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ON CONFLICTS BETWEEN RIGHTS

Seventy-five years ago Wesley Hohfeld canvassed legal language and identified four distinct advantageous positions subsumed under the title of a right.[1] Hohfeld's analysis is so instructive because it shows more precisely the different positions a rightholder can occupy. One cannot fully understand the concept of a right, however, without an adequate account of rights conflicts. More specifically, if one conceives of a rightholder as occupying some type of privileged or advantaged position relative to another, one can fully spell out the nature, extent, and value of this position only after explaining how this right is affected by apparent conflicts with other rights. Thus, in this paper I defend a new account of rights conflicts. I survey the three most prominent theories of rights conflicts and conclude that, while all three are ultimately inadequate, the specificationist view is the best of the existing proposals. Next I revise and expand specificationism so that it can better account for the complexities of rights conflicts. Finally, I suggest how this new model illuminates the value of being a rightholder.

I. THE PROBLEM

To see the problem of apparent rights conflicts, consider the now standard example described by Joel Feinberg. He writes:

> Suppose that you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private

[1] See Hohfeld's *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

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property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace to keep warm. Surely you are justified in doing all these things, and yet you have infringed the clear rights of another person.[2]

Cases like this show that, while it initially may be tempting to think of rights as advantages that place perfectly general and absolute restrictions upon the actions of others, we must revise this conception. Specifically, we must ask, "What does it mean to have a right to X if others may permissibly infringe that right?" We understand rights as entailing at least the existence of duties upon others. Feinberg's example constitutes a problem, then, because the cabin owner's right apparently entails a duty upon the stranded hiker, and this duty would make it impermissible for the hiker to enter the cabin; and yet we agree with Feinberg that the hiker's entrance is permissible. In sum, Feinberg's example is valuable because it exposes our inclination to endorse three jointly inconsistent propositions:

(1) P has a right to X.

(2) If P has a right to X, then S has a correlative duty not to infringe P's right to X.

(3) S may permissibly infringe P's right to X.

One might try to solve the problem by simply stipulating it away. That is, just as Kant insisted that the definition of duty entailed that one could never have conflicting duties, one might allege that the conception of rights implies that rights can never conflict. The simplest way to achieve this resolution is to insist that the absoluteness and the generality of all negative rights entails that no positive rights can exist. A theorist espousing this view would respond to Feinberg's example with this rejoinder: "Although it might seem at first blush to be a conflict between the right of the hiker and that of the cabin owner, further consideration shows that this cannot be so. Since the cabin owner has a property right regarding her

[2] Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," in *Philosophy & Public Affairs* **7** (1978): 102.

cabin, and since a right must, by definition, be both general and absolute, it follows that the hiker may not permissibly enter the cabin and thus has no right to do so."

Although this solution is consistent and has the virtue of simplicity (indeed, I suspect this resolution's simplicity has attracted many to the rigorous libertarian position), it fails on two counts. The first problem is that most of us firmly believe that the hiker may permissibly enter the cabin, and we should not abandon this judgment merely to allow for the most convenient account of rights. Certainly a significant part of moral reflection involves revising initial substantive judgments in the face of conflicting moral assessments, but to accept a counterintuitive substantive conclusion for the sake of explanatory simplicity is to put the cart before the horse in making moral judgments. The second problem with this approach is that rejecting positive rights cannot solve the problem of rights conflict. To see why, consider the right to life and the permissibility of self-defense. As Judith Jarvis Thomson revealed, cases in which a person permissibly defends her life by killing an innocent person show that the right to life can sometimes conflict with another's same negative right.[3] Thus merely rejecting positive rights is unsatisfactory both for the extremity of its demands and its inability to eradicate rights conflicts.

If reversing our substantive conclusions will not solve the problem, we cannot avoid revising our conception of rights. The inconsistency of the three propositions generated from cases like the stranded hiker remains, and the manner in which one explains away this apparent contradiction constitutes one's account of rights conflict. The literature on rights includes three prominent views: the specification approach, the prima facie theory, and a third view offered by Joel Feinberg.[4] The specification view avoids the

[3] See Judith Jarvis Thomson's paper, "Self-Defense and Rights," reprinted in *Rights, Restitution, and Risk* (Cambridge, Mass.: Harvard University Press, 1986), pp. 33–48.

[4] See particularly pp. 68–83 in *Social Philosophy* (Englewood Cliffs, N.J.: Prentice Hall Inc., 1973).

contradiction by denying (1). Specificationists insist that rights are absolute, deny they are universally general, and therefore resolve the conflict by denying the existence of the second right. Often a specificationist conceives of a right as being a single advantage that holds absolutely over all second parties except in cases enumerated in the right's disjunctive list of exceptive clauses. The prima facie view, on the other hand, avoids the contradiction by denying (2). Prima facie theorists claim that rights are universal in generality but lack absoluteness. This approach entails that a right has universal applicability but is liable to being overridden in certain circumstances. Finally, Feinberg seems to be specificationist in his rejection of the prima facie view, but also suggests that (1) plus (2) need not conflict with (3). I will recapitulate and reject Feinberg's view, compare the first two proposals, and then argue for specificationism over the prima facie view.

II. FEINBERG'S ACCOUNT

Initially, Feinberg appears to recommend a straightforward specificationist approach. Not only does he explicitly argue against the prima facie view, he rejects proposition (1) by distinguishing between *claims* and *valid claims*. This move is specificationist since he reserves the term "right" for the latter. For instance, Feinberg would analyze the cabin example in the following manner. The fact that the cabin owner bought, traded for, or was given the cabin provides reasons for her moral dominion over the cabin. We cannot know if her claim constitutes a right, however, until it is weighed against competing claims. Only if the reasons supporting the cabin owner's claim outweigh the reasons supporting conflicting claims is the cabin owner's claim a valid claim and her position a right against the competing claimants. In the stranded hiker's case, Feinberg would presumably resolve the conflict as follows: although the cabin owner's ownership grounds a claim against the hiker entering the cabin, the reasons supporting this claim are outweighed by those grounding the hiker's claim to enter the cabin. In this conflict the hiker's claim is better supported by reasons and therefore is alone valid. Feinberg would presumably conclude that the hiker has a right to enter the cabin, and the cabin owner has no right against him that he not do so.

In short, Feinberg's view seems specificationist since it avoids the conflict by denying proposition (1) (which in this case involves denying the cabin owner's right against the hiker). I will explain specificationism in greater detail below, but first I shall call attention to, and argue against, a peculiar feature of Feinberg's view. In response to a challenge from the prima facie view, Feinberg suggests, "A less paradoxical alternative to the theory of prima facie rights is the view that a person can maintain a right to X even when he is not morally justified in its exercise, or others are justified in not according it to him. Lack of justification for exercising a right does not entail (even temporarily) nonpossession."[5] This statement is problematic, however, because it is at odds with the rest of the author's account. Specifically, given that Feinberg has distinguished between *claims* and *valid claims* (where only the latter constitutes a right), it is unclear how someone can have a right to X (which entails that her claim to X outweighs all competing claims regarding X) and yet not be justified in exercising her claim to X. It seems more appropriate, on Feinberg's analysis, to suggest that because the apparent rightholder is not in fact justified in exercising her claim, her claim is not (all things considered) a valid one. Therefore, she does not in fact have a right to X.

Although I am ultimately unreceptive to Feinberg's amendment, I have an idea why he included it. I suspect Feinberg recognized that the realm of rights is not exhaustive of morality. Specifically, one can be well within one's rights and still act reprehensibly. For instance, presumably I have a right to criticize a terrible meal cooked by a culinarily disinclined and emotionally sensitive friend, even though it would be vicious to do so. Similarly, it would be indecent to insist upon my right to go through the checkout line at the supermarket before the woman behind me if I had a shopping

[5] Feinberg, *Social Philosophy*, p. 75.

cart full of groceries and she had only one item for the infant triplets who were crying and weighing down her obviously weary arms.

The upshot of these examples is that oftentimes one ought not to act in a manner squarely within one's rights. Much of morality (like virtue, charity, and even minimal human decency) is sometimes distinct from matters of justice and rights. Certainly we look negatively upon those who ignore duties that correspond to the rights of others, but we also condemn some for the insensitive, uncaring, and indecent fashion in which they claim their rights. Thus I emphatically agree with professor Feinberg that we frequently *ought not* to do that to which we have a right, but I am unwilling to admit that we can be *unjustified* in exercising our rights. Presumably reference to one's right is precisely the type of explanation required to establish the permissibility of one's conduct.

It seems as though Feinberg wants to exploit a distinction between permissible and justified where, I think, none can profitably be drawn. Thus it strikes me that Feinberg recognizes the distinction between "I have a right to X" and "There is no reason that I ought not do X," but incorrectly interposes it between "I have a right to do X" and "I am justified in doing X." To see this point more clearly, consider a scenario involving Chip and Dale. Chip wagers Dale one hundred dollars that a threatening tornado will not touch down in Tucson. Imagine further that this tornado does in fact come through Tucson, demolishing Chip's home in the process. While Feinberg would acknowledge Dale's right to claim his one hundred dollars, he would simultaneously maintain that Dale is not justified in so claiming, or that Chip would be justified in disregarding this claim. I, however, would suggest that, while Dale certainly ought not to press his claim, Dale's right to do so (on Feinberg's non-prima-facie model of rights valid claims) entails Dale's justification and Chip's requirement to comply. In short, I wonder if Feinberg's recognition of the limited scope of rights theory in the overall realm of morality did not cause him to add a prima-facie-like amendment that ill fit his otherwise specificationist model.

III. THE SPECIFICATIONIST VIEW

Although I am skeptical of Feinberg's amendment, I am generally sympathetic with his approach. Specification strikes me as the best resolution to the contradiction of rights conflicts. According to specificationist views, there ultimately is no conflict of rights. What initially appear to be conflicting rights of Ben and Jerry, say, are actually cases in which at most one has the relevant right and the other does not. The reason no actual conflict occurs where general rights seem to overlap is because these rights actually involve implicit "unless" clauses that specify exceptions to their general claims. "The right to life," for instance, refers neither to an exceptionless and absolute right nor to an exceptionless non-absolute right, but to a right which holds absolutely just in case none of its exceptive clauses is operative. For example, specificationism stipulates that my right to life involves an absolute right not to be killed unless I am threatening someone else's life, or unless I commit a capital offense, or unless . . . etc.

According to this particular brand of specification, a right genuinely exists only in those instances not disallowed by one of the disjunctive exceptive clauses. This suggests that our expression "the right to life" picks out one right that holds in all instances not identified by the exceptive clauses. A better way of interpreting the specificationist model, I think, is as requiring that broad terms like "the right to life" are not technically rights at all but are merely shorthand markers that indicate where an actual right may exist if not outweighed by conflicting reasons.

My brand of specificationism suggests that rights are not as most people think of them, but this is not a fatal flaw. In fact, I would argue that specification (properly understood) is latent within the work of Wesley Hohfeld, who scrutinized rights talk precisely because common understanding was so confused. Hohfeld's analysis shed considerable light on the concept of a right, but no observation was more instructive to the rights conflict debate than his understanding that rights exist within specific relationships. Hohfeld revealed that to have a legal right is to be in a legally advanta-

geous position against a particular second party. Theorists have since argued that Hohfeld was wrong to presume that rights relationships can involve no more than two parties (as in cases of third party beneficiaries), but the basic understanding that each right boils down to a specific relationship remains the salient observation that, in my estimation, motivates the construction, and signals the correctness, of the specificationist's model.[6]

Hohfeld's analysis makes clear that what most of us speak of as "the right to life" is best understood as a shorthand term for our collection of rights to life, which are as numerous as the second parties against whom they hold. That is, the phrase "my right to life," as we typically use it, is an imprecise but frequently convenient expression that refers to my collection of rights to life that includes my right to life against Eric, plus my right to life against James, plus . . . etc. As Carl Wellman explains:

> Clearly any so-called right *in rem* imposes, not a single legal duty upon other persons generally, but a number of distinct and separate legal duties upon each of a number of second parties. But since legal claims and relative duties are logically correlative, a legal right *in rem* must really consist, not in a single legal claim holding "against the world," but in a large number of separate legal claims.[7]

If one applies Hohfeld's observation that a right exists within an individual relationship to the confusion of understanding rights as both general and absolute, the specificationist solution seems the natural one. Cases in which the putative "right to life" does not outweigh competing claims (as against an innocent threatened person who uses self-defense or against a state which justly punishes a capital offense) are simply instances in which *no right actually exists*. The salient point is that, if a right is understood as an advantage against another, the relative position of the two parties is what is crucial. Consider the ideas of tallness and height advantage. At seven

[6] For a discussion of how rights relations can involve more than only two persons, see pp. 21–25 of Carl Wellman's *A Theory of Rights* (Totowa, N.J.: Rowman & Allenheld, 1985).

[7] Carl Wellman, *A Theory of Rights*, p. 59.

feet and four inches tall, Ralph Sampson is extremely tall and has a height advantage over almost everyone. However, we cannot say, absolutely and generally, that Sampson has a height advantage over all others without first assessing everyone else's height. Manute Bol, for instance, is a seven foot and six-inch-tall man over whom Sampson has no height advantage. Rather than claim that Sampson has a prima facie height advantage over all others (and then stipulate that this prima facie advantage is overridden – yet continues to exist – by Bol's height), we specify that Sampson has a height advantage against some but not others. The relative nature of advantages requires us to reason similarly about moral and legal matters. If being a rightholder involves occupying an advantageous position relative to a second party, then it must be because the balance of reasons favors the rightholder in the potential conflict with that party. If circumstances exist in which the second party would in fact be favored, then (in these circumstances) the first person is not advantaged and thus is not a rightholder.

In addition, I prefer specificationism because it best accords with (indeed, seems required by) the most promising conception of rights. I am sympathetic to Carl Wellman's dominion model of rights in which rightholders are advantaged in virtue of the freedom and control they can exercise in relation to the parties against whom their rights hold.[8] Correctly understood, this dominion is mutually exclusive between the parties of any moral, legal, or institutional relationship because both people cannot simultaneously have the relevant control over the other. Once the nature of rights is appreciated, it becomes clear that we cannot speak sensibly of conflicting rights. The only way to make sense of apparent cases of conflicting rights is to assert that, despite initial appearances, (at most) only one party in fact has a right in this relationship. That is, only one party has dominion over the other

[8] Carl Wellman, *A Theory of Rights*. I should note that Carl Wellman is less impressed with my arguments about the nature of rights than I am with his. In particular, he is not convinced that his dominion model of rights necessarily implies that specification theory is correct.

in the area pertaining to the right. Given an adequate conceptual understanding of rights, then, it seems we must eschew all talk of prima facie rights and endorse a specificationist view. This argument against prima facie models openly relies upon Hohfeld's conception of a rightholder as occupying an advantaged position over a second party. I will return to this point below, but for now let me merely suggest that any theory that does not conceive of a right as absolute will have difficulties explaining the advantage of having a right, and consequently, will have difficulty providing a full analysis of rights.

IV. THE PRIMA FACIE RESPONSE

Of course, many theorists have rejected the specificationist approach in favor of the prima facie view. As its name indicates, the prima facie theory alleges that a right is an advantage that exists "on the face of things" but may be outweighed by competing concerns. The striking feature of this view is that it posits the continued existence of a right despite permissible infringements thereof. In Feinberg's cabin scenario, for instance, the prima facie theorist would allege that the cabin owner has a right that the hiker not enter the cabin despite the permissibility of the hiker doing so; the entry's permissibility simply signals that the right has been outweighed or overridden in this particular situation. Since I ultimately advance an expanded version of specificationism, it is worth examining why prima facie theorists reject this view.

The first reason to be disenchanted with the specificationist view is its divergence from the common understanding of rights. This complaint cannot be used against specificationism any more than its prima facie counterpart (and it ought to be used against neither), however, because this common conception has spawned the confusion that motivates both accounts. As mentioned above, rights are commonly understood as general and absolute, but this pretheoretic conception leads directly to the contradiction of rights conflict; if they are general then they must conflict, and if they conflict, they cannot be absolute. Explained in these terms, it is easy to see why

there are two principal views: one denying the absoluteness of rights (prima facie) and another denying their generality (specificationist). Thus it is clear that common conceptions cannot provide sturdy ground on which to stand in this debate, and we must look elsewhere to justify our commitment to one view over the other.

The most popular reason for dispreferring specificationist views is their lack of explanatory power. Judith Jarvis Thomson, for instance, has complained that the specificationist approach explains neither the deontic status of actions nor the need for compensation when rights are putatively infringed but not violated.[9] I am more impressed with Thomson's concerns about compensation than her belief that rights should explain our moral conclusions. I will compare the competing theories regarding compensation below, but first I argue both (1) that a right *establishes* rather than *explains* deontic conclusions, and (2) that the specificationist model actually does a better job on this latter score than the prima facie approach.

Thomson insists that:

> . . . it is worth noticing that a kind of circle is going to turn up here too. What the friend of factual specification has to do is to figure out when it is permissible to kill, and then tailor, accordingly, his account of what right it is which is the most we have in respect to life. But if that is the only way anyone can have of finding out what right it is we have in respect of life, how can anyone then explain its being permissible to kill in such and such circumstances by appeal to the fact that killing in those circumstances does not violate the right which is the most the victim has in respect of life?[10]

Here I think Thomson is simply wrong to look for rights to explain the permissibility of what one has a right to do and the impermissibility of what another has a right that one not do. Instead of being the essential moral building blocks from which theorists argue to conclusions, rights are actually moral edifices we argue

[9] Thomson, "Self-Defense and Rights."
[10] Thomson, "Self-Defense and Rights," p. 39.

towards.[11] Rights are constituted of reasons, and referring to a moral right is a way of stating precisely the moral relationship which exists between parties in virtue of the constellation of moral reasons that each has.[12] Thus citing a right is explanatory in one, limited, sense insofar as the presence of a right entails a certain configuration of moral reasons which explain the (im)permissibility of a given action. This rights citation is not explanatory in the more robust sense that Thomson desires, however, since the right merely marks, rather than explains, the relevant moral reasons.

Thomson might object to my characterization of rights as conclusions established by a balance of reasons, though, since this appears to diminish the importance of rights. If a moral right is constituted of moral reasons, the objection runs, then the reasons are paramount, and the right becomes of only secondary importance. This objection is confused, though, since it incorrectly presumes that something must be less important if comprised of parts rather than ontologically fundamental. But this must be false since a commodity like water is no less valuable merely because it is composed of the more basic elements of hydrogen and oxygen. Just as we value water no less once we recognize it is not ontologically fundamental, we ought not to think rights any less important since they are constituted of reasons. Merely because we learn that to say "A has a moral right against B" is tantamount to saying that "the balance of moral reasons is such that A occupies an advantageous position relative to B in the moral realm," we ought not infer that this position is any less advantageous. I conclude that rights are important because they are conclusions that indicate or establish rather than explain relative positions. I think Thomson

[11] The importance of this point was impressed upon me by Russ Shafer-Landau.

[12] Although some theorists assume that legal and moral rights require legal and moral rules, I follow Carl Wellman, *A Theory of Rights*; Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987); and others in understanding rights to be fundamentally constituted of reasons.

is wrong to demand that an account of rights conflicts be equipped to explain moral conclusions, and it is incumbent upon her to show how rights could perform this function before she leans upon this criterion to dismiss specificationism. What is more, there is evidence that she recognizes the difficulty of furnishing this explanation when she writes:

> It might be that to attribute a right is only to talk about permissibilities and impermissibilities, but in a way that groups or collects them, and brings whole clusters of cases to bear on each other. I do not for a moment think it a novel idea that we stand in need of an account of just how an appeal to a right may be thought to function in ethical discussion. What strikes me of interest, however, is that the need for such an account shows itself even in a case which might have been thought to be transparent.[13]

In light of the above, one might object that specificationism fails to assume the explanatory burden that a rights model should since referring to a right of this sort cannot even establish whether the relevant action is permissible or not. This is so, the objection continues, because the right may have an exceptive clause which negates the apparent deontic status of an action. For instance, referring to A's property right to a cabin does not establish conclusively the impermissibility of B entering the cabin since, as in the stranded hiker's situation, there may be an applicable exceptive clause that justifies B's entrance.

Before answering this challenge, it is worth noting that the prima facie view itself cannot establish the deontic status of a particular action. This is because a prima facie right does not conclusively show that an action is morally impermissible since the non-absoluteness of this right allows it to be overridden by other moral reasons. Again in terms of the cabin example, A's prima facie property right does not establish the overall impermissibility of B entering the cabin since that prima facie right may be overridden. The similarity of the two analyses of the cabin example calls attention to the fact that both theories require additional consideration before

[13] Thomson, "Self-Defense and Rights," pp. 47–8.

overall deontic status is determined. The specificationist theory moves from a general to a specific right and the prima facie model moves from a merely prima facie to a full-fledged, "all-things-considered" right. Thus the prima facie theorist's model cannot pass the very test she criticizes the specificationist for failing.

More importantly, though, when the specificationist view is modified as I suggest above, it does pass this test. (Indeed, considering these very questions motivated my suggestion.) Recall that I claimed that the specification model involves a move from one general putative right to many actual specific rights, rather than a move from one general putative right to one actual right with its exceptive clauses specified. Under specificationism understood in this latter fashion, a right can carry the limited explanatory burden we desire since the putative general right is actually no right at all, and a specified particular right does entail a determinate deontic conclusion. For instance, the cabin owner's specific property right against the hiker entails the impermissibility of the hiker's entrance. Since the prima facie view recognizes two types of rights as genuine (prima facie and full-fledged), where only the latter entails determinate deontic conclusions, the mere presence of a right cannot determine the permissibility of an action. Thus, not only does prima facie theory fail the test it condemns the specificationists for failing, but specificationism (properly understood) actually passes this test!

Prima facie theorists have also criticized specificationism for its inability to explain the need for compensation. Authors like Thomson have suggested that the specificationist view cannot account for instances in which an agent acts permissibly and yet still owes compensation. She writes, "The fact that compensation *is* owing shows (and it seems to me, shows conclusively) that I did something you had a right that I not do."[14] Although Thomson is correct that existing specificationist theory cannot adequately explain when compensation is owed, I think Thomson mistakes

[14] Thomson, "Self-Defense and Rights," p. 41.

the relationship between rights and compensation. Recall that specificationists deny the first of the three jointly inconsistent propositions. That is, apparent rights conflicts are actually cases in which at most one party has a right against the other. Perhaps Thomson's most important complaint against this approach is that permissible actions often require compensation, and she presumes that such compensation can be explained only by the persistence of the right mentioned in proposition (1). The problem for Thomson is that this very assumption which provides the essential impetus for her project appears to beg the question. In point of fact, there seem to be cases in which one has the secondary duty to compensate another for something one had no primary duty not to do. One example is the oft-cited case of *Vincent v. Lake Erie Transp. Co.*[15] In this case compensation was awarded despite the acknowledged absence of a violated right. In particular, a ship owner was ordered to compensate a dock owner for damage done to the dock despite the dock owner's lack of a primary right that the ship owner act so as to avoid damaging the dock. Thus there does not appear to be the type of relationship between rights and duties of compensation that Thomson assumes. In sum, neither of the two explanatory tests gives us reason to favor the prima facie model, and the first test actually leads us to prefer specification theory.

V. THE SPECIFICATIONIST ACCOUNT EXPANDED

Although the question of compensation gives us no reason to prefer the prima facie model, Thomson was right about specificationism's limitations regarding this issue. Therefore, we should expand specification theory to better explain why compensation is sometimes owed despite no violation of a primary right. My proposal is akin to the first move made by specificationists in which putative general rights are narrowed to collections of more specific actual rights.

[15] 10 Minn. 456, 124 NW 221 (1910).

Thus I follow Hohfeld in attempting to clarify rights analysis by gaining a more precise understanding of the possible advantageous positions. In short, I suggest that specification theory must be made even more specific.

Imagine that I own the aforementioned cabin. In virtue of my ownership, I have certain property rights regarding this cabin. The common understanding is that I have one general and absolute right over this cabin. As we have seen above, the problem of apparent rights conflicts has led some to suggest that this right actually involves implicit exceptive clauses limiting its content and the parties against whom it holds. I have alleged that we should think of my ownership as entailing, not one highly specified right, but a collection of specific rights as numerous as those second parties against whom they hold. I shall now explain further why my ownership is best understood as entailing a collection of different types of rights, each of which holds against a specific second party in virtue of that party's relation to me and the cabin. To see this, consider the cases of Philip, Matthew, Ruth, and Lauren. Each of these people, let us suppose, comes across my cabin with an interest in entering it. The conditions surrounding their interests, however, vary in the following morally relevant ways. Philip is the wealthy owner of a neighboring cabin. He wants to enter my cabin and burn my furniture merely because he thinks it is gaudy and that I should redecorate. Matthew is a wealthy hiker who is caught in a blizzard and interested in entering the cabin and burning my furniture to survive the treacherous storm. Ruth is an impoverished pregnant woman who, like Matthew, has accidentally gotten caught in the storm through no fault of her own. She is interested in entering my cabin and burning my furniture so that she and her soon-to-be born fetus might survive. Unlike Matthew, though, Ruth is in no position to pay me for damages to my cabin and furniture. And finally, suppose Lauren is my wife with whom I purchased the cabin, and she is interested in entering and burning the furniture in an effort to weather the storm.

To see why I have a different type of right against each of these persons, we must recall the nature of a right. One has a moral

right against another just in case one has a moral advantage over that person. According to Carl Wellman, one has a right against someone when one's will would occupy a privileged position above the other's in a potential conflict of wills.[16] The reason I have different types of rights against Philip, Matthew, Ruth, and Lauren is because I have different advantages over them. Or on Wellman's model (at least as I am taking the liberty to expand it here), my will would occupy a privileged position in different ways against their different wills. I will explain why we should specify that I have a *full right* against Philip, a *compensation right* against Matthew, a *latent compensation right* against Ruth, and *no right* against Lauren.

I take myself to have a *full right* against Philip, my wealthy neighbor interested in entering my cabin to burn my "tacky" furniture. I suggest that A has a full right against B just in case B has sufficient moral reasons against encroaching A's right to outweigh the moral reasons B has for encroaching A's right. If B fails to respect this balance of moral reasons, B violates A's primary right, and A would be in a position to claim (or waive) compensation from B.[17] In terms of duties, B has a primary duty to A. If B flouts that duty, then B would have a secondary duty to compensate A for violating A's primary right. On Wellman's will model, A's will is in a privileged moral position relative to B's in determining how B ought to act in the primary instance and in the secondary relation if B acted impermissibly in that primary instance. I take myself to have a full right against Philip because, given the description of his circumstances, this account of moral reasons, moral duties, and position of wills seems to apply to our moral relationship. Philip ought not to enter my cabin and burn my furniture,

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[16] Wellman, *A Theory of Rights*, esp. chapters 5 & 6.

[17] Recall that, since the specificationist view stipulates that any genuine right is an absolute right, every rights encroachment constitutes a violation, and it leaves no room for permissible encroachments (often labeled infringements) as on a prima facie model.

and if he were to do so, I would be in a position to claim (or waive) compensation from him.

I have a *compensation right* against Matthew, the wealthy stranded hiker who needs my cabin and furniture to survive the violent storm. I submit that A has a compensation right against B just in case B's moral reasons *against* acting in manner which would infringe A's primary right (were it to exist) are outweighed by B's reasons *in favor* of encroaching what would be A's primary right; yet B's moral reasons *for* compensating A for B's actions outweigh the moral reasons B has *against* compensating A for these actions. In short, A's compensation right against B entails not that A has a primary right against B regarding B's initial act, but only that A has a secondary right to claim (or waive) compensation if B should act in the specified manner. In terms of duties, B has no primary duty to act in a certain manner, but B does have the secondary duty to A to compensate A in the event that B should act in a given manner. On Wellman's will model, A's will is not in the relevant privileged position relative to B's in determining how B ought to act in the primary situation, yet A's will would be in a privileged position relative to B's in determining whether B must pay compensation. Once again, I take myself to have a compensation right against Matthew, then, because our moral relationship strikes me as one which fits this account of moral reasons, moral duties, and positions of wills. That is, it seems correct that Matthew may permissibly enter the cabin and burn the furniture, yet should he do so, I would be in a position to claim (or waive) compensation from him.

Let me be clear here because prima facie theorists are wont to reject precisely this type of right. One might object, "Why must B compensate A if A has no right against her that she not enter and burn?" In other words, "How can A have a secondary right against B in situations where A has no primary right against B?" My answer must be in two parts; I must explain both the secondary right (to compensation) and the absence of the primary right (to non-entry). My answer in each case is simple. A secondary right exists in situations like that involving my cabin and Matthew's plight

because my relationship to the cabin coupled with Matthew's abundance of money generate a constellation of moral reasons which both puts me in a privileged position over Matthew and requires him to compensate me if he enters my cabin and burns my furniture. As rights theorists like Joel Feinberg and Carl Wellman have pointed out, my secondary moral position with respect to Matthew has the distinctive characteristics sufficient to make me a rightholder, not merely because of Matthew's duty to compensate, but because of my control over this duty.[18] As a rightholder against Matthew I am in a distinctly advantaged moral position such that I may either claim or waive compensation from him, and my claim or waive is powerful enough to affirm or extinguish Matthew's duty to compensate me. This much, it is to be hoped, is relatively clear. What remains to be explained is why this configuration of moral reasons produced by the relationship among myself, Matthew, and the cabin does not create a primary right against Matthew. The explanation is that, given that Matthew's moral reasons *for* entering the cabin (which are generated by his relationship with the cabin) outweigh the moral reasons he has *against* entering the cabin (which are generated by my relationship with the cabin), the latter are insufficient to place my will in a privileged position over Matthew's regarding his entering the cabin. In short, the constellation of moral reasons is such that my will does not determine the permissibility of Matthew entering the cabin. Since my will does not occupy such a privileged position over Matthew's regarding this primary action, it is incorrect and misleading to say that I have a primary right over Matthew. I conclude that I have a compensation right, but not a full right, against Matthew because I have only a secondary right to compensation, not a primary right against Matthew entering my cabin.

I suggest that I have a *latent compensation right* against Ruth, the impoverished pregnant woman interested in entering my cabin

[18] See Joel Feinberg's "The Nature and Value of Rights" in the *Journal of Value Inquiry* **4** (1970): 243–57, and Carl Wellman's *A Theory of Rights*.

and burning my furniture so that she and her fetus might survive the storm. I suppose that A has a latent compensation right against B just in case B's moral reasons against acting in a manner that would encroach upon A's primary right (were it to exist) are outweighed by B's moral reasons in favor of acting in this manner. What is more, the moral reasons in favor of B paying compensation to A for acting in such a manner are outweighed by the moral reasons B has against compensating A. Thus A has neither a primary right against B that B act in a certain manner, nor a secondary right against B that B compensate A for B's actions, but merely a latent right to such compensation that can be realized only if B's circumstances were to change in a morally relevant manner. In terms of duties, B has neither a primary duty to A that B act in a certain manner, nor a secondary duty to compensate A. A remains in a potentially privileged position with respect to B, however, because the moral reasons B has against acting in a certain manner entail that B has a conditional (or latent) duty to compensate A. That is, if circumstances were to change in a morally relevant way subsequent to the primary act, the balance of moral reasons would entail that A has the right to compensation from B for B's primary action.

Wellman's will model suggests that in this case A's will has no actual privileged position over B's, but A's will does have a latent privileged position. I have this latent compensation right against Ruth because our moral relationship fits this description. In particular, she might permissibly enter my cabin and burn my furniture without my consent because the moral reasons against her doing so (which exist in virtue of my relationship to the cabin) are outweighed by the reasons in favor of her so acting (which exist in virtue of the perilous condition of Ruth and her fetus). Furthermore, whatever moral reasons she has for compensating me (which exist in virtue of my relationship to the cabin) are also outweighed by her moral reasons against compensating me (which presumably exist in virtue of the necessity of her using her meager resources to feed and clothe her child and herself). It still makes sense to speak of my having a latent right to compensation, though,

because I might have a right to compensation if circumstances changed in the future. If Ruth either won a financial lottery or came into a sizable inheritance, for instance, then she might have a duty to compensate me for her primary act. Thus my advantage over Ruth, on Wellman's account, is that my will would occupy a privileged position with respect to Ruth's concerning her duty to compensate me if she had entered my cabin, burned my furniture, and then come into a sufficient amount of money. As J. O'Brien wrote in his *Vincent* decision, "Theologians hold that a starving man may, without moral guilt take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so."[19]

Finally, I contrast each of the advantageous positions of full rightholder, compensation rightholder, and latent compensation rightholder, to the no-right relation that I might have against my wife, Lauren. A has *no right* against B when B has no moral reasons against acting in a manner that would otherwise (if sufficient reasons were present) encroach A's right. If A has no right against B, then B has no duty to A, nor any actual or conditional duty to compensate A. What is more, there is no circumstance in which A's will would enjoy the relevant privileged position over B's. Since Lauren and I jointly purchased the cabin (and suppose that she alone purchased the furniture), I have no right against Lauren that she not enter the cabin and burn the furniture.

It is important to notice how my account of these rights is a response to, but departure from, the prima facie theorist's objection to the specificationist model. The prima facie theorist argues that where compensation is due, there must be a violated primary right to explain this secondary duty to compensate. I suggest, however, that while this secondary duty correlates to a right, there need not be any primary right since the existence of moral reasons is sufficient to explain the secondary right. What is more, I maintain

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[19] 10 Minn. 456, 124 NW 221 (1910).

that it is inappropriate and misleading to posit an (overridden) primary right to explain the existence of the secondary right, since the pivotal feature of a right precludes it being outweighed. If a right is understood to be an advantage (as I believe it should) then a right cannot be overridden and still be a right since, in being overridden, it is no advantage! It is true that a secondary advantage remains, but this constitutes the secondary right, not the primary right. My option of explaining the secondary right in terms of moral reasons is preferable, then, because there is nothing central to the concept of reasons to preclude them from being outweighed in a primary instance and yet retaining their force and being decisive in a secondary context.

It is in light of the above discussion that it makes sense to speak of the family of rights as containing the species of full rights, compensation rights, and latent compensation rights. While I have explained these types of rights in terms of Carl Wellman's will model, the salient distinctions are equally sensible in other theories, like Joel Feinberg's. According to Feinberg, one has a right just in case one is in a position to make a claim.[20] Thus one has a moral right when one is in a position to make a claim within the moral realm, and one has a legal right when one is in a position to make a claim within the legal arena. The reason it is illuminating to distinguish the different types of rights on Feinberg's model is because one may be in a position to press different claims against different people. Recalling our examples from above, we might say that I am in a position to make the primary claim against Philip that he not enter my cabin and burn my furniture, and if he did, I would be in a position to make the secondary claim of compensation. With respect to Matthew, I am in no position to make the primary claim that he stay out of my cabin, yet I would be in a position to press the secondary claim to compensation if he chose to enter the cabin and burn my furniture. Regarding Ruth, I am in a position to claim neither that she not enter

[20] Feinberg, "The Nature and Value of Rights."

my cabin and burn my furniture, nor that she compensate me should she do so. I would, however, be in a position to make this secondary claim for compensation if Ruth were ever to come into a sufficient amount of money. And finally, I have no right against my wife Lauren because I am in no position to make any such claim against her. Thus my account is compatible with at least two of the most prominent theories of rights.

VI. CONCLUSION

Wesley Hohfeld reacted against the confusion of common rights parlance by distinguishing among four types of advantages, each of which had been generally referred to as a right. Hohfeld's insight was important because it furnished theorists with more precise instruments with which to explain legal, moral, and institutional relations. Writers since Hohfeld have been able to refer to A's claim-right, power-right, immunity-right, or liberty-right against B, so that others can have a better understanding of the nature and value of A's advantage over B than if the theorist had merely explained that A had a right, or even that A had a right *against* B. Certainly my analysis cannot compare to Hohfeld's, but I hope it similarly leads to increased clarity of rights talk. Rather than merely assert that a cabin-owner has a claim-right, or even a claim-right against a particular hiker, we may now specify that the cabin-owner has a full right, a compensation right, or a latent compensation right against the hiker. Any of the latter three statements sheds more light on the precise nature and value of the cabin-owner's advantage over the hiker. Thus I hope to have learned from Hohfeld's central insight and to have clarified the rights conflict debate by applying Hohfeld's vision in a manner which demonstrates both the correctness of the specificationist approach as well as the need for a more detailed model. The pivotal idea is that possessing a right against another entails a type of advantage over this party, and the greater the precision with which one can specify the nature of this advantage, the better one understands the right.

Before ending, it is worth noting a significant limitation of the scope of this project. Throughout this essay I have repeatedly referred to my topic as that of rights-conflict. As the above reference to Hohfeld's work indicates, however, my discussion has actually concerned only conflicts between claim-rights. If one finds my solution to this limited problem promising, one might explore analogous approaches to apparent conflicts between and among power, immunity, and liberty rights, but I have not done so here.

Finally, I should like to comment upon the *value* of rights. Clearly one cannot fully understand the value of anything without a suitable understanding of its nature. Imagine speculating on the value of a "runner," for instance, if one has no idea that it is a long narrow rug often used in corridors. Accordingly, it is natural for one's understanding of the value of rights to hinge upon one's description of the nature of rights. Thus, since Hohfeld's distinctions indicate that there are at least four different types of advantageous positions which can meaningfully be labeled rights, we infer that the value of being a rightholder may be one of at least four distinct things, depending upon the type of right one possesses. Similarly, since I am inclined to recognize three types of claim-rights, I suggest that the value of having a claim-right depends upon the precise nature of that claim-right. Not surprisingly, then, I answer the second question concerning a right's value in much the same way I approached the first query involving a right's nature – by reserving judgment until the precise specification of the right is determined. All this notwithstanding, I think we can speak meaningfully of the value of being a rightholder in general. To my mind, the recognition that a given party possesses a right of any sort (even a latent compensation right) is morally significant to that party, since it involves according that party respect. This is because one cannot be a potential rightholder unless one's existence and relation to things can generate moral reasons that govern others. Thus Ruth's recognition of my latent compensation right against her is of value to me, even though it may never accord me any actual advantageous position, because it signals her recognition that my existence and relationship to the cabin provide her with moral reasons against entering the cabin: reasons that may one day morally require her to compensate me.[21]

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