooner transgress the weaker right. (2) The Goal Test. How important a goal must one have for it to be permissible to intentionally transgress R_1 ? To intentionally transgress R_2 ? The suggestion is that transgressing the stronger right requires a more important goal. (3) The Effort Test. How much effort would one have to make (a) to avoid foreseeably transgressing the right, (b) to accord the right, or (c) to compensate to undo the effects of transgression? The suggestion is that the stronger right will require more effort. The Choice Test is in one way more revealing than the other two, because two rights may differ in strength and yet the weaker one be so strong that maximal efforts are needed to avoid transgressing it and maximally important goals are needed to justify transgressing it.

There are at least three problems with these tests. First, the Effort Test and the Choice Test may give conflicting answers. For example, a bodyguard may be required to make much greater efforts to save the life of his client than he would be obliged to make to avoid doing what will cost some stranger his arm. Yet it might be impermissible for him to do what will save his client's life by means that foreseeably cost a stranger his arm; he must

choose not to fulfill the client's right. Second, the Effort Test and the Goal Test may give conflicting answers. A bodyguard may be required to make much greater efforts to save his client's life than he would be required to make to fulfill the right of another employer, service to whom will save ten thousand lives. Yet the goal of saving even five thousand lives could override the client's right but not override the right of the other employer to his service in saving ten thousand.

The third problem is that the use of these tests to measure the stringency of rights depends on an assumption of transitivity: If R_1 stands up to loss x and R_2 does not, then R_1 will stand up to R_2 . It is always possible, due to some particular interaction between R_1 and R_2 , that this is not so. Hence, these tests are at most *prima facie* indications of the stringency of rights in comparison to other rights. For example, suppose person A has a right to assistance to degree x , but person B has such a right only to degree $x-n$. Even if we can say that the claim of A is more important than the claim of B, it is possible that when the two are in conflict, we should grant B his right because B is the parent of A and children should never be served before parents.

In using these tests (or others like them), it is important to realize that just because R_1 and R_2 yield the same result in some cases, this does not mean that they are as strong *per se*. We cannot prove a universal truth that R_1 is as strong as R_2 by showing for *some* equalized contexts that we must spend the same amount, \$5, to avoid each. For as the cost of avoiding each goes up, R_1 may require the higher cost and R_2 not. This would indicate a difference in their strength. However, if R_1 yields a different result from R_2 in even one case and R_2 offers no comparable different result from R_1 , then we have evidence that R_1 differs in strength from R_2 . (Only one negative is required to deny a universal truth.)

Now consider (2) and (3) in Waldron's discussion. Does taking rights seriously imply taking associated duties—aside from the primary one of intentionally causing infringement—seriously? When Ronald Dworkin said that rights trump over utility (at least utility in whose calculation external preferences would be counted),¹⁶ could he have meant to imply that we must suffer that same loss of utility rather than intentionally violate those rights and also to facilitate the exercise of the right? If he did, the claim that rights trump would be implausible. The merit of (3) in Waldron's discussion is that it is essentially making this point.

If the right not to be tortured arose completely from the interest in not being tortured, then any manner of treatment which had a high probability of resulting in torture would be equally prohibited, including not helping prevent torture. But suppose the right not to be tortured is also about whether morality endorses the treatment of persons in a certain particular manner leading to torture. Then we could account for why there would be a very strong right not to be tortured that trumps foreseen loss

16. The formulation does not speak to whether rights trump other rights.

of utility from not torturing and yet other tortures will be allowed to happen rather than sacrifice utility to stop them (though the acts of torture would not be endorsed by morality). One may even have a right against an act aimed at torturing which is known to have a low probability of success and not have as strong a right to aid that has a strong probability of preventing torture. Not foregoing as much utility to prevent tortures as we forego rather than torture will not be inconsistent. This is just the thesis of nonconsequentialism—that the state of affairs resulting (e.g., tortures occurring) can be the same and one way of its coming about be morally acceptable and another not—applied to rights violation. I rush to save two from being killed and foreseeably run over one. There is one less killing overall. I rush to save two from being killed and leave one person to be killed. There is one less killing overall. Someone may have a right that I not do the first act but no right that I not do the second.¹⁷

In discussing the Trolley Problem, we have seen that the right not to be intentionally killed in order to save others is stronger than the right not to be killed as a consequence of their being saved. This means that while A's right not to have his leg intentionally cut off is weaker than B's right not to be intentionally killed, the former right is stronger than B's right not to be killed as a consequence of a greater number being saved. Though the interest in being alive is stronger than the interest in not having a leg cut off, the different manners in which these setbacks to interests come about help determine the strength (perhaps even the existence) of the respective rights. Suppose we can save the five from a trolley only by either turning it away toward B, whom it kills, or by putting A's leg in front of the trolley. Also, assume that A's right is not overridden merely by the size of the loss to the five. We should resolve the conflict in our duties to A and B by harming B. This, of course, does not mean that if we face a conflict between (a) A's being killed as a consequence of a greater number being saved or (b) A's having his leg intentionally cut off to save a greater number, we must choose (a). We may do what would be impermissible if it is done on its own (cut his leg off) as a substitute for what it is permissible to do, if this is in the interest of A. I call this the Principle of Secondary Permissibility.

While Waldron is quite right to recognize that a fourth-ranked duty associated with torture may be outweighed by a second-ranked duty associated with free speech, this still does not show that the n -ranked duty associated with R_1 would not outrank the n -ranked duty associated with R_2 . Evidence for even this additional claim might be provided by the fact that

17. Dworkin himself makes use of a nonconsequentialist distinction in his defense of a right to request physician-assisted suicide. He considers the objection that such a right (and associated right of a doctor to act on it) may lead to more violations of the right not to be killed against one's will through mistaken exercise of the right. While he grants that a sufficient number of such foreseen mistakes might weigh against the right, he insists that the government's *intending* to deny someone's right to assisted suicide must be contrasted with its *foreseeing* (but not *intending*) those mistakes. See his introduction to "The Philosopher's Brief on Assisted Suicide," *New York Review of Books*, March 27, 1997.

while not torturing to death is more important than not intentionally killing (without torture), this alone does not imply that rescuing victims from attempts at death-by-torture is more important than rescuing victims of ordinary attempted killings.

Given all this, it is a mistake for Waldron to conclude in (4) that the fact that duties associated with a supposedly strong right can be outweighed by duties associated with a supposedly weaker right is evidence for the fact that preventing some amount of infringement of the weaker right could, after all, outweigh intentionally infringing the stronger one. If the manner in which the interest is affected is important, the direct intentional infringement could fail to be outweighed, even if other ways of affecting the interest can be outweighed. It is, of course, possible that no right is absolute, but one will need a different argument to show that than is provided in Waldron's (1) to (4).