SPECIFYING ABSOLUTE RIGHTS

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I

Views about the relative stringency of moral rights come in varying degrees. At the skeptical end of the spectrum, one may doubt their very existence. Or one may acknowledge their existence, but deny that they outweigh other moral considerations. A more moderate position would allow moral rights to trump competing considerations in some but not all circumstances. A stronger position still would claim that some, though not all, moral rights are absolute, i.e., are maximally stringent relative to any other moral consideration. The strongest position possible would claim that every moral right is absolute.

I will argue for the strongest position by criticizing the moderate ones. One of the most sophisticated proponents of moderation in this arena is Joel Feinberg. In a seminal paper,[1] Feinberg asks us to consider the following example. A hiker is lost in the mountains as a blizzard descends upon him. He luckily discovers an alpine cabin—yours—and knocks but receives no answer. Rather than freeze to death, he proceeds to break into the cabin, eat your stores and convert your furniture into life-saving firewood. Surely he is morally permitted to do so. But it seems equally obvious that in doing so, he infringes your rights. Thus we are led to the idea that some rights infringements are justifiable. If that is so, then at least some rights are not absolute.

The problem I am interested in can be summarized by four claims, each of which appears to be true, but all of which when taken together generate a contradiction.

(1) The cabin owner has an exclusive right to the use of the cabin.

(2) Therefore all others have a duty not to use the cabin without the owner's permission.

(3) Therefore it is impermissible for anyone else to use the cabin without the owner's permission.

(4) But it is permissible for the hiker to use the cabin without permission.

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1. Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life, in* JOEL FEINBERG, RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY 221–251 (1980).

One of these propositions must be given up. I believe that (4) is true, that (3) follows directly from (2), and that (2) really does follow from (1). Thus I believe that we must give up (1). Though there are many reasons that might support such a move, including a wholesale rejection of moral rights, I believe the best solution is to allow the owner an absolute moral right to her property, albeit a right whose scope is narrower than we might at first have thought.

II

One helpful way of framing our problem is to ask what happens to the owner's right when it appears to be infringed. There are four possible answers. The first abandons proposition (1), and claims that there never was a right in the first place. Unqualified rights to life or property are, as Bentham said they were, nonsense upon stilts. Once we properly specify the exact contours of the relevant right, we can see that it does not include dominion over the cabin in a way that morally precludes you from entering and destroying its contents. The second response abandons proposition (3), and claims that the relevant right in (1) is merely prima facie. This makes the relevant duty in (2) prima facie as well. Since one cannot infer that an action is impermissible just because one has a prima facie duty not to undertake it, the inference from (2) to (3) is blocked. The third route envisions the relevant right as a real, full-fledged, actual right, but allows that such rights may be justifiably infringed in unusual contexts. Proponents of this view[2] (call it *the infringement theory*) have not explicitly stated whether it is (2) or (3) that they are asking us to give up. The fourth strategy abandons (4), and so rejects the claim that the hiker's actions were morally permissible. However, even Nozick allows that the side-constraints defined by property rights may be suspended in cases of "catastrophic moral horror."[3] I take it that this would be one such case, if the hiker's ultralibertarian conscience stayed his hand and had him die of cold just inches from the cabin. I allow that moral theory sometimes shows us the error of even our deepest intuitive convictions. But rather than argue for mine in this instance, I will simply take it for granted that the hiker is morally permitted to do what he does, that claim (4) is true. I will proceed on the supposition that one would reject (4) only as a last resort; only if one finds the cost of abandoning (1), (2) or (3) too dear. The remainder of this paper is an effort to show how an absolutist modification of (1) yields rather modest costs.

The relevant modification of (1) is given by a view that we can call, following Judith Thomson,[4] *full factual specification.* On this view, there is no right to life *simpliciter*, but rather a right not to be killed except in circumstances A, B, C, etc. On this theory, rights are always absolute, i.e., are of the utmost stringency and can never be morally overridden. Any situation that appears to call for infringement is instead subsumed under one of the exceptive clauses. If in Feinberg's example it was permissible to enter without

2. *See* Herbert Morris, *Persons and Punishment*, MONIST 52, 475-501 (1968); A.I. MELDEN, RIGHTS AND PERSONS 11–16 (1977); JOEL FEINBERG, SOCIAL PHILOSOPHY 71–79 (1973); Feinberg, *supra* note 1; Judith Jarvis Thomson, *Self-Defense and Rights, Some Ruminations on Rights, Rights and Compensation, all reprinted in* RIGHTS, RISKS AND RESTITUTION (1985); JUDITH JARVIS THOMSON, THE REALM OF RIGHTS (1990).

3. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 29-30 (1974).

4. *Self-Defense and Rights, supra* note 2, at 37.

permission, we can infer that the owner's right incorporated an exceptive clause that relinquishes her dominion over the cabin in certain cases of emergency.

Feinberg has criticized this route because no one has yet offered a full specification of even a single right, and, further, the theory yields a damaging ignorance about which rights we have.[5] Judith Thomson has criticized this theory by claiming that the rights that would emerge lack any independent moral explanatory power.[6] And Phillip Montague has criticized this path on the grounds that it fails to explain how, if they infringed no rights, the hiker's or conductor's actions can have any moral significance at all.[7]

Specificationists can admit the truth of both of Feinberg's claims while denying that either is devastating. That no one has yet exhaustively enumerated all exceptive clauses of a right does not mean that it can't be done. However, specificationists could allow that such full specification is indeed impossible, even in principle, without sacrificing their case. Perhaps we cannot provide an exhaustive specification of a right's scope because novel, unanticipated circumstances might force a reconsideration of the content of exceptive clauses. If true, this would explain why no one could know the full extent of a right's scope. But such ignorance needn't be devastating. Neither Feinberg nor any other opponent of specificationism has made out an argument that a right can exist only if its full content is knowable.

Nor does the specification view imply thoroughgoing ignorance of which rights we have. We may know most of the content of a right without knowing all of it. This would often allow us knowledge that in specific circumstances certain persons have or lack particular entitlements, liberties, powers or immunities. Having balanced the claims in the hiker case, for instance, we might justifiably believe that the owner's right is narrow enough to permit the hiker's license. We may know this without at the same time knowing the full scope of the owner's dominion.

III

In Thomson's eyes, we look to rights in large part as explanatory devices—they are vital tools in determining the permissibility of certain kinds of conduct. She faults the specification view because she thinks that it makes rights incapable of explaining why certain actions are permissible or impermissible:

> 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 of 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

5. Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, *supra* note 2, at 228–229. This criticism is echoed by a rhetorical question of Thomson's, *Self-Defense and Rights*, *supra* note 2, at 39.

6. *Self-Defense and Rights*, *supra* note 2, at 38–42.

7. Phillip Montague, *When Rights are Permissibly Infringed*, PHILOSOPHICAL STUDIES 53, 347–366 (1988).

> circumstances does not violate the right which is the most the victim has in respect of life?[8]

Suppose things are as Thomson says. Then we will have as a major premise in moral argument a specification of the contours of a relevant right. We need supply only a factual premise about whether the exceptive circumstances obtain in order to derive a conclusion about the permissibility of the behavior in question. This seems the paradigmatic way in which a moral principle can be explanatory: the conjunction of moral principle and factual claim entails a more particular moral conclusion.

Thomson must claim that being embeddable in a syllogism of the above form is insufficient to make a moral proposition explanatory. Specifically, she must claim that the explanatory power of a rights principle is undermined if the principle is justified only by first determining the permissibility of the actions it governs. Thomson assumes that the order of inquiry for the specificationist must be as follows—first determine the permissibility of an act, then craft the rights principle accordingly.[9] But why accept this view of the specificationist project?

It seems that Thomson is envisioning a specificationist program in which rights principles incorporate exceptive clauses so detailed that they will sometimes, perhaps often, incorporate definite descriptions, reference to unique circumstances, proper names, etc. They would be indefinitely long disjunctions of correct conclusory moral judgments. But the specificationist might instead insist that the relevant exceptive clauses be relatively few in number and couched in terms of repeatably instantiable *kinds* of exceptions. There might, for instance, be a small, finite number of kinds of circumstances that represent exceptions to one's right not to be killed. If that were so, then specificationists would not need to first determine whether a killing is permissible in order to then specially tailor a well-defined right. Rather, they might simply posit their right, with exceptions attached, and then conjoin the relevant factual circumstances to infer the permissibility of a given course of conduct.

It may be replied that no small number of general exceptions is likely to cover all cases. The specificationist will invariably have to incorporate an indefinitely long series of exceptive clauses that become more and more narrowly tailored to meet the exigencies of a complex moral order. If this is true—if every morally laden situation represents a unique concatenation of morally relevant properties, so that such properties aren't repeatably relevant in the same way—then we must resort to a particularist moral ontology and epistemology. General moral principles, including general rights principles, would be insufficient to determine the deontic status of morally laden situations. The specificationist would be forced to incorporate quite detailed and narrowly drawn exceptive clauses into her rights principles.

But this can't be a decisive criticism of the specificationist. If generally described moral properties are repeatably relevant, then there's no reason to deny that such properties can be the sole occupants in the specificationist's exceptive clauses. If, on the other hand, the moral order is too complicated to be captured by generally described properties, then *any* moral principle

8. *Self-Defense and Rights*, *supra* note 2, at 39.

9. Thomson retains this view of the specificationist's order of investigation in THE REALM OF RIGHTS, *supra* note 2, at 88–91.

incorporating reference to such properties is incapable of being conjoined with factual statements to yield a conclusory deontic assessment. Moral principles could not be explanatory in the way Thomson expects them to be. Surely if the particularists are right, it can only assist the specificationist, since infringement theories and prima facie theories are by their nature bound to endorse rights that have rather generally described contents.

If moral particularism is true, then the prima facie and infringement views must be false. This by itself doesn't show that specificationism is true. In fact, one might be tempted to see the truth of particularism as especially damaging to a specificationist programme. For a particularist ontology seems to imply that the string of exceptive clauses appended to any moral right must be indefinitely long. If that were so, then the full content of the right could not even in principle be knowable. Depending on one's metaphysical views, this might imply that the content of the right is meaningless, or indeterminate in the sense of not definitely protecting any particular choices or interests of the putative rights bearer.

There are two responses to this objection. The first, which I'll only mention, is to reject the antirealist assumption that licenses the inference from unknowability to metaphysical indeterminacy. If metaphysical antirealism is false, then we could claim that the in-principle unknowability of a right's content is compatible with its determinately offering particular protections in particular contexts, even if the string of exceptive clauses is indefinitely long.

I don't think that we need to pursue metaphysical issues here, however, since the specificationist has an adequate reply even if we grant antirealists their metaphysical assumptions. The model of rights that has been in the background thus far is one in which we have a limited number of general rights, with broadly described contents, to which we add exceptive clauses. If a particularist ontology and epistemology is correct, then this model must go. We would no longer have a right to life unless..., or a right to one's purchased property unless..., but rather quite concrete rights that confer very particular protections in concrete, definitely described contexts. There would not be a finite number of rights with indefinitely long strings of exceptive clauses attached. Rather, there would be an indefinitely large number of quite particular rights. Rights claims would take the following form: "X" (a name) has a right to Y (definite description) at t (time) in circumstances C, where these latter are finely described and readily make reference to nonrepeatable features of the situation. This by itself should not be thought implausible. Every rights theory will generate particular rights of this form. What is controversial, if anything, is the particularist's assumption that there can be no general rights principles from which such concrete rights claims are inferred. If this sounds implausible, it is no more so than the particularism that underwrites such a model.

Rights claims could still be explanatory on such a view, in the following way. One could infer an overall deontic verdict given a particular rights claim, combined with knowledge that the relevant circumstances obtain. True, this seems a quite weak sense of explanatory efficacy, but it is the only one allowed once we grant particularism. It is also true that one may be puzzled about how to identify which rights we have, since their existence can't be inferred from general principles. But that again is a problem for particularists generally, not a problem peculiar to an absolutist model of rights.

If particularism is true, and there are any moral rights at all, then those rights must be structured along the lines I have just suggested. The standard specificationist model would have to be be replaced by one that abandons exceptive clauses while making rights highly particularized. This may not be a very attractive option. But if particularism is true, we must remember that the prima facie and infringement theories must be false, since these latter presuppose the existence of generally described, repeatably morally relevant properties. Absolutism about rights is the only approach consistent with a particularist moral ontology and epistemology.

IV

Of course, ethical particularism may well be false. Most philosophers certainly think so, or at least write in a way that presupposes its falsity.[10] So let us return to arguments that assume that principles play a plausible role in moral theory. Thus we return to a specificationism that sees rights as incorporating exceptive clauses that identify repeatably instantiable kinds of circumstances that circumscribe the protections afforded the rights bearer. Having done this, specificationism must face further charges of explanatory failure.

For instance, couldn't it be the case that, ably equipped with one's specified right, an unexpected scenario or tricky thought experiment presents itself where morality appears to require the right's suspension? Rather than allow a right to be permissibly infringed, the specificationist will be forced to draw another exception (or recognize an already-existing but hitherto unnoticed exception) to her specified right. And this shows that specificationists are basically engaged in post hoc patchwork, making rights ascriptions in a conclusory fashion.

The best response is to admit that hard cases can force a redrafting of a right's content. Still, this does not show that the order of investigation is as Thomson says it is. If we deny that rights ascriptions are self-evident, then we must be willing to concede the existence of cases where the conflict between intuition and ascription forces a revision of the rights principle. But surely this is familiar stuff. It is the sort of coherentist endeavor to attain wide reflective equilibrium that normative theorists of all stripes engage in.

Consider this response: "But how does the specificationist discern the content of a right in the first place? Isn't it by first determining what has been permissible in past cases and making an inductive inference? If so, then isn't the explanatory deficit reinstituted?" This question asks us to resolve one of the most fundamental issues of moral epistemology. This can't be settled here and it doesn't have to be. Rights ascriptions for any theorist will either be viewed as self-evident or not. If anyone claims self-evidence for their favored full-fledged rights, Utilitarians and others will simply reject them. If, on the other hand, one must justify one's rights ascriptions, then the justificatory resources available to the prima facie or infringement theorist are equally available to the specificationist.

10. Notable exceptions include MARTHA NUSSBAUM, LOVE'S KNOWLEDGE (1990); MARK JOHNSON, MORAL IMAGINATION ch. 4 (1993); JOHN KEKES, MORAL TRADITION AND INDIVIDUALITY ch. 7 (1989); ALBERT JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY (1989); John McDowell, *Virtue and Reason*, MONIST 62, 331–350 (1979); JONATHAN DANCY, MORAL REASONS (1993).

We can see this by noting that the problem of specifying the content of a right is the very same problem as that of balancing prima facie rights, or knowing when a right is permissibly infringed. In each case, conflicting moral considerations generate a moral conclusion either about what a full-fledged right contains, or about the circumstances under which a full-fledged right can be permissibly infringed. If having recourse to such considerations vitiates the explanatory power of the specificationist's rights, it must do the same for those of their theoretical competitors.

This has an important implication. Specificationism is normatively neutral; it, like the prima facie and infringement theories, is a theory about the structure of rights and an explanation of putative rights conflict. It is not a substantive theory that seeks to identify the actual content of rights for any given domain. The specificationist view by itself implies nothing about how many exceptive clauses there are for any given right, or how generally such clauses should be described. One needs to couple a plausible, sophisticated normative theory of property, or killings, or whatever, before one can generate specific rights claims from such a theory. What this shows is that one cannot hope to arbitrate the dispute among specificationists, infringement theorists and prima facie proponents by looking to see which generates the most attractive set of rights. Each will be able to accommodate that set with its peculiar mechanisms of exceptive clauses, justifiable infringements or overridings.[11]

These points can assist us in defusing Montague's criticism of the specificationist project. He cites an example of Thomson's,[12] in which you must break into a stranger's freezer to obtain some steak necessary for saving the life of a protein-starved bystander. Montague claims that tailoring the right narrowly enough so as to permit the taking leaves us without any explanation of the moral significance of your actions. Since you have violated no rights, there is no basis for regret, no need to compensate, or even explain or apologize. Montague's favored position, the prima facie view, succeeds where he claims the specificationist fails, since Montague can cite the prima facie right of the freezer owner as an explanation of why taking the steak, though permitted, was not morally costless. Though he is right about the explanatory resources of his theory, he misjudges specificationism. The resources available to the prima facie theorist are identical to those available to the specificationist. Since an intelligent specificationist will deny the self-evidence of her favored rights, she must allow that their content is determined by moral argument that balances a wide range of competing moral considerations. These may be of varying weight in different contexts. They will sometimes, but not always, be enshrined in an exceptive clause to a right. But when they are not, they function precisely as the overridden, merely prima facie rights of Montague's theory. These diverse considerations needn't disappear just because they fail to have the full moral force of a right. They are as capable as overridden prima facie rights of explaining the residual moral costs in conflict cases.

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11. This normative neutrality does not imply that the choice among the three competing structural theories is unimportant. Nor does it imply that any such choice must be made arbitrarily. There are several criteria that can give determinate guidance in choosing a structural theory. One such criterion is explanatory efficacy. Others are discussed below.

12. *Self-Defense and Rights*, *supra* note 2, at 40.

V

Thomson and Feinberg offer an additional criticism, this one based on specificationism's alleged inability to explain when and why compensation is owed. Thomson and Feinberg are committed to the claim that one owes compensation only if one has infringed a right. That one owes compensation in the steak example establishes the infringement of the owner's right.[13] In Feinberg's example, he assumes that the hiker owes compensation for the goods he has damaged. Compensation is owed; *therefore* a right has been infringed.[14] Since specificationists view both takings as permissible, they deny that rights have been infringed. Therefore they cannot explain when compensation is owed.

This argument depends on two crucial claims: first, that compensation is owed in these cases, and second, that a right must be infringed for this to be so. The first claim is not clearly true.[15] though I will grant it here. The second claim—call it the *infringement thesis*—seems false.

Justification of the thesis requires eliminating competing explanations of compensation, a task that proponents of the thesis have yet to undertake. Imagine a utilitarian justification of compensatory claims that cites the drastically suboptimal consequences resulting from a policy of allowing individuals to take another's possessions without obtaining permission or providing compensation. This general principle, or something nearly like it, might well be the source of many justified compensatory claims, even in a non-utilitarian system. If it is, we can explain compensatory demands without invoking the infringement thesis. Of course this sort of utilitarian theory may be false. I am not arguing for its truth. But its availability creates a burden of proof for the infringement thesis that its adherents have yet to shoulder.[16]

There is reason to think the infringement thesis false even if no general principle of the previous sort is justifiable. If I pull up to a gas station and fill my car, I must compensate the station owner even though I've infringed none of his rights. Further, insisting that the station owner does have a right, *viz.*, that-his-gas-not-be-taken-without-compensation, is simply to presuppose the *specificationist* view. In this case, my taking the gas isn't infringing any rights, but my doing so without paying would be. The specified right can explain why compensation is owed without citing a right that has been infringed. In this regard the specified right seems (at the very least) the explanatory equal of the rights endorsed by infringement theorists.

There is one further problem. If the infringement of a right is to be fully explanatory of justified compensatory demands, then something much stronger than the infringement thesis must be true. Rights infringement must not only be

13. *See id.* at 41. *See also, Rights and Compensation, supra* note 2, at 71–77; *The Realm of Rights, supra* note 2, at 93–96, 99–100.

14. Feinberg defends this inference in *Voluntary Euthanasia and the Inalienable Right to Life, supra* note 1, at 230.

15. *See* Montague's two pieces: *When Rights are Permissibly Infringed, supra* note 7, at 349–353, and *Rights and Duties of Compensation*, PHILOSOPHY AND PUBLIC AFFAIRS 13, 79-88 (1984).

16. See Jules Coleman, *Moral Theories of Torts: Part II*, LAW AND PHILOSOPHY 2, 5–36, 19–24 (1983), and THEODORE BENDITT, RIGHTS 51–64 (1982), for more developed accounts of the Utilitarian possibilities mentioned here. Neither Colemen nor Benditt endorses Utilitarianism, however.

a necessary, but must also be a sufficient condition, of owed compensation. For if it weren't a sufficient condition, then the infringement theorist would have to appeal to considerations other than infringement in order to explain why compensation in particular cases is owed. But if appeal to such considerations must be made, then naturally the specificationist is free to rely on these as well, and cannot be criticized for doing so. Once we allow that matters other than infringements are relevantly explanatory, the coast is clear for specificationists to offer their own account of when compensation is owed.[17]

Specificationists claim that every rights infringement is also a rights violation (i.e., a *wrongful* infringement). Sensible specificationists will allow that rights violations are not fully explanatory of justified compensatory claims. For instance, the hiker very likely does owe compensation to the cabin owner, even though the permissibility of his conduct shows that no right was violated. So rights cannot do all the explanatory work necessary to account for compensation. But this is so as well for the infringement theorists. For rights to be fully explanatory, their infringement would have to be not only necessary but also sufficient for generating compensation claims. But the sufficiency claim is false. Imagine that I must trespass on your lawn to save a child drowning in your neighbor's yard. If we assume the permissibility of such behavior, and accept the structure of rights conflict endorsed by infringement theorists, then I have justifiably infringed the neighbor's right(s). But it is surely false that any compensation is owed. Thus infringing rights is not a sufficient condition of owing compensation.

What this means is that some justifiable rights infringements generate compensation claims, and others do not. Infringement theorists have not given an account of the principle(s) that separate such cases. This makes the notion of a rights infringement far less than fully explanatory of justified compensatory demands. Rights infringement is neither necessary nor sufficient to explain when compensation is owed. There has been no reason given for thinking that the other, non-rights-based moral resources essential for accounting for compensation are barred from the specificationist's use. The argument against specificationism based on its alleged explanatory inferiority in compensatory matters is thus unsubstantiated.

VI

At this point the infringement theorist will want to bring out the heavy artillery, which, in this case, takes the form of a potent set of rhetorical questions. Consider the notorious Trolley Problem.[18] An out-of-control train is hurtling toward five innocent people. The conductor applies the brakes. They fail. The conductor has but a single option—turn the train to a side track. Unfortunately, doing this means killing the one pedestrian who finds herself inescapably situated on the spur. Suppose the conductor may switch tracks. *Surely* the one innocent on the side track does not lose her right to life just because five others happen to be perched on the adjacent rails? Just as surely,

17. The specificationist view doesn't by itself entail any substantive view of when compensation is owed. It is compatible with the simplest of accounts (e.g., compensation is owed if and only if one violates a right) as well as the most complex.

18. First presented by Philippa Foot in *Abortion and the Doctrine of Double Effect*, OXFORD REVIEW 5 (1967).

you don't lose your right to the cabin or your steak just because a needy stranger happens by? You've acquired your property by lawful means and have done no wrong. How could you then lose your right? Specificationists appear to make the ascription of the very most fundamental moral protections a contingent matter that depends entirely on fortuitous circumstances that bear no relation to the agent's own moral character or conduct. *Surely* rights—especially those to life or limb—can't just pop in and out of existence depending upon states of affairs in the world that have no bearing on one's moral make-up?

It is tempting to see these questions as directed only against prima facie theorists, since they do make the existence of a full-fledged right dependent in just the way described.[19] Specificationists, on the other hand, do not believe that full-fledged rights appear and disappear; one has them until one voluntarily waives them or forfeits them through misbehavior. The price specificationists must pay, of course, is that one is more often mistaken about who has which rights. In the Trolley case, for instance, the natural thought that the one innocent has a right to life *simpliciter* is mistaken. If we allow that the conductor is permitted to steer the train in her direction, it must be the case that the innocent has no right to life that will morally bar the conductor's actions.

There is a deep issue that the infringement theorist is pushing. Though the specificationist does not allow rights just to pop in and out of existence depending on fortuitous circumstances, the specificationist must grant that the actual protections afforded by enduringly possessed moral rights are vulnerable to the vagaries of luck. And it is precisely this sort of vulnerability that might be at the root of the infringement theorists' worries. But would they be right in thinking this problematic? Are the protections offered by fundamental moral relations immune from the sort of bad luck that has befallen the cabin owner or the innocent on the side track?

One reason for thinking that possession of rights is (relatively) immune from the bad luck described above stems from a variation of natural rights theory. Natural rights here needn't be preconventional or inalienable. In my sense, they are rights conferred solely on the basis of three necessary and jointly sufficient features. First, one must possess the relevant set of natural features (self-awareness, instrumental rationality, the ability to universalize maxims, whatever). Second, one must not have voluntarily relinquished the relevant right. And third, one must have avoided the kind of wrongdoing that leads to forfeiture. Whatever natural features do ground a right to life, let us stipulate that the one innocent on the track possesses them. She's certainly not voluntarily relinquished her rights. And she's done nothing to deserve her unfortunate plight. So she hasn't forfeited her right. Therefore she's got a right to life.

These are familiar moves, with equally familiar problems. Suppose they could be resolved. Still, this doesn't get infringement theorists what they need. For even if we allow that the one innocent on the side track possesses all the relevant natural features and has not waived or forfeited her right to life, a natural rights theory does not tell us how narrowly crafted the emerging right

19. *See* MELDEN, *supra* note 2, at14–15.

to life is. That rights are generated "naturally" tells us nothing whatever about their scope.

A second reason for minimizing or eliminating the sort of bad luck discussed above stems from deeply held views on equality. An infringement theorist could claim that assignment of a right to the cabin owner or the innocent on the track follows directly from the principle of treating equals equally. As Thomson says, surely the one innocent has a right to life if we do.[20] Presumably this is because she is innocent, and does possess the natural features that we do: she is our moral equal. As an equal, she possesses the very same rights that we do in virtue of our natural traits. The logic of morality requires this: all persons possessing identical morally relevant "base properties" must be subject to identical moral assessments.

The innocent on the track is our moral equal in the sense that she is as deserving of respect and as morally innocent as we are. Whatever natural features are relevant for apportioning moral rights, they are, by stipulation, just as fully instantiated by her as by the other five. Thus specificationists attracted to the kind of natural rights theory described above should readily allow that all six have the same right to life, however narrowly drawn. This may seem problematic. For if they all have the same right, they all have the same protection against being killed. So if the five are protected, the one should be as well. Alternately, if the one is protected, the five must be as well. But both of these claims cannot be true. For in the trolley scenario, at least one person must die.

This problem is only apparent. Two responses show why. First, one might say that (i) all six have identical natural features, therefore (ii) all six have the same right, therefore (iii) all six are equally morally protected against being killed, therefore (iv) it is impermissible to kill any of them. A specificationist could endorse all four claims. This would force her to say that in some cases, an agent has a choice only between impermissible options. Most philosophers who claim that genuine moral dilemmas can occur are committed to this view.[21] It may be false. But whether it is so is an issue quite independent of the specificationist programme. If it is true, then we could accept (i)–(iv) and retain specificationism. If it is false, then we must abandon at least one of the four claims. But we needn't abandon specificationism as a result.

Claim (i) is true by hypothesis. I am allowing that (ii) follows from (i).[22] Since I view rights as moral protections, I also allow that (iii) follows from (ii). But (iv) does not follow directly from (iii). (iii) claims that all six have identical *kinds* of protection. Regarding the right to life, each has the very same

20. *Self-Defense and Rights, supra* note 2, at 39, n.6, Judith Jarvis Thompson, *The Trolley Problem, in* RIGHTS, RESTITUTION AND RISK 94, 105 (1986).

21. Walter Sinott-Armstrong is an important exception. *See* MORAL DILEMMAS (1989).

22. In other words, I am granting the truth of a natural rights theory that makes rights ascriptions depend entirely on possession of certain natural features (plus lack of forfeiture and waiving). This concession is designed to *strengthen* the infringement theory's criticism of specificationism. For suppose such a natural rights theory false. Then two people might possess identical natural features and still possess different rights. Things other than natural features (and forfeiture and waiving) would be a relevant part of the base upon which moral rights supervene. If that were so, it would create the possibility that each of the five possessed a right different from the one innocent, even though all six possessed identical natural properties. This would be of obvious use in resolving the trolley problem. But because this argumentative route is contentious, I simply assume the truth of a natural rights theory that disqualifies such a move.

right that incorporates the very same exceptive clauses. But these exceptive clauses will generate a requirement not to kill their bearer only if all six agents are in identical circumstances. It is far from clear that they are.

If you and I both have a right not to be killed unless we credibly threaten immediately to kill another, then though we both possess this identical right, I may be killed while you may not if I alone unholster my loaded pistol and take aim. You and I possess the same right, the same protections, but only I may be permissibly killed. That's because I am situated in just the circumstances described in the exceptive clause to my right to life. This is the key to a specificationist's account of the trolley problem.

All six have the same right, hence the same kind of protections. Suppose we may not turn the train, say, because doing so would be intentionally killing an innocent, while allowing the train to run its course would be "merely foreseeing" the five deaths. Then though all six have the same right, the relevant right would be specified in such a way as to prohibit turning the train and to require staying the course. Bad luck has situated the five in such a way that their moral protections do not bar the conductor from allowing the train to pursue its multiply deadly path. The very same right does give the lone innocent the sort of protection she was hoping for. It's not that there is any difference in natural traits or moral character that allows this distinction. No one of the six deserves to die. But this just shows that one's deserts don't determine all that it is permissible for others to do you.

We could of course run a similar sort of analysis on the suppositions either that the conductor must turn the trolley, or is free to choose either track. I am not so foolhardy as to try to identify in passing the precise nature of the circumstances that would have to be incorporated into the relevant exceptive clauses licensing such alternatives. The essential point is that, no matter one's normative views on the trolley problem, a specificationist can offer an adequate solution compatibly with our commitments to moral equality. Though all six will have identical rights, the exceptive clauses incorporated in each right will allow their bearer to be killed in certain circumstances. Bad luck can make it true for only some among many moral equals that they find themselves in precisely those circumstances. This is often tragic. But the tragedies that involve luck of this sort could not be alleviated by abandoning specificationism.

What seemed an especially appealing part of the infringement theory was its ability to make sense of the claim that all six in the trolley case had identical rights. Since we are permitted (on those views rejecting moral dilemmas) to kill at least one of these innocents, we are led naturally to the idea that even rights to life may be justifiably infringed. I have tried to show how we might resist this natural line of reasoning by showing how the presence of situational luck can justify according differential treatment to moral equals. Thus even on the assumption that some version of a natural rights theory is correct, specificationism can plausibly explain the moral relations in conflict cases without violating supervenience or any of our deep attachments to equality.

VII

Part of the appeal of an infringement theory is its recognition of what seems a home truth: The arrangement of human affairs sometimes requires the performance of justifiable injustices. Certainly we don't welcome such

situations, but unfortunate circumstances sometimes force our hand and make it the case that the lesser of two evils involves the infringement of a right. To deny this is apparently to suggest that rights are the be-all and end-all of morality. Any view committed to this idea—and specificationism seems one such—represents a cramped, overly moralistic conception of the ethical demands in a life.

I think we should follow the infringement theorists in their insistence that rights and obligations do not exhaust all morally relevant considerations.[23] We should also deny that the Hohfeldian elements comprise all of the interesting kinds of moral relations. What's more, specificationists should admit that standing on one's rights can occasionally violate other moral norms. One can be terribly stingy, querulous or malicious when doing what one has a right to do. All of these concessions should dispel any impression that a specificationist view must be a straitened, overly narrow one.

Still, it is true that specificationism does see rights as occupying a special role in moral theory. Other moral considerations may be overridden, but rights may not. This naturally requires justification, especially given the admission that it is sometimes morally inadvisable to exercise one's rights.

That justification need not take the form of trying to show that all moral considerations are somehow rights-based. It needn't try to show that rights are the only things that generate moral requirements. It needn't claim that the dictates of rights and virtues must always coincide. Rather, the justification comes from attending to the logical implications of rights possession. Rights are special because they alone always generate correlative duties. Real, full-fledged rights always entail real, full-fledged duties. It follows from the concept of a full-fledged duty that if one has a duty to do (or refrain from) X, then it is impermissible not to do (or refrain from) X. It is impermissible to fail to do what real duties require. Duties are not always generated by rights (e.g., they might stem from needs or special relations), but when they are, it follows that it is impermissible to do what will infringe a right. Thus rights directly entail an overall verdict about the permissibility of actions. Ideal directives don't have this property. Neither do the virtues. It is sometimes permissible to do what contravenes an ideal directive, and sometimes permissible to fail to exhibit a virtue. By contrast, it is never permissible to infringe a right. Rights are special in just this way.

For those interested in returning to the schematic representation of Feinberg's example given in section I, they can see that what I've just been claiming is that (2) really does follow from (1), and that (3) really does follow from (2). That is, rights really do imply duties, and it is not permissible to act contrary to duty. I should emphasize that I am here speaking only of full-fledged rights. Prima facie rights, if such exist, are an entirely different matter. But even the prima facie theorist will agree with the specificationist that full-fledged rights imply full-fledged duties, whose infraction is impermissible. Where the prima facie theorist and the specificationist part ways, at least in the Feinberg example, is that the former thinks that the relevant right to the cabin was merely prima facie, whereas the specificationist thinks that a full-fledged right, albeit one that permits the break-in, governs the owner's property.

23. *See* THOMSON, THE REALM OF RIGHTS, *supra* note 2, at 117; FEINBERG, SOCIAL PHILOSOPHY, *supra* note 2, at 75.

It may be tempting to re-issue the charge of over-strenuous moralism again after noting my statement that all infractions of duties are impermissible. However, I intend this not as a substantive claim about the content of morality, but as an analytic one about the meaning of "duty." "X has a full-fledged duty not to do A" just means, or directly entails, "X is forbidden from doing A." The inclination to see a case as one of permissible duty infraction must be resisted, either by acknowledging the real duty and denying the justification of the infraction, or by allowing the infraction, but denying that a full-fledged duty is present.

If my claim about the meaning of "duty" is true, then (3) does follow from (2). Thus the only way for infringement theorists to sustain their position is to deny that having a full-fledged right entails another's having a full-fledged duty, i.e., to deny that (2) follows from (1). Infringement theorists have not explained how this can be so. Surely if I have a genuine right not to be killed in the present circumstances, that imposes a real, full-fledged duty on others not to kill me. We should be reluctant to speak of my right as a real, non-prima-facie right if we had determined that you had moral license to kill.

Liberty and immunity rights define a kind of moral space within which rights-bearers have exclusive domain to do as they please. Entitlement rights give their bearers exclusive control over goods and services. Power rights give their bearers full title to alter the moral or legal status quo. The kinds of claims, powers, freedoms, and, more generally, protections of interests and autonomy that rights confer are predicated on the existence of correlative duties of compliance and forbearance. It makes no sense to speak of these various relations *as* protections if others are not duty-bound to respect them. Though I shall leave it an open question as to whether rights are reducible to their correlative duties,[24] that they do impose such duties must be granted if rights are to function as genuinely powerful moral devices.

Thus specificationists need not view rights as exhausting the moral domain. They can allow for a plurality of morally important relations while still justifying a special place for rights within moral theory. Rights are unique because they may never be overridden and so (conjoined with propositions describing the relevant situational circumstances) entail overall deontic verdicts. This claim is defensible given a parsimonious logic of rights and duties combined with attention to the moral protections we wish rights to confer. I certainly have not said all there is to say on behalf of such a conception. But infringement theorists have said nothing at all about whether, or how, we might justifiably block the inference from (1) to (2), or from (2) to (3). Until they do, we should accept the claim that full-fledged rights imply full-fledged duties, which in turn directly determine the permissibility of duty-governed conduct.

Samuel Scheffler has nicely distinguished three ways in which morality, or a specific moral theory, might be said to be too demanding.[25] First, morality might be overriding—it would never be rational knowingly to do what morality forbids. Second, morality might be pervasive—all voluntary human actions would in principle be subject to moral assessment. And third, morality might be exceedingly stringent—its substantive requirements may frequently

24. See Joel Feinberg, *Moral Rights: Their Bare Existence*, *in* FREEDOM AND FULFILLMENT, 197, 203–205 (1992), for arguments against the reducibility claim.

25. SAMUEL SCHEFFLER, HUMAN MORALITY, ch. 2 (1992).

demand a sacrifice of self-interest. It is important to see that the specificationist view is *neutral* with respect to all three dimensions. This buttresses the claim that recognition of absolute rights need not lead to a view of the moral life that is overly moralistic, too demanding, or dismissive about the importance of moral considerations other than rights. Specificationists can easily grant that rights are not the be-all and end-all of morality, or life.

VIII

Thus far I have concentrated on defusing criticisms of the specificationist programme. Even if successful, such a campaign would only establish the conclusion that specificationism is not worse than its competitors. This might be enough, given that almost the whole of the extant literature on the subject is critical of specificationism. But I think I can do better than that, and argue, if only presumptively, for its superiority. My comments will of necessity be brief, intended more as an outline of future research than as a battery of knock-down arguments.

I think specificationism superior to the infringement view in three ways, all of which have been mentioned in passing. First, only specificationism is compatible with a particularist ontology and epistemology. Admittedly, one cannot know how heavily to weigh this factor until one knows how plausible ethical particularism is, and I have not committed myself to any view here. Second, specificationism can make ready sense of the logical puzzle introduced by Feinberg's example, and does so in a way that yields a logically economical theory of how rights, duties and deontic judgments are related. Proponents of the infringement view, on the other hand, have yet to offer an account of how to block the inference from real rights to real duties, or from real duties to deontic judgments. Theirs is bound to be a less parsimonious logic of rights. Third, rights on the infringement view actually fail Thomson's test for explanatory efficacy. Given a description of the relevant contextual circumstances, one cannot infer anything about the permissibility of a course of action simply by invoking a rights claim. Since rights, on that view, will sometimes be justifiably infringed, one cannot be sure, without attending to non-rights considerations, whether the right should be vindicated. By contrast, moral rights, on the specificationist view, will always entail deontic judgments when conjoined with appropriate descriptions of the relevant circumstances. To that extent, they are explanatorily superior to rights as envisioned by the infringement theorists.

Absolute rights retain their explanatory superiority when pitted against those of the prima facie view. It is one of the hallmarks of this latter theory that one can never look solely to a prima facie right in order to know who has which moral protections in a given circumstance. There is a familiar problem closely related to this explanatory deficit. Prima facie theorists have yet to tell us how we might generate substantive moral conclusions from premises that incorporate prima facie rights. No plausible balancing procedure has ever been put forward. There can be no fixed hierarchy of prima facie considerations, for this would undermine the spirit of evaluative variability at the heart of the theory, and also create insuperable ordering problems whenever a plurality of lower-ranked rights conflicted with one at a higher rank. Nor can we adjudicate prima facie conflicts by opting for that consideration that yields the most good,

since this effectively collapses a rights view into consequentialism and makes rights purely derivative from the ultimate good.

The absence of a plausible balancing procedure makes prima facie rights only minimally efficacious when it comes to explaining the deontic status of a situation. Compare this to the specificationist view. Specified rights offer concrete guidance about who has which moral protections in a given situation. A specified right precisely enumerates the conditions under which (say) a putative entitlement need not be honored. By contrast, a prima facie right entitles one to something only if no more pressing concerns arise. Since such concerns can be, to put it mildly, rather diverse, prima facie rights remain only minimally explanatory without a full picture of the nature and evaluative weight of these other factors.

This puts the prima facie theory in a difficult bind. For if we retain an explanatory test as a criterion of theoretical adequacy in this domain, the prima facie view seems to fail. So suppose we jettison this criterion. Then rights principles need no longer serve as major premises in moral argument. Instead, rights would be ascribed in only a conclusory fashion. But once we take this step, the need for *prima facie* rights evaporates. Prima facie "rights" are really only reasons for conferring moral protections, and so can be distinguished from the protections themselves. Since such rights are properly to be thought of as reasons, it follows that if we diminish their explanatory (i.e., reason-giving) force, then such rights become theoretically otiose. If rights ascriptions are conclusory, then the resulting rights are *absolute*, not prima facie; if rights ascriptions are nothing but allocations of actual moral protections (and correlative duties, liabilities, etc.), then prima facie rights will occupy no place in such ascriptions. All rights will be absolute. In a nutshell: Rights ascriptions are either explanatory or conclusory. If the former, the prima facie view fails, since such rights are quite minimally explanatory without a developed balancing procedure. If the latter, the need for such rights disappears.

Another way to express a part of this last criticism is that a prima facie view is incompatible with the ontology of ethical particularism. That ontology makes all moral claims conclusory, and denies the existence of any general reasons or repeatably morally relevant features. A prima facie right presupposes that certain rights-conferring features always possess the same sort of moral relevance whenever they appear. If particularism is true, the prima facie theory is false. If particularism is false, the prima facie view remains in trouble. For then it has to show how prima facie rights play an essential moral explanatory role. It is doubtful that this can be done.

IX

I believe that there are such things as moral rights, but I have not argued for that claim here. My aim is to show how rights must be structured if they are to play any role at all in a plausible moral theory. Though it is tempting for me to conclude this paper with the ringing phrase "All Rights are Absolute!", I must content myself with the less elegant conditional—if moral rights exist, then they are all absolute. Admittedly, this makes for a major loss of rhetorical strength. But perhaps this is fitting, since my specificationist view is bound to sap the rhetorical strength of most traditional rights claims—to life, liberty, the pursuit of happiness. There are no such unqualified rights, since whatever

rights there are must be absolute, and these traditional ones, as they stand, can hardly satisfy that condition.

When rights appear to conflict with other moral considerations, including other rights, we may resolve the tension by reducing either the scope of the right, or its stringency. I have argued that the best resolution of such cases is to retain maximal stringency while reducing scope through the addition of exceptive clauses. If that is correct, then the specification view provides a sound solution to the logical problem that began this paper.

Specificationism does not lead to a damaging ignorance about which rights we have. It need not make rights ascriptions conclusory (unless all moral assessments are conclusory), and so can accommodate an important explanatory role for rights if any theory can. The specification view recognizes that rights infringement is not a necessary condition of justified compensatory claims, and so avoids an unnecessarily stringent explanatory demand. It allows a reasonable place for luck in moral life. It adheres to commitments to supervenience and respects our intuitive attachments to moral equality. By insisting on the inviolability of rights, the theory strengthens the claims of moral agents, and can likely play an important role among those who endorse it in generating self-respect and self-esteem. Finally, specificationism need not reduce the whole of morality to relations of rights and duties, and so can plausibly recognize the diversity of kinds of moral claims, and needn't issue in an overly demanding conception of a moral life. These considerations, combined with the presumptive cases lodged against the prima facie and infringement theories, strengthen the plausibility of a view that sees all rights as absolute.