ABSTRACT

Title of Dissertation: THE DEFEASIBILITY OF RIGHTS

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Consider the following puzzle. Presumably, you and I both have an equal right to life. But what happens if I try to kill you, and you kill me in self-defense? By most accounts, you did something morally permissible by killing me in this scenario. But, if killing me is permissible, then what happened to the initially granted right to life we both started out with? There is currently significant debate over how to explain this situation. Some have argued that my violent transgressions altogether *forfeit* my initial right. Due to my actions, I *no longer have* the right to life at all. Others have claimed that while I still *generally have* the right to life, this scenario satisfies criteria for a *built-in exception* to that standing right: I have the right in other cases, but not this one. Finally, others have suggested that I *maintain* my right to life in this scenario, but that it takes a *lower priority* in comparison to the right of the defendant, i.e., it is *overridden*. While the differences between these understandings of rights may appear subtle, they have drastically different implications. How we solve this puzzle affects how we adjudicate apparent conflicts of rights, how we make sense of what is owed when rights are intruded upon, and how rights function within our broader ethical and legal theories.

In this dissertation, I develop a model of the last of these positions. To substantiate my view, I offer a precise model of the defeasibility of rights—situated in non-monotonic/default logic, a kind of non-classical logic—and highlight its strengths against competing views.

Specifically, I show that this new schema not only salvages intuitions about infringement, but also prevents the unwieldy proliferation of rights. This is an especially desirable outcome, as it avoids blurring the line between rights and other important normative considerations.

The first paper, *Hohfeldian Conceptions of Rights and Rights Proliferation*, argues that competing theories allow for wild proliferation of rights by adopting some form of the "correlativity doctrine," wherein myriad duties and permissions are equivalent to rights, e.g., an act of charity no longer seems charitable if the recipient has "a right" to aid. The second paper, *Rights as Defaults* remedies this by rejecting the correlativity doctrine in favor of my Rights-as-Defaults Model. Using US free speech case law and work in default logic, I argue that fundamental rights are best understood as modifiable collections of defeasible generalizations. This model allows the right to free speech and its protections to accommodate new cases without building long lists of exceptions into the rights themselves while avoiding proliferation. Finally, the third paper, *Revising the Right to do Wrong,* applies this model to the question: do we have a moral right to do wrong? Do I have a moral right to offend a stranger even if I am required not to? I claim that there is no need for a standalone "right to do wrong" because understanding rights as defeasible means that *any right* can be overridden (or override competing considerations). I show how it is not paradoxical to say I have the right to offend you even though I, all-things-considered, should not, and even if we think interference would be justified.

THE DEFEASIBILITY OF RIGHTS

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Dedication

I dedicate this work to my spouse, Heather, and our two children, Josephine and Adrian. You have provided immeasurable support, motivation, and joy through it all. And to my parents, who valued, encouraged, and inspired me to pursue higher education.

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Introduction

The language of rights is seemingly everywhere. Walk into a hospital for an appointment and you will be asked if you want a Patient Bill of Rights. Look around on the walls, and you may see a sign titled "Breastfeeding Mothers Bill of Rights." As internet use has increased, and people's data remains accessible online for lengthy periods of time, some jurisdictions recognize a "right to be forgotten" or to have personal information removed from internet databases. And the UN has long recognized a long list of human rights ranging from a right to be recognized as a person before the law to a right to paid holiday. Recently, in US constitutional law, the Supreme Court in *Dobbs v Jackson Women's Health Organization,* ruled that the previous decisions in *Casey* and *Roe* which established a constitutional right to abortion under the auspices of the right to privacy were wrongly decided – overturning precedent and leaving abortion laws up to the individual states. The court framed the question as one of whether the Constitution conferred a right to abortion and answered "No." With all these various uses of rights, what is a theorist to do?

Sometimes these rights are very abstract or formulated at a high level of generality. A right to life, liberty, and security, for example, is simultaneously emotionally moving but so vague it admits a variety of incompatible interpretations. A classical libertarian, for example, will hold that security does not include positive rights, or rights to be provided certain goods such as food, medicine, etc. A modern liberal may disagree and appeal to the right to security to justify the existence of a welfare state which supplies these goods, as rights, to its citizens. These differences illustrate one option for a theorist when confronting this dizzying array of rights – devise a theory of rights that accommodates or captures all these alleged instances of rights. In

other words, understand the assertion of a right as a claim that a discrete right, with a similar status to all other rights, exists. A tall order, to say the least.

From a theoretical perspective, construing all these various claims as rights presents a set of unique options and challenges. First, whatever substantive theory of rights one endorses, treating each of these claims as discrete rights means they must be justified on the same or similar grounds. And while some of the rights above seem to fall into similar territory – others do not. A right to be forgotten or to paid holiday seems importantly distinct from, say, a right to equality before the law. Whether one endorses an interest-based theory, wherein rights are justified because they protect important interests, or an autonomy-based theory, wherein rights are justified because they protect or advance personal individual autonomy, treating such disparate rights as being the same *kind* of moral object or of equal moral concern appears suspect. So suspect, in fact, that it has led many to be skeptical of human rights in general as the list of alleged rights continues to grow seemingly without any principled end. This skeptical challenge and concern form the core of the proliferation problem: rights appear to proliferate without end which only casts their value in doubt and muddies the conceptual waters in which we aim to invoke and use them.

A second, alternative option to address this concern, championed notably by Henry Shue, maintains that not all rights have the same *weight* or are of equal moral concern. Some rights, according to Shue, are *basic* in that without certain rights being secured, no other rights (non-basic rights) can be enjoyed.[1] Shue's distinction between basic and non-basic rights avoids the skeptics' concern above – to a limited degree. If some rights are more important than others, such as subsistence rights or rights to food, clean water, clean air, and so on, whatever is required for a

[1] Shue 2020 p. 20

human being to *persist* as a living creature, then other rights may, in cases of conflict or limited resources, be sacrificed. In essence, if both someone's subsistence right and their right to be forgotten cannot be secured, for whatever reason, sacrifice the latter to preserve the former. In other words, all the things listed as rights are indeed still rights – but not all rights are of equal importance. So, a theorist need not defend them *all* on the same grounds or ascribe to each the same "weight." But this move may not satisfy the skeptic.

A reasonable response may be that the proliferation concern has not quite been alleviated: the list of rights still seems quite large. Assigning a priority ranking with respect to a list of rights does not directly address the concern that the list seems too large or seems to grow seemingly without end. All it does is make the task for the rights theorist aiming to defend all these claims a bit easier – avoiding the requirement that all rights be justified *in the same way* or be imbued with the same *importance*. But what is desirable, from the perspective of both skeptics of rights and those who wish to defend rights, is that a moral theory or legal theory not only provide a list of rights but also a way to restrict them, to distinguish them from other normatively important things, and to show how rights can occupy a principled, limited, place within a normative system.

A third option aims to define rights in a way that allows all the claims about rights above to qualify as rights, but instead of being wholly separate and distinct rights, views some rights as composed of rights. Such theories are called cluster-right theories of rights: rights are composed of further rights (and possibly other normative objects) of a different kind. For example, the right to abortion was, prior to *Dobbs*, thought to be one of a myriad of rights constitutive of the right to privacy. In other words, within the right to privacy, there is also a right to abortion – the latter is constitutive of the former. This approach to the litany of rights claims above comes closer to

avoiding the skeptical concern. Placing some rights *within* other rights effectively turns a big jumble of balls into a few orderly pillars or umbrellas. Like placing grazing animals in pens – the theorist's job tagging each one is simplified.

However, this may not satisfy the skeptic nor avoid undesirable counterarguments. In *Dobbs*, for example, the court overturned *Roe* and *Casey* on the grounds that a right to abortion is neither explicitly mentioned in the constitution nor *implicit* in the concept of "ordered liberty."[2] In other words, the court attacked the idea that a right to abortion was constitutive of the right to privacy on various grounds – starting from the question of whether it even rises to be a right in the first place. Additionally, a skeptic may accept the cluster-right view as an improvement to the previous two options. However, it still seems the number of rights, even if we apply a sorting system to produce different *types* of rights, is large and could grow without end. In recent decades, growing use of the internet in tandem with an already accepted right to privacy joined together to produce a right to be forgotten in some places– a right constitutive of the right to privacy. But if the right to privacy is a cluster-right, and the future seems open to a variety of new cases, new technologies seem poised to add more and more rights – bloating the right to privacy to potentially unfathomable size. An umbrella can only fit so many people before many are left in the rain. And if this possibility remains for rights, then the skeptical concern remains.

A fourth and final option departs considerably from these previous three. In the previous three options, it is taken at face value that the theorist is to treat each invocation of rights as rights of the same kind or of different but related kinds of rights i.e., as part of the data about *rights* a theorist must capture. This fourth option, for theoretical reasons, simply rejects this

[2] Dobbs v. Jackson Women's Health Organization p. 5

requirement. Language, particularly political language, is messy and often motivated by pragmatic outcomes and goals over principled normative theorizing. Accusations fly alongside sung slogans. Moving speeches devoid of semantic content speak of "folk" and "freedom" and "the nation." The very language of rights, of "a right," insofar as it has become a crucial aspect of political life, likely fares no better in many contexts. Rather than produce a theory of rights intended to capture or treat each invocation of a right as such, the theorist instead attends to the desired consequences of those who use the language and to the function the appeal plays in reasoning rather than treating each invocation as part of the *meaning*, in the linguistic sense, of a right. It is this fourth option that this dissertation develops and is committed to.

The overall aim is to offer a generalist model of the logic of rights. By that, I mean the model will maintain that rights are (1) defeasible, or capable of being overridden by competing considerations, and (2) serve as reasons or justification in a particular case. (2) is particularly important with respect to the fourth option above. On the model developed and defended in the three papers, the core idea is that a right can generate a conclusion in a case without transferring the property of *being a right* to the specific object or action the right justifies. On this account, I take no substantive position about the grounds or function of rights in normative systems (e.g., interest vs. autonomy accounts). Instead, I offer an account of the logical or conceptual structure of rights to accommodate various theoretical desiderata in a way that avoids proliferation but retains the core desired consequences of those invoking a right. On this account, it will be possible to say that some good or act *is required* as a matter of right, or because of a right, but that the instance or the good/act itself is *not* a right. This outcome simplifies the rights theorist's job by allowing and demonstrating how a more minimal list of rights, with fewer rights to defend *qua* rights, can still accomplish the political and moral aims of those who invoke the language

the skeptic worries about. In essence, one could argue using the logic of rights laid out in this dissertation to claim that the court in *Dobbs* is asking the wrong question: access to abortion *should* exist for all, by virtue of the right to privacy, but that access and its details are not separate rights that require the same or similar justification used to establish the right to privacy.[3]

To say rights are defeasible as in (1), and thus subject to defeat in the face of competing considerations, is easiest to illustrate by example and contrast with other views. Thomson lays out the view and contrasts it with alternatives using the following case: suppose someone is driving a tank with the intent of killing you. Most of us think the tank driver has a right to life. However, we also think that you may defend yourself – even if that means killing the tank driver.[4] Generally, it is thought that rights have some correlative duties i.e., the tank driver's right to life entails a duty on you to not kill him (and the same holds for your right to life). Clearly, the tank driver does something wrong in trying to take your life – but we do not think you do something wrong if you kill the tank driver in self-defense. Can talk of rights make sense of this asymmetry?

One option Thomson explores is the view that the tank driver, in trying to kill you, has *forfeited* his right to life in the pursuit of violating your right to life. However, she argues that this may lead to odd results. For one, suppose the tank breaks down en route to kill you. If the driver has given up their right to life with the initial act of pursuing you, then although circumstances have prevented the driver from doing so, you could kill the driver. In some contexts, like war, this may make sense. But in ordinary circumstances (or as ordinary as one can

[3] A similar argument by Dworkin can be found in Dworkin 1996 p. 76-81 where, distinguishing between interpretation *qua* the application of abstract principles to cases and reference *qua* seeking out where something like abortion is "referred to" in the constitution, Dworkin rejects the distinction between enumerated or explicitly listed constitutional rights and unenumerated or "implicit" rights. He does so on the grounds that the distinction relies on approaching the constitution in a referential rather than an interpretive manner favoring the latter over the former.
[4] Thomson 1977 p. 3

make attempted murder), we may not accept this result but instead claim that insofar as you *could* get to safety without hurting the driver, this is precisely what you should do. To provide a legal analogue, many states recognize a "duty to retreat." What this means, with respect to self-defense, is that if it is possible for you to escape from a confrontation without using deadly force, then you are obligated to at least try to do so before deadly force in response is justified.[5] Since the forfeiture view would seem to imply that even when the tank driver's tank breaks down, anything you do to them would be permissible, Thomson rejects this view.

Another option Thomson describes is the specificationist view which comes in two variants: factual and moral specificationism. At its heart, specificationism about rights is the view that rights are absolute i.e., when a right applies, that is the end of discussion. So, in cases where apparent exceptions arise, those exceptions are or must be built into the nature of the right. In the original case of the tank driver, such a view would maintain that the driver's right to life must be specified to include that they have the right to life *only if* they are not actively trying to kill someone. This response makes sense of the asymmetry above – it is permissible for you to kill the driver in self-defense because the driver's right to life does not apply.

In the description of the exception above, I have described factual circumstances in which the right to life does not apply. In doing so, I offered a *factual specificationist* conception of the right to life – the right to life implies a right to not be killed only if one is not actively trying to kill someone. Other circumstances can then be added to cover all possible exceptions. By contrast, *moral specificationism* would articulate the exceptions in normative rather than descriptive terms – the right to life does not imply a right to not be killed *simpliciter* but instead a

[5] Importantly, the duty-to-retreat doctrine is held by a minority of states where as stand-your-ground laws are held by the majority, wherein proportional self-defense measures are permissible without first attempting to escape the confrontation.

right to not be killed *unjustly*. In other words, if one is going to be killed *justly*, then one's right to not be killed because of the right to life does not apply. Similarly, the moral specificationist approach accommodates the asymmetry above. Insofar as killing the tank driver in self-defense is a just killing, then their right to life does not apply. Specificationism about rights, of both variants, can accommodate the apparent asymmetry of the case – but at a cost.

First, notice that the general structure of specificationism about rights understands the correlative duty on others to hold *unless* some facts, descriptive or normative, are satisfied. For example, if X is *not* trying to kill Y, then Y has a duty to not kill X. However, surely more exceptions to this will arise: what if X is going to kill an innocent bystander, Z, and Y can prevent it only by killing X? This seems like a reasonable exception we would have to build into the right. But the sheer number of cases and conditions that could arise seem infinite – and we cannot know what others we might encounter in the future. If specificationism is correct, then we can only claim a right applies once we fill out all the relevant exceptions. But this seems to be an impossible task since the list of exceptions is potentially infinite. Additionally, this approach flies in the face of other important ways in which we invoke exceptions to rights best illustrated by discussing the final view, rights generalism.

The fourth and final view Thomson articulates to make sense of the asymmetry in the tank-driver case above is generalism about rights. According to generalism, rights are not absolute. Rather, they may apply to a case or be invoked by an agent but are subject to being overridden by competing considerations i.e., all rights are *prima facie* rights. To say a duty is a *prima facie* duty is to say it is a duty we are under which can be subject to being overridden by competing considerations of greater moral importance.[6] The classic case is this: I promised to

[6] The literature on *prima facie* duties, also known as conditional duties, or *pro tanto* duties is vast. Here, I am simply referring to the core idea as initially discussed by Ross. See Ross and Stratton-Lake 2007 p. 28-29.

meet you for lunch. This means I have a duty to meet you for lunch. But along the way, I come across a small child in mortal peril who I can easily save – at the cost of meeting you for lunch. Yet, most of us would say I should save the child. In other words, my duty to save the child *defeats* my duty to meet you for lunch. Rights generalism views rights in a similar fashion: the right holds but can be defeated by competing considerations.

In the case of the tank driver, generalism about rights accommodates the asymmetry by claiming that while the tank driver does have the right to life, the duty it places on you is overridden by your concern for your own life. If you kill the driver in self-defense, you have acted contrary to the driver's right but in a morally permissible way. This phenomenon is referred to as *infringing* a right.[7] If it was the case that the driver had stopped trying to kill you, but you killed the driver anyway, you would have acted contrary to their right but in a morally impermissible way – referred to as *violating* a right.[8] Compared to specificationism, there are a few points in favor of generalism about rights. And although the aim of this introduction and the dissertation is not to definitively defend rights generalism, seeing its benefits in contrast to specificationism is useful for motivating why I bother to focus on a generalist model of rights in the first place.

Even though we know exceptions exist for some general statements, we tend not to bother with them until they arise. But we also do not reject the legitimacy of the general statement until all the exceptions have been specified. To give a simple epistemic case: we accept the statement that "birds fly" even though we all know (or should know) that some birds, like penguins, are flightless. We do not seem to think to ourselves, "Birds fly except for Penguins" each time we think about birds. Similarly, much of our reasoning around rights, moral and legal,

[7] Thomson 1977 p. 6-8
[8] Ibid.

takes a similar form. Political speech is presumptively protected by the 1st amendment until someone shows otherwise. The consideration of whether some exceptional case has arisen places the burden of proof on those who wish to restrict it. The right applies *by default* without first checking it against a list of possible exceptions. In essence, generalism about rights aligns more closely with our ordinary reasoning about rights in political, moral, and legal contexts in the sense that it takes the right to apply by default and deals with exceptions as they come rather than tokening a right with a long list of exceptions in each instance.

An additional benefit of generalism is that the infringement/violation distinction seems to help make sense of cases where someone acts contrary to a right in a morally permissible manner, but compensation is thought to be owed to the one whose right was infringed. Feinberg offers the paradigmatic example:[9] suppose a hiker is caught in a bad snowstorm. To survive, they break into a nearby locked cabin for shelter. To survive the days they are trapped, they chop up the wood furniture inside for fuel for a fire and eat whatever food they can find. In doing so, we think the hiker acted permissibly to save their life. However, they also used someone else's property without permission. In other words, they acted contrary to the cabin owner's property right which would place a duty on the hiker to not touch the owner's stuff. Yet, many of us would think that the hiker owes some form of compensation to the owner for the use of their property. Generalism makes sense of this by maintaining that the owner's property right, while overridden, is still "in force" in some sense – which explains why compensation is owed. In contrast, the specificationist approach must claim that this exceptional case is one where the property right simply does not apply – leaving the issue of compensation dangling.

[9] Feinberg 1978 p. 102

For both reasons, that generalism aligns better with our ordinary reasoning about rights, and that generalism provides an answer to the issue of compensation when rights are defeated, the dissertation focuses on developing a theory of rights generalism. I have, in no way, settled the debate between specificationists and generalists about rights – but that is not my goal. Instead, my aim is to offer a more precise account of the defeasibility of rights applied in the cases above – and do so in a manner that allows these rights to serve as justifications for conclusions in reasoning i.e., one draws a conclusion *because* of a right. Accomplishing these tasks requires turning to literature on defeasible reasoning and non-monotonic logic, a form of non-classical logic.

Consider the case of birds and penguins above. If we understood "Birds fly" as a statement in classical logic, we would have to claim it is a material conditional of the form: If something is a bird, then it flies. But now, when we see a Penguin which does not fly, the penguin appears to be a counterexample falsifying the conditional rather than an exception to a general rule. In contrast, defeasible reasoning and non-monotonic logic construes "Birds fly" as a defeasible, or default rule – one whose conclusion holds until new information defeats the usual inference between being a bird and flying in favor of a different conclusion, that a penguin does not fly. Similarly, to say in Thomson's tank driver case above that the tank driver has a right to life which implies a duty on others not to kill the driver, while also claiming that acting in self-defense makes killing the driver permissible, would be a contradiction in classical logic. I cannot simultaneously be permitted to do what I ought not to. So, capturing generalism about rights appears to require abandoning classical logic and the use of material conditionals in asserting the relationship between a right and its correlative duty.

To provide a model of rights generalism that avoids proliferation and captures how we reason with rights across a variety of normative contexts, legal, moral, political, is my aim. As mentioned above, part of the project is revisionary – not all assertions of rights will, on my account, qualify as bald assertions of a distinct right. I will argue for an interpretive approach to such claims. The activist clamoring for a specific right is, in my view, using language to get a point across about the importance of some good. But this pragmatic use of the language of rights must be carefully interpreted by a theorist to avoid the proliferation worries rights theorists and rights skeptics alike care about. As such, the dissertation is organized around three papers: (1) a paper motivating the need for a new generalist model by articulating the proliferation problem and generalist desiderata and arguing that current models cannot deliver what is needed; (2) a paper developing a new model of generalist rights starting from the constitutional right to free speech in the US as a paradigmatic fundamental right; (3) a paper which applies the model to a further issue – the right to do wrong and conflicts of rights.

The first paper in this dissertation, *Hohfeldian Theories of Rights and the Proliferation Problem* argues that the proliferation problem raised by the skeptic is a serious one. It is serious not only for practical reasons, but theoretical ones. If rights are to find their "proper place" within morality, then how we define their logical structure matters. The paper argues that the most prevalent accounts, inspired by Hohfeld's seminal work establishing the idea of right-duty correlativity, cannot avoid the proliferation problem. I consider different types of Hohfeldian accounts on offer in the literature and argue that none are successful. The paper concludes by showing that the problem lies in allowing both the conclusions stemming from an appeal to a right and the right which justifies the conclusion to both be rights albeit of different kinds. The

result is that as rights continue to be applied, the list of discrete rights will continue to grow. I close by sketching the requirements for an alternative approach.

The second paper in this dissertation, *Rights-as-Defaults and Free Speech*, builds the case for a generalist model of rights by examining how we reason with fundamental rights. The paper focuses mainly on free speech case law in the United States to argue for, and develop, a model of rights situated within default logic called the Rights-as-Defaults Model. When we invoke the right to free speech across a variety of cases, we recognize that (a) only one right is doing any work and (b) the right is defeasible or subject to competing considerations which may defeat it. Drawing on work in defeasible reasoning and default logic, I argue that we should understand fundamental rights, and rights in general, as modifiable collections of defeasible generalizations. While these collections are modified as time goes on, the default rules constitutive of the collection can be applied or invoked in cases, weighed against competing considerations, and either win the day or lose out. Not only does this model capture how we seem to reason with the right to free speech, and fundamental rights more generally, but also offers a novel way to characterize the desired features for a robust generalist model of the logic of rights.

The third paper in this dissertation, *Revising the Right to Do Wrong*, applies the Rights-as-Defaults Model to the question: can I have a right to do what is all-things-considered morally wrong? My answer is, on my model, a resounding yes. Not only is this a sensible claim, but it does not lead to paradox or contradiction. An act may be within the scope of your right, but that does not mean the right necessarily wins the day – competing considerations can defeat it, meaning that sometimes we should refrain from exercising our rights. Importantly, I also contend that the "right to do wrong" is not a unique discrete right we need to attribute to individuals to get these results – in line with recent work by Bolinger. However, given that my explanation and

account is theory-neutral, it shows how a revised conception of the right to do wrong can be held not only by autonomy theorists, Bolinger's aim, but also any theorist who accepts that rights are defeasible.

Paper 1: Hohfeldian Theories of Rights and the Proliferation Problem

In this paper, I argue that popular models of rights generalism cannot adequately prevent rights proliferation and sketch the requirements for a novel model of generalism to accomplish this task. First, I articulate the problem of rights proliferation and distinguish two types: political and theoretical. Focusing on theoretical proliferation, I review two examples of Hohfeldian generalist cluster-right models of rights, represented by Wenar and Thomson, and argue that neither satisfies an anti-proliferation constraint. I argue the problem arises from the interaction of two core components of these generalist views: (1) that rights play a justificatory role in reasoning (rights-as-premises) and (2) that rights create further rights in response to novel or changing contexts (rights-generation). Lastly, I sketch an alternative model of rights generalism, the Intermediate Interactionist Model, which prevents proliferation by denying (2).

I. The Problem of Rights Proliferation as a Problem of Logical Space

The increased ubiquity of the language of rights in politics has produced significant changes across the globe. From the emergence of the UN to the US Civil Rights Movement and Arab Spring, appeals to rights increasingly shape public discourse aimed at social and political change. While outcomes where theory and practice become closely intertwined are often cause for celebration, the increased frequency of appeals to rights raises a challenge: an apparent unabated increase in the number of rights said to exist. This problem is called the rights proliferation problem.[10]

The problem comes in two forms – one I will call the *political* form and the other I will call the *theoretical* form. The political form of rights proliferation concerns rights discourse, or the way agents and institutions invoke rights in practice. For example, the UN list of universal

[10] Wellman 1999; Cranston 1967; Tasioulas 2019, 2021.

human rights is quite broad ranging from a right against enslavement[11] to paid holidays.[12] The worry is that such a broad list shifts human rights claims from claims of the utmost moral importance to ideal but *unnecessary* claims. As Cranston puts it:

'A human right is something of which no one may be deprived without a grave affront to justice….Thus the effect of a Universal Declaration which is overloaded with affirmations of so-called human rights which are not human rights at all is to push *all* talk of human rights out of the clear realm of the morally compelling into the twilight world of utopian aspirations.'[13]

In a word, if all morally important things become rights, then none are rights because the important function rights play in drawing attention to grave injustices is lost.[14] This problem is pragmatic because it stems from how the language of rights is deployed and interpreted. And while I find political proliferation worrying and intriguing, it is not my present concern.

The theoretical form of rights proliferation, or theoretical proliferation, concerns what a right *is* in a theoretical sense more than how rights are *used*: how are rights defined? What is the relationship between moral rights and morality? What is the relationship between legal rights and the legal system? In this vein, Thomson lays out the standard for a theoretical anti-proliferation constraint: rights should make up a territory within the continent of morality.[15] The definition of rights in an ethical theory must not allow rights to consume the entire moral continent the ethical theory generates. To clarify this relationship between a rights theory and morality, it is helpful to stipulate a difference between a morality from an ethical theory. [16]

[11] United Nations, 1948, Article 4
[12] Ibid., Article 24
[13] Cranston 1967.
[14] Tasioulas 2019, 2021.
[15] Thomson 1990 p. 3
[16] Sharply distinguishing between an ethical theory and the morality of an ethical theory I draw from Williams 2006 chapters 5 and 10 and Thomson 1990 p. 30-31.

For my purposes, an ethical theory consists of at least two types of moral judgments: (1) moral judgments as reasons[17] which justify and confer (2) a moral status on particular acts as a second class of judgments.[18] For an ethical theory, E, call the former class of moral judgments the set of moral principles, P, and the latter class of moral judgments the moral code or morality, M.[19] The core idea is that principles are formulated in a generalized way e.g., "do unto others as you would have them do unto you," which apply or combine with the facts of a situation to generate a moral judgment regarding a specific act. Seeing someone asking for spare change and applying the golden rule formulation generates a judgment that you *should* give *that* person asking for it your spare change. In other words, the *morality* of a given ethical theory, for my purposes, is akin to the *extension* of the principles applied to a domain of cases deemed relevant. I will refer to these judgments as *generated* by the principles of an ethical theory insofar as the principles justify those judgments in various scenarios.

To illustrate for clarity, suppose your ethical theory includes the following principle: (p1) One ought not torture babies for fun. If this principle is accepted, then in any case in which a particular baby is nearby, the principle applied to that scenario *generates* the following judgment as part of the morality: (m1) one ought not torture that baby (referring to the baby in the scenario). Suppose p1 was the only principle of the ethical theory. Then the morality of the theory, M, would be all the concrete instances of babies one ought not torture.

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[17] Thomson 1990 p.30 refers to these as explanatory moral judgments. I prefer the language of justification if only because it strikes me as more like what we mean when we assert that principles *suppor*t particular conclusions. But I do not mean that ethical theory is necessarily top-down in its reasoning. We could, of course, look at our intuitions and seek out the principles required to justify those judgments, and so engage in bottom-up ethical theorizing resulting in a principle that is explanatory of our judgements but simultaneously offers a justification for those judgments.

[18] Thomson 1990 p. 31 calls these object-level moral judgements. Again, I define these more broadly to allow a more general approach and because even in Thomson's example "ought" modifies what appears to be a kind or species of acts rather than one specific act considered as object in a specified context. Nothing in my argument will turn on this difference.

[19] As will become clear later, this set includes permissions and prohibitions as well as obligations.

On this approach, an ethical theory which takes rights to exist can view rights as (1) a principle or collection of principles in P, (2) a collection of judgements in M, or (3) some combination of both (1) and (2). With this description, we can recast Thomson's anti-proliferation constraint on rights theory more carefully.

Whatever rights some ethical theory, E, prescribes, they must be *fewer in number* than the concrete judgments which make up the morality, M, of the ethical theory. In other words, there should be some substantial number of judgments in M which are either not in R or not generated by R. But to what extent must R be smaller? I know of no definitive answer to this question. Instead, what often occurs is a kind of *reductio*.

Raz, for example, rejects the Hohfeldian strict correlativity doctrine which asserts that rights and duties entail one another precisely because it would leave no room for duties of charity/virtue.[20] If all rights entail duties, and all duties entail rights, then not only do I have a duty to give my spare change to someone who asks for it, but the one who asks has *a right* to *my* spare change. But being entitled to charity seems to be a contradiction: paying what *I owe* you is not charity! This line of argument rejects this result as absurd and concludes: if a right to charity is absurd, and results from the strict correlativity doctrine, then the correlativity doctrine should be rejected.[21]

Although not a complete answer to the degree question raised, this example suffices to illustrate a way to define the theoretical anti-proliferation requirement (ATP): A theory of rights *theoretically proliferates* rights just in case the rights (R) generated by a theory map onto all, or

[20] See Raz 1984 p.199-200. In addition, Raz 1986 Chapter 8 considers any view which makes rights equivalent to, or fundamental to a moral theory, as one which does not leave sufficient room for other morally important things. An important wrinkle to this response to the correlativity doctrine is whether correlativity applies to only "directed duties," as Sreenivasan 2010 argues. I address this objection below.

[21] Perry 2009 p. 541-550 provides an overview of a different method of argumentation restricted to the law only, as opposed to morality, wherein counterexamples already existing within the law are sought to show failure of either direction of entailment.

almost all, of the judgements making up the morality (M) generated by the principles (P) of the theory. In other words, when the moral code generated by an ethical theory (or legal code generated by a legal system) has too much overlap with a theory of rights, the theory of rights violates the anti-proliferation constraint. Further, as Raz and Thomson suggest, if a theory of rights violates ATP, then we should reject it. This formulation treats theoretical proliferation as a problem of logical space insofar as it concerns the amount of space in M that R takes up.[22]

In addition to capturing the anti-proliferation constraint, the model of an ethical theory I have presented also allows us to capture the differences between competing conceptions of rights. For example, specificationists about rights argue that rights are conclusions in deliberation – to put it directionally, one argues *toward* rights rather than *from* them.[23] The specificationist views rights in the sense of concrete moral judgments in M – they are moral judgments *in a particular case*. As such, rights are "absolute" on the specificationist view wherein either a right applies and is "in force" or it is not. Like a moral judgment in a particular case, a specific act is either permissible or impermissible. So, whenever we say someone has a right, according to the specificationist, it necessarily outweighs competing considerations in deliberation. But this view is not the only option on the table.

In contrast, Generalists about rights view rights as providing justification in deliberation and allow that we can argue from rights to conclusions.[24] For generalists, rights are defeasible or *prima facie* and therefore capable of being overridden by competing considerations. The generalist family of views conceives of rights as either (1) a set of principles in P, or (2) some

[22] Another possibility is to restrict proliferation with respect to P so that the set of rights, R, cannot be coextensive or nearly coextensive with the set of principles P. My reason for excluding this possibility would be that it would rule out, by stipulation, the potential to model a rights-based morality. While I believe a rights-based morality has things backwards, I do not wish to rule it out purely by stipulation which is consistent with my general aim in this paper to remain theory-neutral regarding the grounds and function of fights in an ethical theory.
[23] This description of the views I borrow from Oberdiek 2008 p. 128.
[24] Ibid.

combination of principles in P and moral judgments in M. This latter approach appears to be the most common view held by generalists. Such views conceive of rights as cluster-rights, or rights composed of rights, so that rights are formulated more generally, like a principle, but are also *constituted* by concrete instances, which are also rights, in M.[25] By contrast, I will argue in section IV for a view which comes closer to (1), wherein rights are identified with a subset of the principles of a normative system, but which will ultimately be distinct from cluster-right views.

With this initial understanding of the problem and requirements, we can assess theories of the logic or structure of moral rights. Rather than weigh in on the debate between generalists and specificationists, I restrict my focus to the two types of generalism. The next section explicates the largest and most familiar approaches to the structure of rights, Hohfeldian Cluster-Right Generalist theories of rights, developed from Hohfeld's seminal work on rights. I then argue that such models cannot satisfy the ATP requirement – and that different attempts to avoid this result and remedy those models are of no avail.

II. Hohfeldian Generalist Cluster-Right Theories and the Proliferation Problem

Suppose I am sitting at lunch with my colleagues, open my lunch pail, and begin to eat my sandwich. The sandwich is mine – I own it. If a colleague tried to eat my sandwich, I would reasonably protest. Part of that protest though is not merely that I would go hungry without it – but that my ownership of it gives me a right to that sandwich. And if I have a right to that sandwich, then there are things I may do with it that others may not: I may eat it and they may

[25] This will become clearer with the discussion of Thomson's Liberty-Rights in section II.

not unless I transfer it to them as a gift or through some sort of exchange. In essence, I possess a claim to the sandwich.

For Hohfeld, such a case is an instance of rights "in the strictest sense," or a claim-right.[26] For now, I will use the terms "right" and "claim-right" interchangeably as Hohfeld does but, as we will see, this will not always be the case. For Hohfeld, having a claim-right to my sandwich is defined as another individual having a duty to not eat my sandwich.[27] This is the right-duty correlative (RDC): A's having a right against B regarding an action φ is defined as B having a duty to refrain from φ-ing. Similarly, since I own the sandwich, I possess the privilege of eating the sandwich. To have a privilege to φ, for Hohfeld, is to lack a duty to refrain from φ-ing. If I have the privilege to eat my sandwich, then I am under no duty to refrain from eating my sandwich. Further, that lack of duty to refrain means no one has a right against me that I refrain from eating my sandwich. This relationship is the no-right/privilege correlative (¬RPC): A's privilege to φ is defined as A lacking a duty to not φ, with respect to B, and, by RDC, we can infer B has no right against A with respect to φ. These two "correlatives" define "right," "privilege" and "no-right" as to either possess or lack a duty towards another person concerning some action.

We can also get inverse relationships from Hohfeld's definitions above, or what are known as the Hohfeldian "opposites."[28] My colleague's duty to refrain from eating the sandwich means he lacks the privilege to eat the sandwich. So, duties and privileges are opposites (DPO): possessing a duty to not φ means I lack a privilege to φ. And, lastly, for obvious reasons, rights

[26] Hohfeld 1913 p.35 provides a similar example but with a salad instead. I have worded the example above differently, as we will see, so that it can capture the main idea of Hohfeld and Hohfeld inspired cluster-right theories.
[27] Ibid. p. 30
[28] Ibid.

and no-rights are opposites (¬RRO) because the latter is the negation of the former. [29] I will refer to each of these as "positions" because they are intended to track the different positions any two agents can stand in relation to one another concerning an action.[30]

For Hohfeld, in the sandwich case above, there is only one right, namely, my claim-right to eat the sandwich. My claim-right simply is the duty on others to not eat my sandwich because, as a definition, the correlativity of the two options is symmetric – claim-rights entail duties and duties entail claim-rights. I have a privilege to eat my sandwich, which means I have no duty to refrain, and others have no-right to eat the sandwich because they have the duty to refrain by virtue of my claim-right. In essence, we can boil the case down to two things definable in terms of duties or lack thereof: (a) my lack of a duty to not eat my sandwich and (b) the duty of others to not eat my sandwich. We can reduce this even further and dispose of talk of duty in favor of permissibility: I am permitted to eat my sandwich, and all others besides me are not permitted to eat my sandwich or interfere with my eating of it.[31]

In contrast to Hohfeld's restriction on the interpretation of "right," many cluster-right theories of rights draw on Hohfeld but allow that "right" can refer to more than just duties. In his original formulation, Hohfeld restricts the meaning of "right" to claim-right. By contrast, Hohfeldian cluster-right theories allow various other Hohfeldian positions to be rights. The core

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[29] A careful examination of the relations does reveal asymmetries where there should be none. Hohfeld uses "opposites" in two different senses. This is discussed at length in Kanger and Kanger 1966, Lindahl 1977, and Sergot 2013. While interesting, the modifications proposed by those authors would take us too far afield and has no bearing on my critique of the cluster-right theories under discussion.

[30] See Lindahl 1977 Chapter 4 for an influential full treatment of this idea which modifies the Hohfeldian framework here with insights from other rights theorists.

[31] The reduction I am deploying is the standard interdefinability of obligation in terms of permissibility found in Standard Deontic Logic. Permissibility entails not-ought-not, or, in symbols, $P\varphi = \neg O\neg\varphi$ for some state of affairs or action. And while the paradoxes of SDL are well known and studied, it is also used and endorsed by those who wish to reconstruct rights along Hohfeldian lines – see Hurd and Moore 2018 for an account which places a Hohfeldian theory of rights within standard deontic logic.

unifying idea is that rights are clusters or collections of Hohfeldian positions where each of those positions may also be rights. Rights are composed of or constituted by many rights.

Thomson provides an Any-Position theory of cluster-rights.[32] She allows that any of the Hohfeldian positions may be rights.[33] For example, consider Thomson's account of a Liberty.[34] For brevity, I will focus only on the first-order rights constitutive of a liberty. Hohfeld's privileges are, as she points out, unilateral permissions stating the permission to *do* something. But to say someone is "at liberty" with respect to, say, a sandwich, is to say something more. To be "at liberty" is to be allowed to exercise discretion with the use of the sandwich. This discretion means you are permitted to eat the sandwich, but also permitted to *not* eat the sandwich. To be "at liberty" is to possess bilateral permission, to do or refrain from some action. Further, Thomson generalizes the duty on others associated with liberty. In the sandwich case, there are many things the colleagues at the table must not do, such as tie you to your chair to prevent you from eating your sandwich. For you to possess and exercise your liberty also requires that all others possess a duty of non-interference. In terms of Hohfeldian first-order positions, Thomson's liberty is a right and a cluster-right containing a bilateral permission for the right-holder and a duty of non-interference on all others. Lastly, each of those permissions are a species of Hohfeldian privilege taken to be rights and the duty of non-interference, as a constraint on others, is equivalent to a claim-right you possess.[35] The Liberty is a right composed of at least 3 rights which are each Hohfeldian positions. So, Thomson's view is a Hohfeldian Cluster-Right view.

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[32] This is more commonly called an "Any-incidence" theory (as in Wenar 2005) but because I have chosen to use "positions" to refer to the Hohfeldian relations, I am changing the name for consistency.
[33] Thomson 1990 p. 55
[34] Ibid. p. 53-57
[35] Ibid. p. 77

Hohfeldian Cluster-Rights theories of rights are frequently also, as in Thomson's case, generalist theories of rights where rights are defeasible.[36] To illustrate, consider the following variant of Feinberg's cabin case.[37] Juan is hiking in the mountains of Colorado when a sudden, unexpected blizzard hits. Scrambling for shelter, Juan comes across a currently unoccupied but clearly used cabin owned by Sally. To survive, Juan kicks in the locked door, breaks up the wooden furniture to start a fire, and helps himself to the food in the pantry as he waits out the storm. The most common conclusion is that Juan's actions are justified however he owes compensation to Sally for what he broke and ate.[38]

Thomson, Feinberg, and other Hohfeldian cluster-rights generalists understand this case as one where two rights conflict: Juan's right to life and Sally's right over her property. Sally's property right implies that, unless she has given Juan permission to do what he did, then what Juan did was wrong in some sense.[39] However, because Juan's life was in danger, what Juan did was permissible. But Juan still owes Sally compensation for the property damage caused in exercising his right to life and it is difficult to make sense of why he owes compensation if we do not think of Juan's act as wrong in some sense.[40] On generalist cluster-right views, this is a case

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[36] Thomson 1990 p. 85 rejects the thesis that claims/claim-rights are absolute in order to explain our intuitions concerning moral residue.

[37] The original version of the case can be found in Feinberg 1978 p. 102. The present case is my version of it but the two are structurally identical.

[38] See *Vincent v Lake Erie Transportation Co.* for a legal example. A ship captain was deemed to have rightfully tied his ship to a dock when a violent storm quickly approached, but because the boat's rocking damaged the dock, the captain was ordered to compensate the dock owners for the damages despite the court's agreement that the captain acted correctly.

[39] One way of interpreting this is the claim that the fact that the property is owned by Sally and not Juan has some "weight" or "force" in deliberation as a way of understanding defeasible reasoning or reasoning with *prima facie* obligations. That fact, although "weighing less" than Juan's permission to use the property to save his life, still has some "weight".

[40] This understanding of Juan's act, and the need to explain how it is Juan can do something all-things-considered permissible yet still owe compensation, lies at the core of Thomson's explanatory argument for generalism about rights. Essentially, to explain compensation, we must posit moral residue. But if there is moral residue, then Juan still did something "wrong" in some unspecified sense of the word. See Thomson supra note 27 and Parent and Prior 1996 p. 840 for a response.

of permissible infringement by Juan of Sally's property right. A right is permissibly infringed just in case one acts contrary to a duty correlative with another's right, but the act is permissible all things considered. In contrast, a right is violated just in case one acts contrary to a duty correlative with a right and the act is impermissible all things considered. For example, if there was no storm, and Juan was only a bit peckish, yet broke into the cabin, ate up the food, and chopped up the furniture all the same, Juan would be violating Sally's property right. The key defining feature of generalism is the possibility of permissible infringement. [41]

In addition, generalist cluster-right theories view rights as having two places in argumentation – as reasons or justification for a conclusion in a case and as the conclusion in a case.[42] The appeal to rights in a case leads to a conclusion about rights which will also be a right. For example, invoking Sally's cluster-right of ownership in the cabin case justifies why she has a claim-right against Juan's use of the contents in the cabin which imposes a duty of non-trespass on Juan. But this right is permissibly infringed by Juan – his use of the cabin is permissible because of his right to life. His right to life overrides Sally's property right in the case. In other words, Juan, in this case, has a right to the use of property he does not own. And the permissible failure to abide by the duty of non-trespass infringes Sally's property right generating a duty of compensation.[43] The permissibility of the use of the property, for Juan, is also a cluster-right because (1) he is permitted to use it, (2) he may choose not to and die – an odd choice but one he may make – and (3) if anyone stopped him from doing so we would think they are in the wrong

[41] While there is an important debate about the nature of rights between rights generalists, who view rights as defeasible, and rights specificationists, who views rights as absolute with apparent exceptions built into the right, I will not weigh in on it here since my focus is clarifying the theoretical requirements for rights generalism. For the original distinction between the views, see Thomson 1977 p. 6-8. For a defense of specificationism against objections from Thomson, see Parent and Prior 1996. For a hybrid view combining aspects of generalism and specificationism, see Liberto 2014. For an argument against both specificationism and the hybrid view in favor of generalism, see Montague 2015.
[42] This description of this feature I borrow from Oberdiek 2008 p. 128.
[43] Thomson 1977 p. 11

which suggests a duty of non-interference. 1-3 have the structure of a Thomson Liberty. A right to the use of the property, for Juan, is thus generated by appeal to Juan's right to life in the case and is part of the cluster-right which is Juan's right to life.

Before assessing how Hohfeldian cluster-rights generalist views fare with respect to the anti-proliferation constraint, let's assess the apparent requirements of the view. First, generalist theories of rights maintain that when deliberation in a scenario occurs, rights are already "in force." Rights are held by all agents across all possible contexts[44] – there is no context where violating rights is permissible. Let's call this feature Universal Application (UA). Second, the structure of rights allows them to function as reasons in argumentation. To allow one to argue *from* rights is to claim rights can be invoked as premises or justification. Call this second feature Rights-as-Premises (RP).

The third aspect of cluster-rights generalism is that UA and RP combine to generate novel rights in a scenario.[45] In the cabin case, Juan's right to life is appealed to in order to conclude that Juan has a right to the food in the pantry, to the wood of the furniture, to the breaking of the door, and any other action required to escape the storm and survive. Call this feature Rights-Generation (RG). A final feature previously discussed is that rights can be overridden by non-right considerations or can override one another, as the permissible infringement of Sally's property right demonstrates. In other words, rights are defeasible. Call this aspect Defeasibility (DEF). The hallmark of generalist cluster-theories of rights, then, is that they possess all four

[44] The contexts would of course need to be indexed to a particular normative system under consideration to determine the full list of the contexts of application. What falls under the jurisdiction of a legal system and what falls under the jurisdiction of a moral system differ. For example, only some kinds of promises, those deemed to be contracts, fall under the former whereas promises in general fall under the latter.

[45] Thomson 1977 p. 13-14 articulates this aspect when she raises the initial question of whether, when facing a person named Aggressor in a tank, the would-be victim, named Victim, has the right to kill Aggressor or whether Aggressor still has the right to life. A right to self-defense appears, generally, derivative from a general right to life (and it would be incoherent to say one has the right to life but is not permitted to act in self-defense). This feature is often also called the distinction between "core" and "derived" rights as in Raz 1986 p. 168.

aspects: Universal Application (UA), Rights-as-Premises (RP), Rights-Generation (RG), and Defeasibility (DEF).

With these features in mind, we can formulate a generalist schema starting from the cabin case above focusing on only Juan's right:

(1) Juan is stuck in a severe storm and will perish unless he finds shelter and Sally's locked and empty cabin is within Juan's reach.
(2) Juan has the right to life.
∴ Juan has the right to use Sally's property.

The reasoning in the cabin case is a particular context and instance of reasoning along the following lines:

(1) A context, c, is under consideration which falls under the set of contexts, C, in the jurisdiction of a background theory or system.
(2) Some right, r_1, which is part of the set of rights, R, in the background theory or system applies in context c.
∴ Some right, r_2, such that $r_2 \neq r_1$, also applies in c.

(1) indicates the background considerations for application. The context is one our non-specified background theory takes to be within its scope. (2) illustrates RP, and (2) and (1) together capture UA. Lastly, the conclusion captures RG – whatever the outcome is, it will also be a right. Call this schema the Generalist Schema of Rights Reasoning.

On this schema, importantly, the rights in (2) and in the conclusion must be some deontic sentence. Why? Rights violations make no sense otherwise. To say a right has been violated is to say something has occurred which should not have occurred all things considered. However, one cannot violate purely descriptive facts. So, if r_1 in (2) is a right which can be violated, it must be some kind of "ought" statement and the same holds for the conclusion. Further, some "ought" in

r_1 is required if the relationship between (2) and the conclusion is one of justification.[46] Since the conclusion is a deontic sentence, there must be a normative premise to avoid an is-ought gap.

Now we can show that a Generalist Hohfeldian Cluster-Right view, such as Thomson's, leads to theoretical proliferation. First, as described here, morality specifically refers to the practical guidance given to an agent in specific cases because of the background moral theory's principles. This morality, or moral code, makes up the set M. At its core, this set is composed of things one ought to do, things one ought not do, things one is not required to do and things one is not required to not do. To simplify further, we can interpret M as a collection of permissions (**P**) and their negations using the traditional interdefinability of obligation, prohibition, and permission from standard deontic logic.[47]

Taking permission as primitive, to say it is permissible that φ, or **P**φ, is equivalent to saying is it not the case that one ought not φ, or ¬O¬φ. If something is prohibited, or impermissible, we can say it is not the case that you are permitted to do it, or ¬**P**φ. A duty to φ can be understood as both being permitted to φ, or **P**φ, and being prohibited to fail to φ, or ¬**P**¬φ. We can also capture bilateral permissions which require that for an act, **P**φ and **P**¬φ are both true. And lastly, a duty to refrain, or O¬φ, can be understood as a prohibition against doing φ, ¬**P**φ (by the permission-obligation definition above). Assuming that for any φ, it is either permissible or not, then for any act φ, M exhausts the possibilities of permission.[48] Every sentence in M, or in morality, is either one or a combination of: **P**φ, ¬**P**φ, **P**¬φ, ¬**P**¬φ.

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[46] Waldron 1981 p. 34 views this as how rights reasoning works in general with an appeal to "general rights" involving deliberation and justification to yield a particular right in a particular context argued to follow from the general right's interaction with the context.

[47] While standard deontic logic, or SDL, is well studied and well known to be rife with problems and paradoxes, I find it a plausible tool for the analysis of the relationship between rights and duties like others who work on rights with a Hohfeldian gloss (see note 17).

[48] One may think that I am leaving out the possibility of something being "indifferent" to morality, or such that the moral code does not declare it permissible or not. I am because it strikes me as plausible that to say morality is "indifferent" with respect to an action is to simply say it is not part of the domain or within the jurisdiction of

Every Hohfeldian privilege is a unilateral permission or **P**φ. And each of these is a right. So, every unilateral permission is a right. Thomson's liberty-rights have three elements – a bilateral privilege, and a duty of non-interference. The bilateral privilege consists of two unilateral privileges, **P**φ and **P**¬φ. Both are rights. The duty of non-interference on others, which defines a claim-right, is a prohibition, and so can be understood as either ¬**P**φ or ¬**P**¬φ. Both are prohibitions on others which define a claim-right. If privileges are permissions, and duties of non-interference prohibitions, then what is left in M? Not much if anything since M, morality, just is the assemblage of possible permissions and their negations. Given the UA feature of generalism, and the reasonable intuition that rights must never be violated, anything which is permissible is a privilege and therefore a right. Anything prohibited, because it is a duty, correlates with some claim-right on the correlativity doctrine. And any duty one has, since it must be permissible to do what one ought to do, is also a privilege and therefore, oddly, also a right.[49] This result violates ATP.

One objection which could be levied against this argument is an appeal to the necessity of "direction" in both Hohfeld's work and rights in general, which my argument is missing. In his original formulation, Hohfeld is explicit about the relations holding between two distinct and specific parties – and much work has been done interpreting rights in this explicitly relational sense.[50] Sreenivasan 2010 argues that claim-rights require directionality and that there will be cases, such as charity cases, where no claim-right exists. A duty, and therefore a claim-right, is

morality and, so, it also likely has nothing whatsoever to do with rights given that rights, on this picture, are the kinds of things which should never be violated and hence have no content which could be construed as morally "indifferent".

[49] While I do not pursue it here, I expect a similar result to follow *mutatis mutandis* for the second-order rights since an essential element of Hohfeldian powers is not merely ability, but permissibility of making those changes – we exercise powers at our own discretion. My power of transfer over an object I own is at least partly constituted by being permitted to change my relation to the object and being permitted to not change my relation to the object. So, again, even this single power contains at least two rights if all privileges are rights.

[50] See, for example, Lindahl 1977 Chapter 4's exhaustive treatment of rights as positions between two agents.

directed just in case it is owed to someone in particular, or as a consequence of a particular relation arising between two individuals.[51] He offers the following case from Thomson:[52] Alfred and Bert are classmates. Alfred's pencil breaks and Bert has plenty of pencils to spare. But no one in particular, let alone poor Alfred, has a claim against Bert that he gives Alfred a pencil.[53] So this case, as an example of charity, lacks any rights. If this is possible, then not all morality, as merely permissions and prohibitions, becomes rights but only combinations of *directed* permissions.

The emphasis on direction is also usually taken to mark the distinction between general and special rights. Special rights are generally understood as arising from specific contingent events or transactions involving specific persons.[54] General rights are often defined as rights whose correlative duties fall on everyone or are held "against the world."[55] Thomson's liberty rights which impose duties of non-interference on everyone are one example. However, the "against the world" metaphor, and directionality in general, obscures how the exercise of any right will always pick out specific individuals. In essence, all duties are necessarily directed in practice, and so the distinction between directed duties and non-directed duties collapses.

Consider the right to freedom of movement. The right to freedom of movement, as a general right, entails a general duty on others not to interfere with my movement. But is this right held against literally everyone all the time? Not without violating some important aspects of the relationship between "ought" and "can." As I walk down the street, there are individuals capable of blocking my movement. Surely, they have an obligation not to interfere by blocking my path,

[51] Sreenivasan 2010 p. 467. Sreenivasan accepts the directed/non-directed distinction and offers an account of what makes a duty directed.
[52] Thomson 1990 p. 117
[53] Sreenivasan 2010 p. 472
[54] Waldron 1988 p. 106-107; Hart 1955 p. 183
[55] Waldron 1988 p. 108; Hart 1955 p. 187

tackling me, etc. But what of someone who lives on the other side of the world? Considering they are incapable of blocking my path, they can be under no such duty. But if my right to freedom of movement is really a duty against *everyone*, and the person on the other side of the planet is under no such duty, then it would follow I don't have such a right.

While the argument above may seem odd, it relies not only on the view that "ought implies can" but that the converse, "cannot implies not ought", is also true.[56] To see the usefulness of this principle, suppose the very wealthy in our society are determined to never contribute to charity, thereby violating a moral duty they are under.[57] In response, we vote to impose a 1% Charity Tax on all individuals making over $500 million/year. The proceeds from that tax are earmarked for specific reliable and effective charities. Should we, in this case, say that due to the tax on those wealthy individuals, they fulfill their duty of charity? Intuitively, no – precisely because despite the proceeds going to charitable organizations, the money is exacted through the coercive power of the state which undermines the status of the action as being charitable. Yet, it is the case that they cannot help but give money to charitable organizations. It would appear that they cannot help but satisfy their duty of charity, making this act no longer charitable despite the consequences being identical to them making the charitable donation themselves. Given this result, it appears that for the wealthy to act charitably requires not only that they can give to charity, but that they can refrain from doing so.[58] In other words, to be in a position to satisfy an obligation requires being in a position, in terms of one's ability, to refrain from fulfilling one's obligation – that one cannot avoid bringing about the same consequences as fulfilling the obligation appears insufficient.

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[56] For this argument I draw on the position as developed in Howard-Snyder 2006.
[57] Whether we construe this duty as an imperfect obligation or not, as will be seen, is irrelevant to the interpretation of the ought-implies-can principle under discussion.
[58] For a similar case and argument in terms of virtues, rights, and self-definition, see Cohen 1997 p. 46.

Consider the implications of rejecting "cannot implies not ought" for the right to freedom of movement. Right now, billions of people exist on this planet who I will never meet, never know, never share a meal with, and who will never be in a position to interfere with my movement or my life at all. If the general duty of non-interference applies to them, then they are fulfilling this duty, with respect to me, every moment of every day of their lives lived. Additionally, sitting in my office writing this, at this very moment, I am also fulfilling this duty a billion times towards each of those people and a billion times over in each passing moment of my life. The sheer number of times the duty is satisfied quickly appears astronomical. So astronomical, that we should reject it and return to Earth. The very purpose of a general description of a duty, it seems, has been lost. But what of so-called "special duties"?

At first glance, it may appear that I am suggesting *all* duties are directed in the sense that all duties are "special duties." Keeping promises may appear to be an example: the act of making a promise to someone creates a (special) duty *toward* that person and arises from a contingent fact, namely, the making of the promise. But it is unclear that this interpretation holds up under scrutiny when examined similarly to the case of the duty of non-interference associated with the right to freedom of movement. Can we not formulate promise-keeping as a general duty too?

A basic generalized principle might simply be: "Keep your promises." In such a case, the generalized abstract form of the duty to keep your promises will simply pick out those you make a promise to and provide details about *what* you specifically owe to someone by virtue of the promise. The specific promise to a specific person seems more an instance of you abiding by the general duty of promise-keeping. If so, then what is "special" about it? Seemingly nothing – it is simply a type of conditional duty formulated abstractly then implemented more concretely via specific details of a given promising instance. But if general duties cannot really be held "against

the world," and special duties can be reformulated as instances of general duties, then what does this mean for rights?

Applying these results to the general and special rights distinction suggests something has gone awry – because what I describe above concerning freedom of movement should not produce a counterexample knocking down the right itself. The issue, I think, is that the general/special right and the directed/non-directed duty distinction rely on too coarse a description of "against the world" and too thin a description of contingency. I don't have to leave my house, but when I do, as a contingent fact about how I chose to exercise my agency that day, individuals in my vicinity who can violate my rights ought not to – and they become specific individuals, namely, those who can – violate my rights. This is a contingent event, and so it satisfies one of the defining disjuncts of how special rights arise – making the right both a general and special right. Yet, all facts about my life are likely contingent in the same sense – things could have been different. If so, then the distinction between directed/non-directed duties and special/general rights is moot.[59]

Duties of charity and other duties of virtue are also directed in the sense above. When I am called to be charitable, there will be those I can help and those I cannot. If there are people I cannot help, then I have no duty to be charitable toward them. And if I have no duty to be charitable toward them, then the duty does not concern "the world" or "everyone". Directionality fails to mark out a unique kind of specificity. The degree of specificity, in terms of who is to receive my charity, will always be dependent on my abilities as an agent and features of the world that put people into a position to receive my charity. But these will always change

[59] Alternatively, one could define rights as universally quantified material conditionals and this "empty" abstract formulation is what is meant by "general" in general rights. But this option is not available to a rights generalist who thinks rights are defeasible because defeasibility is definitionally anti-universalist as it is non-monotonic.

depending on how and where I am called upon to be charitable, and so even duties of charity have directionality because of contingent aspects of how my life unfolds. If this is plausible, then directionality no longer appears to capture some unique kind of duty or right, but rather a feature of exercising agency in general. If this is correct, then talk of the "directionality" of rights, as an attempt to avoid proliferation, solves nothing – leaving the proliferation problem intact.

In this section, I've argued that defining rights as a collection of Hohfeldian positions, where each of those positions are also considered rights, given three of the four desired features of rights generalism – universal application (UA), rights-as-premises (RP), and rights-generation (RG) – violates the theoretical anti-proliferation constraint. Thomson's Hohfeldian cluster-right theory cannot satisfy anti-proliferation while maintaining the desirable features of rights generalism outlined above. And I've argued against modifying the account by adding a directional component to distinguish rights and non-rights. But what exactly is the source of the proliferation on these accounts – the Hohfeldian interdefinability schema? Or the desired features of generalism? My answer: both.

III. The Source of the Problem

So far, I have argued that one form of Hohfeldian Cluster-Right Generalism violates the anti-proliferation constraint. Now I will attempt to locate the source of the proliferation problem. I will restrict my focus to the Several Functions Theory as developed by Wenar, argue it faces the same critique as Thomson, and generalize the problem.[60]

Wenar develops a view primarily of the function of rights, as the name suggests, but this requires a view of the form of rights.[61] For Wenar, rights are (1) molecular rights, or rights made

[60] Wenar 2005

[61] At the very least, the number of possible ways a particular (or several) function(s) can be performed does not admit an infinite number of possible forms or structures. For example, a sprinkler whose function is to water the

up of a combination of the Hohfeldian positions which are also rights (atomic rights) which (2) serve one of six specified functions. Given the focus of this paper, let us restrict our attention to (1).

To illustrate, the right to bodily integrity on the view is a complex "molecular" structure composed of "atomic" second-order rights which can affect the (also atomic) first-order rights.[62] The right contains a claim against others touching your body, which is a first-order right since it is a right to something specific which is not a right. In addition, one has the power, as a second-order right because it concerns one's claim-right against others, to (not) waive that claim and make it permissible for someone to touch your body. These are two of the four Hohfeldian positions Wenar views as making up the molecular "Right to Bodily Integrity".

This structure, in application, follows the schema of generalism discussed in the previous section: invoke a right as a premise, combine it with specific details about the context, and concludes a further right constitutive of the former right exists. However, it is precisely this outcome which leaves untouched an ambiguity in the meaning of "right" which either produces a circularity that doesn't satisfy generalist desiderata or leads to proliferation.[63]

The ambiguity which needs resolution can be made clear by considering the molecule/atom metaphor as an analogy from chemistry to a normative system. A single water molecule is made up of two hydrogen atoms and one oxygen atom (H_2O). The properties of hydrogen atoms differ from oxygen atoms, and the properties of each are different than the properties of water molecules. If one were to say water molecules are composed of hydrogen and

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grass which, instead, spews fire, is not performing its hydration function. So, performing the function of "hydrating the grass" denies at least one conceivable way a sprinkler can operate/be constructed: spewing fire instead of water.

[62] Wenar 2005 p. 233.

[63] Importantly, Wenar admits that terms like "right" are "systematically ambiguous" but that this is not a problem just as such ambiguity exists for terms like "free" (Wenar 2005 p. 236). However, as discussed in the beginning, systematic ambiguity in rights discourse should not be encouraged – since that only feeds the proliferation concern. If rights are to be systematized within the law and ethical theory, eliminating ambiguity seems the preferred move.

oxygen molecules, one would simply be mistaken. First, the error would be a kind of category error because atoms are a different *type* of thing than molecules. Second, what is important for our understanding of water is the properties which emerge from two different atoms with distinct structures and properties interacting.

If rights are allowed to persist in their "systematic ambiguity,"[64] then we risk a similar problem. To see why, recall that rights generalism requires four features: (1) Universal Application (UA), (2) Rights-as Premises (RP), (3) Rights-Generation (RG), and (4) Defeasibility (DEF). In the Hohfeldian Cluster-Right forms of generalism discussed, the right invoked as premise is said to be composed of or constituted by additional rights. But if rights are *generated* in a context by the appeal to RP, then what, precisely, does it mean for a Cluster-Right to be "composed" of or "constituted" by further rights?

The most obvious initial response would be to understand cluster-rights as basic sets definable in terms of those further rights. However, this interpretation makes the appeal to rights circular. Consider the cabin case again. Suppose we mean that Juan's right to life simply contains, by definition, his right to use Sally's property in an emergency. If so, then no new right is generated by the interaction of the right to life in the case. Instead, the right appears to have always included the right to use others' property in emergencies. However, this means the appeal to the right as a *reason* for the permissibility of Juan's action is circular: Juan can use Sally's property not because the right to life justifies the use of the property, but because the right to use Sally's property (among other things) defines the right to life. Rather than justification, the conclusion follows by stipulation. So, the argument on the basic set-construal of the right to life loses the justificatory role of RP and the "generative" element of RG.

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[64] Ibid.

Another interpretation of "composed of" could be that there are different types of rights and specify the relationship between them. Instead, we just allow different types of rights on what they take as their object. The right invoked in RP is a different kind of right than the one in the conclusion of generalist reasoning captured by RG. There is no worry of circularity as before because a different right is the conclusion of the generalist schema. So, UA and RP don't lead to RG, where the right "R" in both RP and RG is the same, but rather a different type of right in the conclusion. Call this R*G or rights*-generation. So, this new form of rights generalism consists of UA, RP, R*G and DEF.

To illustrate the initial plausibility of this view, consider Shue's distinction between basic and non-basic rights.[65] A right is basic just in case it must be secured for the exercise of all other rights. All other rights are non-basic. For Shue, subsistence rights are basic rights. What good does it do to ensure that people have the right to paid vacation if they do not also have the right to clean water and food? A hungry vacation is no vacation at all. For Shue, the right to paid vacation is a non-basic right. Given the increased specificity of "right to paid vacation", and that Article 24 of the UDHR states paid holidays as *included* in the right to rest and leisure, the following possibility emerges: the right to rest and leisure is a basic right (one should not be worked to death) and the right to a paid holiday is a non-basic right. Further, the right to a paid holiday is a consequence of the right to rest and leisure (by R*G) in our current economic environment – and so is a conclusion from UA and an appeal to the right to rest and leisure as a premise (RP). So, adding a rights typology avoids circularity, and preserves both RP and some notion of "generation" via R*G.[66]

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[65] Shue 2020 p. 20s

[66] Importantly, the type of justification here concerns implementation and is about practical necessity which makes the second right's inclusion context dependent. See Nickel 2022 p. 30.

Avoiding this circularity, however, only adds an additional layer to the proliferation problem because the various right*'s will change across contexts. Suppose we define right* as the individual Hohfeldian positions and a right as a set of right*'s. Now consider the case of the right to freedom of movement from earlier regarding my right to walk down the street. The individual persons which I have right* with respect to changes over time because the individuals capable of interfering with me change as I move through different contexts. But if that's true, then the right*'s which I have in each context change. And if those change, then now the things composing my original right to freedom of movement change, and so the right itself changes. Rather than proliferation of right*'s, we now have proliferation of rights as premises as each new context generates new right*'s taken to be constitutive of the rights invoked as premises. So, shifting to R*G avoids circularity but at the cost of proliferation.

What the shift to R*G demonstrates is the need to reconsider the relation of support or justification between rights* and rights. If that relation is one of interdefinability based on the correlativity doctrine used in Hohfeldian cluster-right theories, then either we cannot avoid proliferation or the appeal to rights is circular. In other words, what needs to be assessed is the property between RP and RG (or R*G) required for generalism to be coherent. My answer in the next section is simple: there is no such property. Instead, RG or R*G can, and should, be dropped as a feature of rights generalism.

IV. A Solution, a Wrinkle, and a New Model

The arguments in the preceding sections presume the primacy of a particular way of invoking rights. Wenar's theory begins with two forms of right assertions:

(i) "$a\ has\ a\ right\ to\ \phi$"

(ii) "$a\ has\ a\ right\ that\ b\ \phi$"

where a and b are agents and ϕ is some action.[67] These take rights to be object-level moral judgements picking out specific objects and agents. There is, however, a third common locution with a different possible interpretation:

(iii) "ϕ *is within* $a's$ *rights*" or "a *is* ϕ*ing within* $a's$ *rights*."

The locution in (iii) differs from (i) and (ii) in that the act or object under consideration in the context is not a right. Rather, the action or object falls within the scope of a right or domain of permissible actions the right grants. This difference indicates a possible alternative theory: using RP and UA to generate or justify a novel deontic conclusion *without* RG.

The difference can be seen in Justice Holmes's opinion in the US Supreme Court case of *Schenck v US.* In the case, Holmes famously provides the example of shouting "Fire!" in a crowded theater as a case where such speech, given the context, is not protected by the first amendment. By analogy, in determining that the defendants' publication of an anti-draft pamphlet during WWI is not protected by the first amendment, Holmes wrote:[68]

> 'We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.'

In assessing free speech cases, the court does not frame the issue as whether an individual has a right to a particular speech act, but whether a particular speech act falls *within* one's right to free speech.

This example illustrates that legal reasoning about constitutional or fundamental rights need not attribute the status of "right" to the consequence of each individual case deemed *within*

[67] Wenar 2005 p. 225
[68] Schenck v. United States p. 52

a right's jurisdiction.[69] Rather, the assessment of new circumstances and new cases considers whether a case should or should not fall within the boundary already set by both the law and precedent. The new schema, in contrast to the schema in section II, looks like the following:

(1) Context is one in which the right applies (UA)
(2) Appeal to right (taken as fundamental or already given) (RP)
(3) New circumstances under deliberation generate a case, c.
∴ Either c falls/should fall within the right or c does not/should not fall within the right.

Call this the Austere Generalism Schema. Essentially, we have the invocation of a right as a premise, which all generalist views have in common, but we have a conclusion about a new case which does not assert a new right but a conclusion as an *extension* of or within the scope of the existing right. This is generalism without RG, without rights-generation.

Given this schema, we can sharply distinguish between a *right simpliciter*, or right *qua* premise, and a *right-extension,* the set of circumstances or cases deemed to fall within the scope of the right simpliciter. This form of generalism, as far as I know, has not yet been fully explored. One difficulty is that in denying that a right can be a particular deontic conclusion, there is a loss of interdefinability between a right and a duty. As a result, this model of rights rejects the correlativity doctrine making it non-Hohfeldian. Further, it is not a cluster-right view since, on this model, the conclusions are not new rights constitutive of the right, but rather non-right deontic conclusions subsumed under a right. So, it would be a mistake to say a right is a collection of rights on this account. Instead, the account focuses on the required structure of "right" to justify or support novel conclusions as "within" the scope of the right.

[69] This is particularly the case in US constitutional law cases where appeals to rights, as enumerated in the US constitution, as well as precedent cases interpreting said rights, forms the starting point of court opinions. This feature suggests that the use of "right" in constitutional law is markedly different than the use of "right" in private law.

Finally, this model should prevent rights proliferation by removing its source. I've argued that proliferation on generalist cluster-rights models results from the models generating new rights in new circumstances from existing rights while defining the justifying right in terms of those rights which make up the conclusions. The correlativity doctrine of interdefinability captures the dynamism of rights at the cost of proliferation. The Austere Generalism Schema, in contrast, blocks the proliferation causing inference by modifying the collections of cases within a right's jurisdiction without asserting new rights.

To drop RG though, which is not present in *Schenck*, requires articulating what "within" means. I do not wish to trade the ambiguity of "right" for the vagueness of "within". And there is a further requirement: rights must be modifiable in response to new contexts. In Holmes's reasoning, whatever is or should be "within" a right is a function of specific circumstances and new circumstances must allow for novel extensions of the existing rights appealed to in argumentation. Let's call this requirement MOD. Our new austere generalist model now must satisfy DEF, UA, RP, and MOD.

The approach I wish to take views collections of rules, like those in a legal system and ethical theory, as a normative system whose aim is to articulate norms and relations between norms which link circumstances under consideration in the system with deontic conclusions. This relationship is what MOD and RP requires – that the invoking of the right brings with it descriptive and normative content to justify a deontic conclusion in a case. Thankfully, work on intermediate concepts provides an illuminating starting point.

The core notion of an intermediate concept coined by Ross is simple but effective. Consider the legal concept of ownership.[70] What, exactly, is one referring to when invoking the

[70] Ross 1957 p. 819-820

concept “ownership”? Initially, one may respond: to own something is to have permissions regarding the use of a specific object, the power to transfer it to others, the power to exclude others from using it, etc. However, this alone would be insufficient – because these normative aspects of ownership, or as Ross calls them, legally recognized consequences, are “conditioned”[71], or are consequences of specific descriptive facts recognized by the legal system. There are a variety of ways one could come to own a table – a gift, purchase, contract for labor to build it, etc. If either of these occurs, then one has the variety of permissions and powers listed above. For Ross, when we invoke “ownership” in a legal case, all we are effectively doing is using the term as shorthand to refer to the relationship between the disjunction of possible ways to own a thing and the conjunction of the recognized legal consequences of that disjunction. In other words, “ownership” just refers to the collection of things which link the conditions for a particular status to be recognized and specified consequences of that status.

What makes ownership “intermediate” is its place in reasoning. For example:

(1) If I buy a table, then I own a table.
(2) If I own a table, then I may destroy it.
∴ If I buy a table, then I may destroy it.

Although the phrase “I own” occurs twice, in both (1) and (2), what is it doing/actually referring to? For Ross, nothing other than saying there is a relationship between the antecedent specified in (1) and the consequent specified in (2). Invoking ownership merely claims that the conditions bequeath a particular status such that the conclusion of being allowed to destroy it follows – it is an intermediate step. We can, essentially, eliminate the "I own a table” appeal, because the conclusion above is all we mean by “own”. The conclusion is just one of many possible relationships between descriptive facts and normative conclusions constitutive of “ownership”.

[71] Ibid.

Ross then concludes that "ownership" in the law has no separate meaning or independent referent, but that it is essential because it functions as shorthand for the vast and changing collection of cases, conditions, and consequences the law recognizes as comprising the concept.

In the case of rights, Ross argues the same considerations apply. The appeal to "right" is not entirely meaningless but lacks any independent referent or content. In other words, "right" does not refer only to the conditions or status which a person may have, nor does it refer to the specific consequences or deontic conclusions about what one may or may not do, but instead "right" refers to the relation *between* the facts taken to represent a status such that those normative consequences follow. In essence, rights are a partially specified modifiable collection of norms which link a disjunction of specific descriptive facts to a conjunction of specific deontic consequences of those facts. "Right", in the strictest sense, refers to that collection.

There is a wrinkle, however, for Ross's account of legal rights as a generalized account of rights. For Ross, rights are a collection of only two elements: descriptive conditions and normative consequences in a legal system. In that context, that those descriptive facts are sufficient to generate those normative conclusions arises from the authority of the legal system. In other words, why a deontic conclusion follows from a descriptive fact, which would be fallacious in any other context, is that the legal context adds a background or suppressed "ought" through its authority which links the two.[72] Devising a generalized theory of rights, given that the appeals to rights occur in a variety of moral and legal contexts with different ethical theories and legal systems under consideration, requires making explicit the suppressed "ought" constitutive of legal authority in Ross's cases. Making this aspect explicit not only avoids an is-ought gap but is required to satisfy MOD.

[72] Thanks to Hallie Liberto for pointing out this crucial role of authority in the legal system to me.

To see why, think of the right to privacy as Ross might: the relationship between a disjunction of a set of relevant facts, call this $\bigvee F$, and a set of the conjunction of deontic consequences, call this $\bigwedge C$. Let's say the right to privacy, P, up until t1, is the set of defeasible consequence relations (to satisfy DEF), $\rightarrow$, between $\bigvee F$ and $\bigwedge C$. Or, $P = \bigvee F \rightarrow \bigwedge C$. What happens when a new fact of our world, f*, emerges at t2 – such as a new technology like, say, the internet? Well, we know that $f^* \notin \bigvee F$. But if we push for, say, permission to remain anonymous on the internet, let's call this deontic conclusion/consequence c*, we also know that $c^* \notin \bigwedge C$. Neither the novel conditioning facts nor the desired deontic consequences are part of the right at t2 on this view. If Ross is right about what a right is, then appealing to the right to privacy at t2 accomplishes nothing – and so RP lacks persuasive power. But RP is ubiquitous and necessary for generalism.

To solve this problem, we can modify the account by adding a background "ought" sufficiently general to combine with a class of descriptive facts and link them to a class of deontic conclusions. In other words, the appeal to the right to privacy is an appeal to the effect that the principle or "ought" integral to a right which justifies an already existing set of cases also applies (possibly by analogy) to the novel circumstances and produces (possibly by analogy) novel deontic conclusions. In essence, an appeal to a right or rights assertion claims that the interaction of the new case, given the background principle and collection of already accepted cases, should be added – as should its associated deontic conclusions – to the right. Call this the Intermediate Interactionist Model (IIM) of rights-generalism.

Intermediate Interactionist Model of Rights Generalism (IIM): A right is a modifiable collection of specified antecedent conditions and background principle(s), which defeasibly imply a set of deontic conclusions.

One advantage of IIM is that it satisfies RP and UA via the background principle but

lacks RG – and so avoids rights proliferation. Further, the model satisfies MOD inherently: by understanding rights as appealing to the collection of relationships said to exist in the background normative system between a specified general principle endorsed by the system (such as "Congress shall make no law…abridging the freedom of speech,"[73]), specified general circumstances the principle applies to, and the deontic conclusions resulting from it, a sufficiently general principle can take on new cases to compare to accepted cases and generate new deontic consequences on that basis.[74] Importantly, these new consequences included are part of the right-extension – not rights themselves. Lastly, lacking interdefinability of rights via some form of the correlativity doctrine makes this a non-Hohfeldian form of generalism. The IIM satisfies RP, UA, MOD, and DEF while not satisfying RG. In doing so, it prevents rights proliferation while retaining the core spirit of rights generalism.

V. Conclusion

In this paper, I've argued that the rights proliferation problem has two variants – political and theoretical. Restricting my focus to theoretical proliferation, I argued that Hohfeldian Cluster-Right forms of rights generalism cannot avoid theoretical proliferation. Namely, I argued that the rights-as-premises (RP) feature and rights-generation (RG) feature combined with the correlativity doctrine cannot avoid proliferation. Lastly, I sketched a new model of rights generalism, the Intermediate Interactionist Model, which lacks RG but allows rights to be modifiable and function as reasons in argumentation by building into the right the principle

[73] US Constitution 1st amendment.
[74] Arguably, all kind terms in the law operate in a similar fashion so that they are both general, non-extensional in the strict sense, but modifiable in terms of its members. For example, "the press" did not include the New York Times before the company came into existence in 1851 but once established "the press" includes the NYT as a token of that type in the law. See Schauer 2009 p.48-53 for a discussion of the need, use, relevance, and limitations of sufficiently general types in common law court reasoning.

which justifies the antecedently accepted cases within the right's scope. This model satisfies UA, RP, DEF, and MOD without leading to rights proliferation and, so, should be a preferred starting point for investigation over Hohfeldian Cluster-Right models of rights generalism.

Paper 2: Rights-as-Defaults and Free Speech

Generalism about rights is a remarkably common but somewhat fuzzy view. At its core, rights generalism requires rights be (a) defeasible and (b) serve as reasons in argumentation. To capture both aspects precisely, this paper offers a novel model of rights generalism, the rights-as-defaults model. The aim is a theory neutral model of the form, or logical structure, of rights which any substantive theory of rights friendly to rights generalism can deploy. To that end, I argue that rights are best understood as modifiable collections of defaults, or defeasible generalizations, whose normative consequences are triggered by interaction with relevant facts or circumstances. This model captures: (1) how we reason with fundamental rights, (2) how rights justify conclusions in scenarios, and (3) how rights conflict with rights or other reasons.

First, I will explain the generalist position, its attraction, and its requirements. Second, I construct a generalist model of rights by assessing U.S. Supreme Court precedent concerning free speech as a paradigmatic example of defeasible fundamental rights. The resulting rights-as-defaults model not only captures legal and moral reasoning about rights, but also offers a novel way to characterize the key distinguishing feature of rights generalism: the difference between infringing a right and violating a right. Lastly, I compare it to another logic of generalist rights by Mullins and discuss limitations and future applications of the model.

I. Rights Generalism and Defeasibility

Rights generalism has two core tenets: rights are (1) defeasible and (2) reasons.[75] First, let's discuss what defeasibility is before turning in the next section to reasons. To say rights are defeasible means they are not absolute i.e., rights can be withdrawn or defeated in the face of competing considerations. This claim is quite common and should not be too controversial. For

[75] This characterization can be seen in Thomson 1977, 1990, Oberdiek 2004, 2008, Montague 2015, and Mullins 2020.

example, in *Chaplinsky v New Hampshire* Justice Murphy writes, "…it is well understood that the right of free speech is not absolute at all times and under all circumstances."[76] When, for example, an instance of speech is likely to cause mass panic or harm, such as shouting "Fire!" in a crowded theater when there is none, such speech is not protected by the 1st and 14th amendments.[77] In other words, there will be cases and contexts where the right to free speech, both the permission to speak freely and the immunity from prosecution associated with it, is defeated by competing considerations. Any adequate account of rights generalism must articulate what it means for a right to be defeated. Thankfully, the idea of "defeat" has already seen much study and development.

Work on defeasibility assesses what it means for one reason to defeat another in deliberation. In this domain, defeat comes in two types:[78]

(1) overriding/rebutting defeat,

(2) undercutting defeat.

Rebutting defeat occurs when new or additional information supports a different and conflicting conclusion than what was supported prior to this new information. Suppose I see an apple in front of me which appears red.[79] That the apple appears red gives me reason to conclude that the apple is red. A reasonable default rule or defeasible generalization to endorse would link these two propositions: (d1) If something appears red, conclude it is red, *by default* i.e., the conclusion holds given its premise in the absence of more information.

However, suppose a trustworthy friend tells me the color is the result of an optical illusion. As an illusion, the apple must not be red (or it wouldn't be much of an illusion – or at

[76] Chaplinsky v. New Hampshire 1941 p. 571.
[77] Schenck v. United States 1918 p. 52.
[78] Pollock 1987 p. 485.
[79] The following cases are adapted from Horty 2012 p.122-123 and Pollock 1987 p. 486.

least not a very good one). Let's write this as another default: (d2) if an optical illusion makes something appear red, conclude it is not red, *by default*. Provided with this new information, I should conclude that the apple is not red. Importantly, this does not mean I should doubt my perceptual abilities. (d1) is still a good rule in this case because my perceptual faculties are functioning fine! But my friend's testimony gives me reason to assign (d2) greater priority than (d1) – compelling me to conclude that the apple is not red.

Such a case is an instance of rebutting or overriding defeat – new information which takes a higher priority for drawing one conclusion appears and "overrides" previous information. The reason, "the object appears red," is overridden by the reason, "the optical illusion makes something appear red." As a result, the conclusion "the apple is red" is rebutted by the conclusion "the apple is not red." Only the conclusion "the apple is not red" is warranted in such a case. But there is another way (d1) may be defeated – it could be *undercut*.

Undercutting defeat occurs when new information casts doubt on the connection asserted in a default rule – encouraging you to toss out an otherwise good reason and rule. To tweak the case above, instead of an optical illusion, suppose my friend tells me she slipped a new experimental drug into my morning coffee to see how it affects color perception. In this case, I should also believe the apple is not red but via a different route. That I am under the influence of a drug means I should doubt the usual connection stated in (d1) – I have reason to suspect that my perceptual faculties are not functioning normally. In other words, "appearing red" is no longer a good reason for concluding something is red. The fact that I am under the influence of the drug *undercuts* the connection between my perception of the apple and the apple's color. I should still conclude the apple is not red, as before, but for different reasons. Such cases are instances of undercutting defeat because they encourage excluding certain reasons, and their

accompanying default rules, from consideration. Learning I am under the influence of a drug which affects my perception means that how something appears gives me no reason, no warrant, to draw any conclusions. Lastly, a case could exhibit no defeat at all.

Suppose I walk into a room and see a shiny red apple on a table. If this is all the information I have, then the default (d1) above is a good one – and sufficient – for concluding the apple really is red. No new information and no additional default rules conflict with or cast doubt on what I am seeing. I conclude "the apple is red" and take a bite without a second thought.

Given these three possible cases of defeasibility, an account of the defeasibility of rights must capture when: (1) a right is not defeated or defeats other considerations, (2) a right is defeated in the overriding sense, and (3) a right is defeated in the undercutting sense. Additionally, the language above also suggests the second core tenet of generalism: if rights can be defeated, in the same manner as reasons above, then what precisely does it mean to say rights are reasons?

II. Rights Generalism and Rights as Reasons

According to generalists, rights are reasons for drawing conclusions. To put it directionally, generalists about rights require that one can argue *from* rights to some normative conclusion. But what is the logical structure a right must have to play this role?

If you and I were walking down the street, and you yelled something profane at a passerby which I chastised you for, you could respond, "I'm just exercising my right to free speech." In that response, you assert that (1) you possess the right to free speech and (2) your profanity is permitted. (1) concerns the conditions which must be satisfied for an agent to have

the status of a rights holder – and I set this issue aside. My concern is how does your claim about the right to free speech *justify* (2), the permissibility of the speech?

You do not appear to be asserting a right *qua* norm, in the sense of creating the permission to speak profanely.[80] Not only do you lack such authority in this case, but your language instead refers to an already existing right and isn't a proclamation so much as a simple description. You claim that the profanity is permitted *because* of your right to free speech.[81] In other words, you are not making it such that your speech is permitted but instead appealing to what is *already allowed,* seemingly, in the background.

However, your claim cannot be a simple restatement of the claim that the speech is permitted – at least, not if you are intending to *justify* the permissibility of your action to me. If "right to free speech" simply meant the speech is permissible in this case, then I would accuse you of circularity. You cannot claim permission to X by simply asserting X is permissible! On such an interpretation, the right would not be justifying anything.[82] So the right neither creates the permission, nor does it simply restate it.

Your response to my criticism is clearly different from these two options. Rather, your defense seems to be closer to an argument akin to:

(1) I have said some profane thing.

(2) I have the right to free speech.

∴ I was permitted to say that profane thing.

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[80] Navarro and Rodriguez 2014 p.78-80.

[81] As will be made clear, there are limitations on when and which kinds of speech are permitted or protected by the first amendment guarantee of a right to free speech for US citizens. Profanity, as a category of speech, is not simply universally protected for all cases by the right because some instances may be "fighting words" which are not protected.

[82] I take up this argument in more detail in the previous chapter as a problem for a Hohfeldian approach to rights generalism wherein rights are identified as various permissions, obligations, powers, etc.

What is the structure (2) must have for the appeal to *justify* the conclusion? To avoid circularity, it must somehow link the descriptive speech act in question to a deontic modifier – permissibility. To accomplish this linking, (2) needs to be a conditional of sorts. Perhaps your response pithily sums up something closer to:

(1') If I am a US citizen, then I have the right to free speech.

(2') If I have the right to free speech, then I am permitted to say some profane thing.

(3') I am a US citizen (and we are in the US).

(C1) I have the right to free speech. (MP on 1' and 3')

(C2) I am permitted to say some profane thing. (MP on 2' and C1)

Yet even now it is not clear what the right itself is. One approach is to view the right as a conditional with 3' as the antecedent and C2 as the consequent. Perhaps the right in this case simply is: (RFS) If I am a US citizen, then I am permitted to say profane things. Such an approach takes an intermediate concept view of the term "right" e.g., C1 serves as an intermediate conclusion to C2. If the right has this structure, then it makes sense why you appeal to it – if that conditional is true, then it justifies the conclusion given the circumstances. This approach to interpreting rights is known as interpreting rights as intermediate concepts.

The idea of an intermediate concept can be traced to Ross 1957 and has seen much development.[83] The core idea is the claim that legal concepts lack any independent referent, or meaning, aside from being shorthand for, or a way to gesture toward, a link between a bundle of legally relevant circumstances and their associated normative consequences. RFS above has this structure – and would just need to be enriched with more facts and consequences to produce a full account. For Ross, terms like "right" and "ownership" simply are large material conditionals

[83] See Lindahl 2004, Lindahl and Odelstad 2000, 2006, 2008 where the philosophical notion of an intermediate concept is developed into the technical notion of an intervenient concept.

specified by the legal system whose antecedent is a disjunction of possible relevant facts or circumstances which entail a conjunction of normative consequences. RFS above would be an instance of selecting one disjunct from the antecedent, one's citizenship status, and one conjunct from the consequent, that profane speech is permissible. For Ross, "right to free speech" simply is RFS filled out in detail – and such a conception appears to provide the justification for your claim that your speech was permitted.

To see the usefulness of this approach, consider Justice Holmes's reasoning in the landmark, but now overturned, case of *Schenck v. United States*. The case concerned a pamphlet published during WWI urging citizens to resist being drafted into the military. Schenck's conviction under the Espionage Act of 1917 was upheld by the court on the grounds that, under different circumstances, Schenck would have been acting within his constitutional rights. However, a nation at war is a unique and different context with different consequences. In his reasoning, Holmes states that "the character of every act depends on the circumstances in which it is done."[84] He then offers the famous example that yelling "Fire!" in a crowded theater, when there is none, is not protected speech. His reasoning for both cases is that speech which, due to its content and the context of utterance, presents a clear and present danger (which depends on the context) is not protected by the 1st amendment. While this case and the clear and present danger test it established were overruled by the court in *Brandenburg v. Ohio*, it provides a helpful starting point for interpreting the right to free speech as an intermediate concept that provides justification for specific speech acts.

Contemporary free speech law retains the notion that whether speech is protected depends on a combination of the context and content of the speech act. As the fire case

[84] Schenck v. United States 1918 p.52.

demonstrates, if imminent harm is likely to occur, then such speech is not protected.[85] But, if a speech is political advocacy, and there is no imminent danger because the speech occurs, say, to a large crowd gathered in a field in the middle of Ohio, then it is protected.[86] To put it in terms of Ross's large conditional: that imminent harm is likely to occur is *not* one of the disjuncts which triggers the permissibility of the speech. However, speech which is political advocacy is one of the disjuncts which entail that the speech is protected i.e., permissible and the speaker is immune from prosecution. If rights are intermediate concepts, in the Rossian sense, then "right" refers to the conditional whose antecedent consists of a disjunction of the types of speech which are said to entail a conjunction of normative consequences which constitute "protected", as described in the law, and nothing more. As a linguistic claim, however, this result seems too strong.

As Spaak and Wenar, among others, point out, it is common to claim that a particular individual has a right to a specific object or action. [87] For example, we often say homeowners have the right to paint their house whatever color they wish. In this claim, the term "right" neither refers to a conditional nor performs the linking role suggested by the intermediate concept account above. Instead, the invocation of "right" picks out a specific entitlement which is claimed as a right. Given the ubiquity of this type of usage of "right", if the view cannot accommodate such usage of the term, then this inability is a serious strike against the theory. However, it is not clear that we must take every invocation of "right" at such face value nor endorse the strong linguistic thesis Ross does – that the *meaning* of the term simply is the vast conditional.

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[85] Killion 2019 p. 2; Brandenburg v Ohio 1968 p. 448-449.
[86] This is what *Brandenburg v Ohio* concerns, namely, the constitutionality of an Ohio statute used to prosecute a Ku Klux Klan leader for assembling with others to advocate for violence, sabotage, etc.
[87] Spaak 2014 p. 471 considers this objection to Ross's view and offers a different solution than the one I offer here. Wenar 2005 p. 225 takes the locutions in which the right refers to a specific object or act as a fundamental form of rights assertion.

Terms like "right" are polysemous in their usage in law, ethics, and ordinary language. Wenar, for example, refers to this as a necessary systematic ambiguity.[88] My focus is not the linguistic meaning of all instances of the word "right", which probably lacks a single unified answer, but instead the structure a right must have to justify conclusions in deliberation. My concern is the logical structure of a right to perform a crucial function for the generalist – namely, acting as a reason justifying a conclusion. In the case of the homeowner above, the alleged right appears as a conclusion based on certain facts – one's ownership of the house means one has the right to paint it whatever color they wish. But alternatively, we could rephrase the claim without doing violence to its persuasive force to read: "I am well within my rights to paint my house whatever color I wish." In this version, the homeowner seemingly marks the act as an instance *within* the scope of his property right. In both cases, the homeowner is permitted to paint the house, and no one can interfere. But this latter interpretation is more congruent with generalist aims – the painting is permitted *because* of his property right rather than *because it is* his right. To apply the intermediate concept approach functionally, rather than linguistically, would be to say that one's right to property includes a link that if one owns a home, then one may paint it whatever color they wish. This structure allows the right to be a reason, as desired. And an additional benefit is that we only need to claim, and so defend in a substantive theory, the existence of one discrete right to explain the case – the right to property. Despite this benefit though, Ross's schema cannot alone satisfy the generalists' desires.

If rights are one large conditional, then this conditional can function as a reason in deliberation by serving as a linking premise between a descriptive premise and the desired normative conclusion. However, if it is a bloated material conditional, as Ross suggests, then it

[88] Wenar 2005 p. 236-237.

cannot capture the defeasibility of rights. Classical logic which deploys material conditionals is monotonic whereas defeasible reasoning is non-monotonic. There is no "defeat" in classical logic without paradox.[89] So, allowing rights to be both defeasible and reasons in argumentation requires some modifications.

To accomplish both tasks, I will argue that understanding rights as modifiable collections of defeasible generalizations, or defaults, instead of as a single large material conditional, can give the generalist both desired features of rights. If we conceive of fundamental rights as defeasible generalizations, they maintain a linking character allowing them to act as reasons, in the spirit of the intermediate concept approach. But this modification also captures their defeasibility. The next section develops this model in detail and outlines some key advantages of the approach.

III. Rights-as-Defaults: A New Model

Holmes famously wrote: "The life of the law has not been logic: it has been experience."[90] In doing so, he carved out one path which theories of legal reasoning consider – an inferential but non-deductive or "non-logical" path. While some theorists have viewed a legal system as a collection of problems and cases whereby solutions follow by logic alone, or deduction, others have suggested the consequence relation between a rule and its application to be a pragmatic, or non-deductive, one.[91] The Rights-as-Defaults Model I develop in this section draws on work in defeasible reasoning and default logic to combine these two approaches with

[89] The reason for this is because classical logic allows for strengthening the antecedent whereas defeasibility requires rejecting this property. More precisely, suppose we are using classical logic and have the statements: $A \Rightarrow P$ and $B \Rightarrow \neg P$. From this, we cannot consider the conjunction of A and B without generating a contradiction. But as seen in the rebutting case above, considering a case where A and B are true and (defeasibly) imply contradictory conclusions is the hallmark of defeasible reasoning.
[90] Holmes 2010 p. 1.
[91] Navarro and Rodriguez p. 143-149.

the aim of capturing the reasoning used in free speech case law. The hope is that the law follows a bit of non-classical logic applied to a wealth of experience. We need not decide between logic and experience – we can have our cake and eat it too.

First, it is helpful to say more about what a default rule is. [92] Consider the following: **(T)** Tweety is a bird and **(F)** birds fly. If this is all you know, then it is reasonable to conclude that Tweety flies. However, what if you later learn that **(P)** Tweety is a penguin? Then, based on **(P)**, you should conclude that Tweety does not fly.[93] The statement, **(F),** is a default rule (default for short) or defeasible generalization. Few of us would assert that "Birds fly" is false even though we know penguins exist. We accept the claim as a defeasible or default rule – one which holds under some but not all circumstances.

A default is composed of three pieces: a premise, a conclusion, and a defeasible implication relation between them. In the case of (**F**), the default would be more accurately stated as "if something is a bird, then it flies, by default." The statement "being a bird" is the premise and "the thing flies" is the conclusion. In symbols, we can write it as the default, δ_F, such that $\delta_F = Bird \rightarrow Flies$, meaning that if one knows that something is a bird, then one can conclude, by default, that it flies. The information in **(T)** means that δ_F applies – so we conclude that Tweety flies, by default. When we learn Tweety is a penguin however, new considerations, and new rules, enter to defeat that conclusion – in a rebutting/overriding sense.

The desired conclusion is that Tweety, though a bird, as a penguin, does not fly. To get this result requires two additional elements: (1) that we assert a link between being a penguin and not flying, and (2) that we take the fact that Tweety is a penguin to be more important or relevant

[92] The default logic developed in this section builds on Horty 2012. A full technical treatment can be found in the appendix, but I restrict the rest of the paper to the minimal elements necessary for my argument.
[93] Horty 2012 p. 16-18, 24.

than Tweety being a bird. We can capture (1) as another default like our default δ_{F}**.** Let's call this one δ_{P}, where $\delta_{P} = Penguin \rightarrow \neg Flies$ i.e., if something is a penguin, conclude it does not fly, by default. Capturing (2) requires a different kind of default rule, known as a variable-priority default rule.

A variable-priority default rule is a default rule whose conclusion assigns a priority ranking to default rules, symbolized as $d_{B} < d_{P}$**,** which indicates that δ_{P} is more important than δ_{B}(the "d" just acts as a name for the default rule indicated by the "δ")**.** For our purposes, we can construe (2) for this case as indicating that when you learn an animal is both a bird and a penguin, assign a higher priority to the default concerning penguins over the default concerning birds. In other words, $\delta_{R} = (Bird \wedge Penguin) \rightarrow d_{B} < d_{P}$. Taken together, this assignment of greater priority between our defaults means I should adopt or endorse the default about penguins over the default about birds because it takes a higher priority given the information we have. In conclusion, Tweety does not fly. *Rebutting* defeat is captured with this technical notion of "priority" – the priority ordering does not attack a particular default rule itself, but rather states which is more important for drawing a conclusion in a case, as seen in the previous section. With the technical pieces for rebutting/overriding defeat clarified, we can turn to the second kind of defeat, undercutting defeat.

Consider again the case where my friend slipped a drug into my coffee which affects my color perception. In the absence of this information, I may have endorsed a default about the relationship between perception and reality like so: $\delta_{vision} = Looks\ Red \rightarrow Is\ Red$ i.e., if something looks red, conclude it is red, by default. However, learning I've been drugged casts doubt on the reliability of this rule. The object's appearance is no longer a good reason to draw any conclusion, i.e., I should *exclude* the mere appearance of an object, and any default which

relies on it, from consideration. Defaults which accomplish this are called exclusionary defaults and have as their conclusion a predicate, $Out(d_n)$, which says to exclude the named default. Let's make such a default for this case: $\delta_{Drugged} = Drugged \rightarrow Out(d_{vision})$ i.e., if I am drugged, exclude the default about vision, by default. To get our desired conclusion that the object is *not* red, we also need one more default: $\delta_{Warped} = Drugged \rightarrow \neg Red$ i.e., if I am drugged, conclude that an object is not red, by default. Taking these three defaults together, I should exclude δ_{vision} from consideration – leaving me with the conclusion of δ_{Warped} and conclude the object is not red. Such instances, and uses of exclusionary defaults, capture *undercutting* defeat through the technical notion of "exclusion." The technical notion of exclusion captures how we eliminate reasons from consideration when they are undercut by removing them from consideration in a case. With this basic grasp of default rules and the two kinds of defeat they illustrate, we can now turn to see how it can be applied to the right to free speech in the US.

Let's consider the following case called **Offense**. A speech act occurs which is ideological and political, aimed toward the wider public, which many find deeply offensive. The rhetoric involves denigrating insults towards societal groups, such as veterans or minorities. Given only this information, is such speech protected? According to the court in *Brandenburg v Ohio* and *Snyder v. Phelps et al*. – yes. In both cases, the speech was highly offensive. The former concerned a Ku Klux Klan meeting which advocated for the expulsion of minorities and overthrow of the government, while the latter concerned the Westboro Baptist Church's protest at the funeral of a fallen soldier wherein picketers carried signs which read, "Thank God for Dead Soldiers" and similar things much to the dismay of those attending the funeral (who sued for emotional damages). To say the speech is protected is to say, at least, that it is permissible, others

should not interfere, and the speaker is immune from prosecution (by either government or individuals). [94] In the absence of any further information, the burden lies with those who wish to regulate the speech e.g., governmental entities, to show that certain considerations apply which justify either (i) classifying the speech as "not protected" or (ii) for regulating *how* the speech occurs.[95] In other words, public political speech is protected, *by default*.[96]

Given the description above, we can make a first pass at a default constitutive of the right to free speech: $R_{FS} = \{\delta_{PS} = Political_{Speech} \rightarrow Permitted_{Speech} \wedge Immune_{Speech}\}$. In words, if speech is political then it is permitted and immune from prosecution, *by default*. Perhaps, though, one would object that such offensive speech is not protected on the grounds that this kind of talk is not permitted, by default. This would provide a competing default about speech and speech acts: $\delta_{Offense} = Offensive_{Speech} \rightarrow \neg Permitted_{Speech}$ i.e., if speech is offensive, then it is not permitted, by default. If this is all the information we have for **Offense**, then we are unable to draw any conclusions – the conclusions of each default rule contradict one another. But the appeal to the right, like when you told me you could yell offensive things at random strangers, should *justify* the outcome that the speech is protected. In other words, the assertion of the right can only justify the conclusion if it includes how it defeats competing considerations.

In this case, there is no doubt that the speech is political and offensive so there is no undercutting defeat. Instead, the claim is that the political nature of the speech, although offensive, means it is of greater value or importance and this idea is constitutive of the right. So,

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[94] While most free speech protections concern government interference, since *Snyder v. Phelps et al. 2010* protected speech is also shielded from tort liability, or the capacity of one person to sue another for harm caused by the speech.

[95] Schauer 2004 p. 1772.

[96] The question of how or why a particular speech act is considered covered by the right to free speech or first amendment is an important question – but for my purposes, I begin *after* such determination has occurred. The determination of whether a case is part of the "coverage" of the first amendment is a complex issue which requires a multifactorial approach as discussed in Schauer 2004 and Tsesis 2016.

we can devise a variable priority default concerning the ranking between these two defaults when speech is both permitted and offensive:

$$\left(Offensive_{Speech} \wedge Political_{Speech}\right) \rightarrow d_{Offense} < d_{PS}.$$

If the appeal to a right is meant to *justify* the conclusion that the speech is permitted, then as stated earlier, the content of the right cannot merely be the claim that political speech is protected. The claim must go further – it must also support the notion that the speech takes higher priority relative to claims about offense. And we often say something similar by appealing to the value of deliberation, for example, as embodied by the right to free speech. Let us, then, name the default above δ_{Del1}, since many defaults about deliberation's importance are likely needed for a full account. And we can enrich R_{FS} above with it. So now the right is:

$$R_{FS} = \{\delta_{PS} = Political_{Speech} \rightarrow Permitted_{Speech} \wedge Immune_{Speech},$$

$$\delta_{Del1} = \left(Offensive_{Speech} \wedge Political_{Speech}\right) \rightarrow d_{Offense} < d_{PS}\}.$$

With this revised definition of the right to free speech, we can apply it to the **Offense** case.

We know that the speech is political in nature, aimed at the public, and highly offensive to many. As one of the background facts is the premise of a default rule constitutive of the right to free speech, we will say that the right is *operative* in this case i.e., its premise is "triggered" by the facts relevant to the case. But the right to free speech means that when political and offensive speech occurs, the default about political speech *overrides* the default about offensive speech. Ultimately, we should conclude the speech is protected and immune from prosecution – in line with current case law that mere offense is not sufficient to justify infringing or regulating the right to free speech. The right can only justify this conclusion, and so serve as a reason to conclude it is protected, when it not only links the relevant circumstances to the relevant normative consequences, but also asserts its priority ranking with respect to competing

considerations – as expressed in the variable priority default. Ultimately, we conclude that the speech is permitted – because of the two defaults constitutive of the right. The right to free speech defeats a default concerning offensive speech – and so the speech is protected.

This case illustrates how a right can (1) act as a reason for a conclusion and (2) defeat a competing consideration. The regular default rule and the variable priority default rule, taken together, justify the conclusion. Appealing to the right, then, invokes these as *reason* for the permissibility of the speech – implying it is protected in this case. So, the rights-as-defaults model can capture how a right defeats competing considerations. But now it must be shown how a right can be defeated in both the rebutting and undercutting sense. Let's first start with how the right to free speech may be undercut.

Consider a speech act which is political/ideological but advocates for violence in front of an already angry and armed mob. Call this case **Incitement**. The government has a responsibility to take steps to ensure public safety if violence appears imminent. The court has ruled that speech-acts in a context in which violence is imminent aimed at bringing about violence/lawless action are not considered protected i.e., the usual protections do not apply when threats to public safety or lawless action are likely imminent due to the speech. In *Brandenburg*, such cases are explicitly described as exceptions to the general rule that the state may not forbid certain kinds of speech. In other words, encouraging violence is protected when done "in the abstract" and without any impending danger to the public, but not protected if it *incites* or is likely to incite violence. Generalism about rights, in contrast to its competitor, specificationism about rights, does not endorse building exceptions into rights. Given this aspect of the view, how can it capture the language that incitement to violence is an *exceptional case* which is not protected?

Put simply – we can interpret the claim as one that incitement cases *undercut* the right to free speech.

First, advocacy for violence, such as the overthrow of the government, is a form of political speech aimed at the public and of public interest. However, the threat of imminent violence is intended to lead to the conclusion that the speech is not protected. In other words, that the speech qualifies as incitement defeats the reason that the speech is political in nature. To say incitement is *not* protected by default means aiming at the usual relationship between political speech and its associated protections. We can represent this idea as a simple exclusionary default rule: $\delta_{Incite} = Speech_{Incitement} \rightarrow Out(d_{PS})$, which reads that if some speech is an *incitement*, then exclude the default concerning political speech. That the speech is political is no longer a good reason to conclude it is protected. In **Incitement**, our new default severs the usual connection between political speech and protected status. Excluding the default from such an instance would lead to the conclusion that the protections do not exist for such cases. So, incitement is, as desired, *not* protected by the right to free speech despite the political nature of the speech.[97] Importantly though, this outcome requires a small revision to our definition of when a right is *operative* above.

As **Incitement** illustrates, not every case in which the information in the case matches the premise of a default means the default remains part of deliberation. Our incitement default above, for example, implies that the political speech default rule should be excluded from consideration. As a result, we should not consider such a case as one in which the right to free speech is operative – inciting a riot is not within the scope of the protections of the right to free speech. To accommodate this, we can add that a right is *operative* in a case if and only if for

[97] We may then add an additional default rule, if we wish, which states that such speech is not permitted and not immune – but we need not do so now to show how generalism captures the idea of such speech being not protected.

some default constitutive of the right, its premise matches relevant background facts in the case (or is *triggered* in the technical language in the appendix) and the default is not excluded. In sum, inciting a riot is not protected free speech despite its political nature because a competing default, perhaps grounded in the government's right to protect the public, is operative in such cases and excludes from consideration the defaults which make up the right to free speech. Rights can be undercut – and incitement is not protected speech.

So far, this model of rights generalism has captured how the right to free speech can (1) defeat competing considerations by rebutting or overriding them, and (2) be said to be restricted or not relevant in certain cases of political speech via the notion of undercutting defeat. Yet there remains a final case to capture: when the right to free speech is overridden or rebutted. Can the model capture the idea that a case is one where a right is operative but defeated, nonetheless? I think so.

To illustrate, it is helpful to consider a case where some other right defeats the right to free speech. Call the following case **Captive**. Imagine individuals are engaged in political/ideological speech and are picketing in your neighborhood. They have decided to picket, without marching anywhere, on the sidewalk in front of your house. You do not wish to hear their obnoxious and offensive slogans while you sit in your home. In such cases, the court has ruled that (1) such speech is protected and (2) interference is permissible to restrict the locations in which such speech can occur. The main defense of this position stems from an appeal to the right to privacy – in your own home, you are entitled to choose what to listen to but picketing in front of your house makes you a captive audience in your own home.[98] Since we

[98] Frisby v Schultz 1988.

already have the basic schema of the right to free speech, let's fill in the details about the right to privacy for this case before seeing how they conflict and how privacy wins out.

As the right to privacy is also considered a fundamental right, I would also represent it as a collection of default rules (R_{Priv}). The relevant details, for this case, concern basic entitlements you have in your own home. In your own home, if you do not wish to hear some political speech then others are not permitted to continue that speech – "There simply is no right to force speech into the home of an unwilling listener."[99] We can construe this as providing two defaults constitutive of the right to privacy where one concerns the home, (δ_{PH}), and the other concerns the priority ranking between privacy at home and others' free speech ($\delta_{Castle1}$):

$$R_{Priv} = \{\delta_{PH} = Home_{\phi} \wedge Speech_{\psi} \wedge \neg Wanted_{\phi_{Speech_{\psi}}} \rightarrow \neg Permitted_{Speech_{\psi}},$$

$$\delta_{Castle1} = Home_{\phi} \wedge Speech_{Unwanted_{\phi}} \rightarrow d_{PS} < d_{PH} \}$$

This first default can be read as – if someone, ϕ, is at home and the speech of another person, ψ, is unwanted by ϕ, then the speech by ψ is not permitted, by default.[100] The second default can be read as one of many castle-like defaults determining the value of the home relative to competing values. It states that when ϕ is at home and does not want to listen to some political speech, the default concerning privacy at home takes priority over the default concerning political speech. With both relevant parts of the rights described, we can now examine how they collide.

Political speech, like that in **Captive**, is permitted by default. As the court ruled in *Frisby*, the content of such speech is protected by the 1st amendment – and since there is no threat of violence, we have no worries about undercutting defeat as in **Incitement**. Without an

[99] Ibid. p. 485.

[100] It seems prima facie plausible to me to construe these as defaults because, for example, in the event of emergency broadcasts the government is thought to generally be permitted to send emergency broadcasts. Retaining that capacity seems crucial to the effectiveness of a government in exercising its duty to protect its citizens. In such instances, another default rule about emergency broadcasts would be taken as defeating the right to privacy.

exclusionary default rule in sight, we can conclude that the right to free speech is operative in **Captive –** meaning the speech is protected. However, given the background facts, so are the two defaults constitutive of the right to privacy! Taken together, the variable priority default, $\delta_{Castle1}$, assigns a higher priority to the default about privacy in the home. As a result of this priority ranking, we should conclude that the speech by ψ in this context is not permitted. In other words, this case is one where the right to free speech is *rebutted* or *overridden* by the right to privacy. As the default about the right to free speech is not undercut, we can still claim the speech is protected, as desired. However, in such contexts, since the speech is not permitted due to another right taking priority, certain government regulations are allowed (with respect to *where* such speech can occur). With **Captive**, we have captured the last of the three cases of rights defeasibility we aimed to represent, consistent with the basics of contemporary US free speech case law. As a result, we can also finish explicating the basics of a generalist model of rights.

In each of the three cases above, the capacity for rights to defeat, and be defeated, was illustrated. From this discussion, one definition which emerged is the notion of a right being *operative* in a case: a default constitutive of the right has a premise which matches the background facts, and that default is not excluded. But generalists have a further distinction considered indispensable to their view: the difference between a right infringement and a right violation.[101] Thankfully, the model above also allows us to provide a novel description of this difference.

The core idea is that a right is *infringed* just in case one acts contrary to a right but in a manner which we think is all-things-considered permissible. In contrast, a right is *violated* just in case one acts contrary to a right but in a manner which we think is all-things-considered

[101] Thomson 1977 p. 6-8

impermissible. For example, if the government shut down a protest like the one in *Snyder* outlined in the **Offense** case above, they would be violating the right to free speech. In contrast, government acting to limit where picketing can take place to protect citizen's right to privacy would be a permissible infringement of the right to free speech. What about **Incitement**? Well, the model suggests something interesting – the right to free speech is *neither* infringed nor violated in that case.

The simple definition of infringement above presupposes that a particular right applies or, as we saw, is *operative*. Yet, in **Incitement**, the very nature of the context of the speech undercuts the usual relationship between political speech and its protections. Insofar as such a case is thought to be outside the scope of the right to free speech, such considerations simply do not apply. This outcome may be surprising to some. But if we take seriously the claim that rights are not absolute across all times and places, then this result should be welcome. The domain of rights covers many cases, as it should – but it should also be possible that some cases will not involve rights at all. The rights-as-defaults account of incitement cases illustrates one such domain. But what about when a right *is* operative and there are competing considerations?

Restricting our focus to cases where rights are operative means that only one form of defeat is relevant: rebutting defeat. To be more precise, let's define when a right is *overridden*: a right is overridden just in case it is operative but defeated (i.e., the right is rebutted). **Captive** shows a case where government actions contrary to the right to free speech are permissible. So, we can say that a right is *infringed* just in case one acts contrary to a right, but the right is overridden. Now we can define violation rather handily: a right is *violated* just in case one acts contrary to a right and the right is *not* overridden i.e., it is operative and not defeated. I violate your right to bodily integrity if I punch you without cause – but only infringe it if I am acting in

self-defense. In the former case, nothing overrides your right to bodily integrity – in the latter, my right to bodily integrity permits me to defend myself (within reason) which infringes (overrides) your right to bodily integrity. On this account, there is no incoherence in claiming that something can be within your rights but competing considerations defeat or override your right – capturing what it means for rights to not be absolute. There are a few advantages to this model worth highlighting before comparing it to a competing account and discussing the limitations of the model.

First, consider how the rights-as-defaults model handles cases which present themselves as exceptions to rights. As we have seen, there are two different ways a case can be said to be an exception: (1) it looks like a case where a right applies but it turns out it does not (undercutting) and (2) the right does apply to a case but takes a lower priority than competing considerations (overriding). In neither case do we need to modify the right itself to accommodate the specific cases which defeat it. As competing considerations arise, whether the rights of others, compelling government interests, or the very survival of the nation, they may defeat the rights of others as illustrated. But this "weighing" of reasons can occur without requiring any changes to the content of a right. Exceptional cases can therefore be handled by generalism about rights in a sensible way.

Second, this model allows that rights may be modified over time – bringing together logic and experience. While we need not necessarily build in exceptions to the rights, we may need to add new defaults as new cases arise. For example, in *Reno v. ACLU* the Court struck down the Communications Decency Act (CDA) attempting to regulate the internet as unconstitutional. Although the aims of the CDA were laudable, aiming to punish those who make indecent material available to minors, the Court reasoned that the methods the CDA deployed

were not narrowly tailored enough to avoid erosion of free speech on the internet. The Court recognized the internet as a growing "marketplace of ideas" subject to the same free speech protections as already recognized for other public and private fora. As a result of the case, we could add a default rule regarding location to the right to free speech: if speech occurs on the internet, then it is protected *by default*. However, as determining the method by which the right is modified depends on a particular background theory, all I can, and need to, claim is that my account allows the modification required for the right to be flexible for novel future cases. Hate speech is part of free speech in the US – but not in Canada. How and why particular cases will be included or excluded from the scope of a right depends on a larger theory I remain neutral about – but the model allows any theory to make their desired modifications.

Lastly, my account identifies rights with a modifiable collection of default rules. An assertion of a right, to function as a reason in a case, asserts at least two default rules constitutive of a right – one "normal" default rule and one variable priority default rule – to reach the desired normative conclusion. If the right is those rules, then it follows that the normative conclusion itself is not a right. And while this may at first appear counterintuitive, I believe it is a strength rather than a weakness.

In the domain of human rights theory, a persistent concern involves fears of rights proliferation undermining the legitimacy of rights claims. Essentially, if every new good which would be beneficial is considered a discrete right, such as the right to paid holiday expressed in the Universal Declaration of Human Rights, then the list of rights appears poised to grow without end. However, we can avoid requiring that paid holiday is a discrete right, subject to the same scrutiny as a right against genocide, by instead understanding it as one of many defaults constitutive of the human right to rest and leisure. In this way, perhaps there will be

circumstances where paid holiday should be guaranteed – but there will be others where it is overridden or undercut due to things like the economic capacity of the state obligated to implement human rights. To add a default rule to an existing right is not to say there is a new right – but rather a new case which falls *within* the scope of the right. Rather than an argument for a right, an argument must be made based on a background theory about *why* something should be included. But this reasoning leads, admittedly, to a limitation on my view about what makes a right a right.

As I have attempted to provide a model any substantive theory of rights can deploy that views rights in the generalist way, I have nothing useful to say about which things are rights and which are not. A Bentham-style utilitarianism would dismiss the very idea of natural/moral rights wholesale. A Gewirth-style account would hold that there is only one right: the right to be free. What the proper function of rights is depends on the normative theory one is committed to. All I have suggested and shown is that if one adopts a generalist view about the form of rights, then rights cannot merely be their associated entitlements – rather, they structure the conditions for and distribution of entitlements for a background theory. This is not an insignificant result, but admittedly a minimal, albeit precise, one.

The Rights-as-Defaults model captures the idea of rights generalism: rights are defeasible reasons for some conclusion. It captures these elements by construing rights as modifiable collections of defeasible generalizations where the appeal to rights makes use of two (or more) kinds of default rules to justify a normative conclusion. Despite the advantages this approach confers, it also has several limitations, as every logical model tends to. To explore those, I first compare my account to Mullins' generalist logic of rights before discussing limitations and future directions.

IV. Comparison to Mullins and Limitations

Mullins has also provided a generalist logic of rights based on work in default logic and defeasible reasoning.[102] In contrast to my account, Mullins's account is, first, a default deontic logic[103] while mine is not because my account treats permissions and obligations as already given by the normative system operating behind the scenes. In addition, Mullins account situates a generalism about rights within a Hohfeldian framework wherein claims/claim-rights are equivalent to *pro tanto* duties identified with the consequences of the binding defaults in a reasoning scenario.[104] I employ neither of these because our usage of an appeal to fundamental rights, my main aim, I argue, requires something different.

Consider the profanity case from the beginning. The appeal to the "right to free speech" can be identified with three different parts of the argument: (1) descriptive character of the speech act, (2) the permission to engage in the speech act, or (3) the relationship between (1) and (2). For the appeal to a right to play a justificatory role, I argued that the right must be identified with (3) and the agent's appeal suggests it is already accepted or endorsed as a reason for the conclusion.

To recap, suppose the "right to free speech" simply meant (1). If the right is simply identified with the type of speech, then the argument appears to go nowhere. The desired conclusion is normative – that such speech is permitted. But (1) does not give you that information without presupposing it is already protected – we've gone in a circle. Suppose the "right to free speech" simply meant (2). The argument now appears straightforwardly circular:

[102] Mullins 2020.
[103] Ibid. p. 641.
[104] Ibid. p. 646.

you are telling me profanity is permitted because profanity is permitted. The “right" is no longer justifying a particular conclusion so much as merely insisting on it.

Suppose the “right to free speech” means (3). Your assertion identifies the right as the relationship between the type of speech and the deontic status of the speech. Insofar as it does so, the acceptance of that relationship, or the claim that such a relationship is accepted by the background legal system, justifies the conclusion that the speech is permitted by pointing to the legal recognition of such a relationship. This recognition justifies concluding the speech is permitted although it is profane. And it is this assertion that the rights-as-defaults model captures. Without it, it is unclear on Mullins account how the rights *qua* conclusions or duties can serve a justificatory, rather than conclusory, function which generalism requires.

I admit this result is a departure from the austere theory of reasons Mullins deploys which identifies reasons with the triggered premises of defaults rather than the defaults themselves.[105] However, it is common, if not necessary, both in morality and law to appeal to accepted conditionals as reasons justifying and linking some circumstances to some deontic conclusions. Consider what it means to say, “I should show respect for persons.” I can show respect in a variety of ways – by being deferential to elders in my community, by not interrupting when others are speaking, etc. When trying to be respectful, I assess what the conditions are (who am I addressing? What is their title? What is the context?) and decide based on the associated requirements what I am obligated to do (Handshake? Hug? Kiss on the check? Avoid eye contact?). I justify my show of respect by applying a rule in conjunction with the background conditions. But that is roughly equivalent, in default logic, to saying I accept the default. Thus, in my reasoning, the default itself acts as justification for behavior too, not only a component part

[105] Mullins 2020 p. 645; Horty 2012 p. 41-46.

of the default.[106] In other words, rights are also reasons because defaults are (or can be) reasons too – and their acceptance, applicability, and appeal is how we come to generate and justify specific conclusions.

As intimated in the previous section, the Rights-As-Defaults model has several limitations despite its advantages. First, it leaves out various complicated factor-based processes by which the courts decide which norms in the law apply.[107] To adequately capture this aspect of reasoning with fundamental rights, the system would need to be enriched to include an initial stage using factor-based analysis to select the applicable defaults/norms. So, a variety of important aspects of the court's reasoning remains untouched.

In addition, the model fails to capture the dynamism of rights fully. By dynamism I mean the way rights take on new cases and generate new duties, permissions, liabilities, etc.[108] As a result, it is insufficient to capture how rights described at a very general level come to possess their content. In particular, it leaves out the phenomenon of "trimming" or "expanding" rights, wherein their scope of application is expanded or narrowed, as well as the normative content and priority of that content, as the practical implementation of a right is worked out.[109] My suspicion, as discussed above, is that those details require importing a substantive theory of rights – something I have purposefully avoided. But more work needs to be done on how, once such a theory is selected, it comes to decide which defaults to add, remove, and which level of generality applies to them in the rights the theory asserts.

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[106] Another, perhaps more familiar way of expressing this, is that much of my practical reasoning occurs using so-called rules of thumb. But in using that rule of thumb, I tacitly endorse it as a reason for some conclusion given the conditions which determine the applicable rule. If I did not accept the rule which links the conditions to my obligations, I would tell you I have no reason to satisfy those obligations because I do not accept that rule.
[107] For factor-based analysis of legal reasoning using default logic, see Horty 2011, 2019, 2021.
[108] Raz 1990 p. 186.
[109] Nickel 2022 p. 43-44.

Despite these limitations, the rights-as-defaults model has a degree of plausibility. On the model, we can capture the three different ways a right can be defeasible in a scenario. This outcome was desirable because all three possibilities of defeat are recognized in legal reasoning about fundamental rights. Further, the model shows how rights can be reasons – by being defaults that jointly justify a conclusion with background information relevant to a case. As a result, the rights-as-default model offers a novel form of generalism that offers a coherent and novel interpretation of the infringement/violation distinction and points to how rights, particularly fundamental rights, can be said to structure the distribution of entitlements under a variety of conditions while not being absolute.

Paper 3: Revising the Right to Do Wrong

In this paper, I argue for a revisionary conception of the right to do wrong: there is no distinct right to do wrong, as a separate right a moral theory must explain, but there may be cases where something which is all things considered morally wrong is within one's rights. More specifically, on my Rights-as-Defaults model of fundamental rights, we can show how a revised conception of the infringement/violation distinction creates conceptual space for instances where an act is all things considered morally wrong yet protected or "within the scope" of the exercise of one's moral rights and its implications.

First, I discuss two cases concerning the right to free expression and previous answers to the question, "is there a moral right to do wrong?". Second, I explicate the core ideas of the Rights-as-Defaults model, and show how it can be used to answer the question in a way which (a) preserves our intuitions about the defeasibility of rights and their role in moral theory while (b) denying a separate and distinct right to do wrong, thereby (c) answering the question without needing to add more rights to the list of rights – which is a theoretical virtue. Third, I show how a revised conception of the infringement/violation distinction attainable on this model can also explain intuitions about rights conflicts and compensation in a manner that maintains a symmetry of reasoning between the law and morality often left asymmetrical by competing accounts.

I. The Alleged Right to do Wrong and Free Expression

Suppose there is a moral right to free expression. I take no stance regarding which ethical theory is true in terms of what grounds the right and, as we will see, the view I describe here can be imported into a variety of grounding theories. Further, I suppose rights are defeasible meaning that rights can legitimately conflict with one another and other moral considerations.[110] Lastly,

[110] Such a view is commonly referred to as "generalism" about rights. Most sources concerning rights view rights as non-absolute and the exceptions would be theories who subscribe to some form of specificationism (see Oberdiek

the right to free expression is interpreted as a moral right to speak as one wish, to refrain from speaking at all, and has an associated duty on others to not interfere with your speech. This conception of the right captures the usual bilateral permission concerning speech and duty of non-interference on others associated with such liberty-rights.[111] Under these preliminary assumptions, consider the following cases as moral analogues of cases already found in US case law.

Danger: In a small, crowded space, for reasons unclear, you consider shouting "Fire!" which will likely induce a panic resulting in many injuries.[112]

Slur: You see a stranger across the street and feel a deep dislike and disgust for them. You consider calling them a slur. They can ignore you and walk away.[113]

In both cases, we will suppose that saying the slur or shouting "Fire" are all-things-considered impermissible. If you were to say them, you would be doing something wrong. However, we already granted that you have a moral right to free expression, and insofar as these are instances of speech, we can ask: do you have the moral right to these utterances? In other words, do you have the moral right to do what is all-things-considered morally wrong?

According to the legal analogues, the answer appears to be "No" in the case of **Danger** but "Yes" in the case of **Slur**. The case of **Danger** is akin to incitement which is not a kind of speech protected by the 1st amendment.[114] In essence, the court reasons that not *all* speech is protected by the 1st amendment, and so such considerations do not apply to the case. The case of

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2004 and 2008; Parent and Prior 1996) or who view rights as, by definition, entities which are absolute in some sense because they always serve as trumps, or defeaters, against consequentialist considerations (see Dworkin 1978).

[111] Thomson 1990 p. 53-57

[112] The legal analogue for this case be found in Holmes' decision in *Schenck*. See Holmes 1918 p. 52.

[113] The ability to walk away from the offensive speech, and the fact that you are not yelling the slur in the person's face, is intended to shift the case away from being one of "fighting words", as in *Chaplinsky v New Hampshire*, where such speech is a class of speech one should expect to immediately result in violent altercation. The terms use is offensive to the listener. For an account of the pragmatics linking slurs and offense see Bolinger 2015.

[114] Killion 2019 p.2.

Slur, however, is a kind of offensive speech presumed to be protected by first amendment guarantees.[115] Despite the offensive content, government regulation of offensive speech is presumptively not permitted and so the duty of non-interference holds.

Analogously, we can assert the same two conclusions concerning interference morally rather than legally. In both cases, the speech act is morally all things considered wrong. Following the court's reasoning, we would have to say that shouting "Fire!" in **Danger** is not part of your moral right to free expression. And in **Slur**, shouting the slur is part of your moral right to free expression. What does this mean for the general question about whether there is a right to do wrong, simpliciter?

Waldron's view of the right to do wrong seems to imply that the asymmetry above does not exist. According to Waldron, the very function of rights in moral theory is to give others a reason for not interfering by protecting your ability to exercise discretion as a necessary aspect of moral agency aimed at self-development.[116] However, rights do not give the right-holder reasons for acting.[117] Although the actions above are both all things considered wrong, to protect autonomy, we must presume a duty of non-interference on others which may be overridden by, say, concerns about the harm that will result. However, to have a moral right to free expression means to have a moral right to say *whatever* one wishes – and so the moral analogs of the legal cases are symmetrical for Waldron, but interference is justified in Danger but not Slur.[118] For Waldron, there is a moral right to do wrong you possess in both cases but it is defeated in one and not the other (with respect to whether others can or should interfere).

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[115] Killion 2023 p.1
[116] Waldron 1981 p.29, 34. For a response to Waldron, see Galston 1983 and Waldron responds in Waldron 1983, clarifying the line of argument I present.
[117] Waldron 1981 p.28
[118] Herstein 2012 comes to the same conclusion grounding a right to do wrong.

In contrast, Øverland argues that one may have a moral right to do wrong only with respect to special duties, but when the moral wrong in a case is a violation of a general duty, or a duty that exists despite the lack of a specific relationship to a person, then the autonomy of the perpetrator never outweighs the burden violating the duty would incur on its victims. In other words, there is no moral right to do wrong when the wrong violates a general duty.[119] In examining the cases above, **Danger** clearly concerns a general duty to not bring about harm to others – and so there is no right to do wrong. Similarly, since **Slur** concerns a stranger, then the general duty to not offend is operative, and so you lack a right to do wrong in this case as well. Similarly, Øverland would deny the asymmetry found in the law but *pace* Waldron, conclude that one lacks a right to do wrong in both cases and so interference in both cases would be justified.[120]

Finally, Bolinger offers an alternative view, namely, that there need not be a right to do wrong in any substantive sense. Rather, placing a high value on autonomy only requires interfering conservatively.[121] But interfering conservatively will, in practice, be indistinguishable from granting a moral right to do wrong.[122] In the two cases above, then, we may grant that interference is permitted in **Danger** but not in **Slur** because the costs of interference in **Slur** may be too high. On Bolinger's account, there is no right to do wrong in either case because there is no need to posit an independent right to do wrong to protect autonomy. Like Waldron and Øverland, this account denies an asymmetry between the two cases with respect to an alleged right to do wrong.

[119] Øverland 2006 p. 389, 404.
[120] Ibid. p. 389
[121] Bolinger 2017 p.52-53
[122] Ibid.

On all three accounts above, for the two cases discussed, none appear capable of accommodating the asymmetry which exists in the legal analogs of the two cases – namely, that one lacks a right to do what is all-things-considered wrong in **Danger** but possesses it in **Slur**. One explanation for this may be that the legal cases are symmetrical upon closer examination. Bolinger points out that avoiding interference will look, in practice, like granting a right to do wrong. In the legal cases, perhaps what is occurring is something like balancing the costs of interference concerning cases of offensive speech. Interfering in **Danger** by prosecuting the speech after the fact, if unable to prevent the act, is justifiable interference, on balance. But in **Slur** the fear of a chilling effect deterring the kind of public debates necessary for democracy to thrive makes interference too costly even if we judge it would be a good thing. This would suggest that talk of a right to do wrong in the latter case is mistaken. It is not granting a legal right to use slurs *per se*, but, instead, merely the guise of such a legal right by recommending non-interference.

One difficulty with this attempt to re-interpret the legal cases to prevent the asymmetrical conclusions concerning the right to free speech is that interference in **Slur,** at least according to current understandings of 1st Amendment protections, is not permissible in any sense. To say speech is protected by the right to free speech, or that an instance of speech is "protected", is to say it is immune from prosecution. If the speech is immune from prosecution, then even if some public good could be realized by prosecuting such speech, interference would be impermissible. Prosecuting such speech would be a violation by the state of a right the citizen possesses, and so, *pace* Bolinger,[123] such interference would not be a violation of a collective duty but of a right held by an individual member of that collective. The asymmetry remains.

[123] Ibid. p. 54 provides an analogous case concerning not interfering with voting for a political party with an immoral platform because it would violate duties owed to the body politic or collective, but not be a rights violation

Other than the source or context of the principles and facts, I see no reason to suppose that legal reasoning and moral reasoning are distinct kinds of reasoning. As such, I assume that, by parity of reasoning, an account which can accommodate the asymmetry in the law concerning free speech in morality is preferable. Further, in the law and many moral theories, rights are defeasible, or non-absolute, and subject to being defeated by competing considerations. In the next section, I will explain one such view, the Rights-as-Defaults view, showing how it captures the defeasibility of rights, and apply it to these two cases. The result, I will argue, is that the Rights-as-Defaults account of fundamental rights can accommodate the asymmetry between these cases in a moral theory – maintaining symmetrical reasoning between the law and morality.

II. Rights as Defaults and the Defeasibility of Rights

The Rights-as-Defaults model holds that rights, particularly fundamental rights, are best understood as a modifiable collection of defaults with a particular structure as outlined by a background theory the rights are situated in.[124] A default, or default rule, is a defeasible generalization. A defeasible generalization is a generalization whose conclusion does not hold for all cases and can be "withdrawn" depending on additional information present in a case.

To illustrate, consider the following statements:(i) "Birds fly", (ii) "Penguins are birds", (iii) "Penguins do not fly."[125] Generally, we accept that Penguins are flightless birds even though we also accept that, in general, birds fly. Further, that there is a species of flightless bird does not

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because there is no duty owed to a *specific* individual. However, as noted above, the legal cases treat each individual citizens as one member of the collective to which a duty is owed in a case, and so the distinction between duties owed to the body politic and duties owed to individual members of it collapses in that domain.

[124] In what follows, no background knowledge of default logic or formal logic is required. Nor do I have sufficient space to adequately defend the model. For a complete formal treatment of the model and argument motivating its usage, see the previous chapter and appendix. My aim in this section is to explicate the core ideas and apply them to the two cases above drawing some conclusions about the alleged right to do wrong.

[125] I adapt the following characterization and cases from Horty 2012 p. 16-18, 24.

lead to us rejecting (i) as false. But if (i) is not false, then it cannot be a universal generalization. Instead, (i) is a defeasible generalization, meaning something like: if something is a bird, then conclude that it flies, until you have more information. For example, if you learn the bird is a penguin, then you should conclude, instead, that the bird does not fly. Such defeasible generalizations are often called default rules. This allows us to use a more economical expression such as: if something is a bird, then it flies, by default. Further, we will call the antecedent of the default rule the premise of the default and the consequent of the default rule the conclusion of the default. And to save time, we can write it like so: $\delta_{\text{i}} = Bird \rightarrow Flies$, or, more generally, $Premise \rightarrow Conclusion$.

The sentence in (iii) can also be considered a default. To see why, for the sake of illustrating defeasibility, consider the following two possibilities: (1) the penguin has advanced intelligence and, seeking somewhere tropical for vacation, books a flight to Tahiti; (2) the penguin has advanced intelligence and driven by her dream to fly, invents a jetpack. In either case, such a penguin could be said to fly, and so the conclusion in (iii) would not follow if we interpret it as a material conditional. Instead, we have another default, $\delta_{\text{iii}} = Penguin \rightarrow \neg Fly$, where "¬" is the standard negation. With these two defaults in mind, we can now illustrate how one default can defeat another by overriding it.

In the original case, all we are given is that we have a creature before us which is a bird and a penguin. In the absence of this information, intuitively, we should conclude that the creature does not fly. But, since δ_i is a defeasible generalization, this is not a counterexample, but a case where the default concerning penguins can be said to take higher priority, given the information we have been provided. We can represent it as such for ease of discussion: $\delta_{\text{i}} < \delta_{\text{iii}}$, meaning, that δ_{iii} is of higher priority than δ_i. Given the information we have then, and the

priority assignment, we should adopt δ_{iii} to conclude that the creature does not fly, despite being a bird. The default rule concerning penguins overrides the default rule concerning birds. Now we can turn to casting fundamental rights as defaults.

Fundamental rights, such as the right to free speech, the right to privacy, the right to bodily integrity, etc., are complex structures. They must be complex, in part, because their content is very general, vague, and subject to revision as new cases arise. For example, what qualified as within the domain of privacy concerns has changed with the advent of personal computers, smartphones, and the internet. The right to privacy had to be applied to novel technologies and circumstances in a manner consistent with previous applications. However, this revision need not create a new distinct right but can simply extend a right's domain of applicability. It would be an odd and worrisome result if every new case of speech, privacy, or bodily integrity previously not considered, led to the creation of a new right.

Combining these two ideas, the rights as defaults model is as follows: rights are a modifiable collection of defaults with a premise and a particular structure in their conclusion given by a background theory. For example, given 1st amendment guarantees, we would say that, in the case of the right to free speech in the law, it contains at least the two following defaults for speech which is political and speech which is commercial: δ_{Pol} = If the speech is political, then it is protected, by default; δ_{Com}= If the speech is commercial, then it is protected, by default. In symbols, we could write:

$$R_{FreeSpeech} = \{\delta_{Pol} = Political\ Speech \rightarrow Protected\ Speech,$$

$$\delta_{Com} = Commercial\ Speech \rightarrow Protected\ Speech\}$$

The protected status of speech concerns, mainly, that the government may not interfere, but also that the right holder is permitted to speak and, importantly, also permitted to refrain from

speaking. So, the conclusion of the defaults concerning the right are a bilateral permission for the right holder and a duty of non-interference on all others.[126] For my purposes, I understand the immunity from prosecution for such speech as a form of non-interference – making the right holder liable for such speech would be a form of interference with the exercise of the right.

Now we can assess, from the perspective of the agent in **Slur**, how it can be that he has the right to be offensive but should not, all things considered, do so. Offensive speech is generally considered protected because content-based regulations of speech are presumptively unconstitutional. Suppose we have a moral theory which accepts the right to free speech outlined above where offensive speech in public, directed toward members of the public, is considered political in a broad sense.[127] But, of course there is no legal requirement to be polite and non-offensive. Yet, morally, we may suppose there is since offensive speech, particularly the use of slurs, is derogatory when directed at individuals. However, it must also be a defeasible generalization that offensive speech is impermissible since we can imagine a case where, perhaps, saying something offensive is the only means of stopping someone from inflicting harm on another. So, we have the following default rule from the background moral theory of your choice: $\delta_{Off} = Offensive\ Speech \rightarrow Impermissible$.

Our background moral theory states that the speech act, which is both political and offensive in this case, should be all-things-considered impermissible. In other words, it requires

[126] It is more common, in default logic, to view the deontic modals not as constitutive of the default rules but as resulting from quantification over the conclusions in each case. However, that method would (a) require more technical machinery than is necessary for my current purposes and (b) the formal model I develop is not intended to be a deontic logic but takes, as given from the background theory under consideration, the assignment of the deontic modals.

[127] "Political" is another umbrella term when it comes to speech and does not mean, exclusively, speech about politics or politicians. Rather, it concerns speech aimed at the public about matters of public concern which has generally been thought to include advocating violence in situations where lawless action is not imminent (*Brandenburg v Ohio*), saying offensive things about individuals nearby that are not captive audiences (*Snyder v Phelps et al.*), and speech acts which are considered offensive by the vast majority of the public, such as burning the US flag (*Texas v Johnson*).

that the default concerning offensive speech overrides the default concerning political speech – that the speech is offensive, although political, should be given more "weight", so to speak. So, the background theory is committed to the priority ordering between the defaults that: $\delta_{Pol} < \delta_{Off}$, in the case. Given the information in **Slur**, and the two defaults, one constituting the right to free speech, and the other concerning offensive speech in general, our agent should not yell the slur at the stranger because it is impermissible due to δ_{Off} overriding δ_{Pol}.

Importantly, the conclusion in the case is not that the offensive speech is both permitted and not permitted. The only relevant conclusion is that of δ_{Off}. However, given the information about the case, it is true that the premise of δ_{Pol} is satisfied. In default logic, we would say that the two defaults are triggered,[128] since their premises are present in the information about the case. Is this an instance of the right to free speech? On the rights-as-defaults model, yes – precisely because a default constitutive of the right is triggered, and so the right is applicable in this case. Technically, I refer to this as the right to free speech being operative just in case, in some scenario, the premise of some default constitutive of the right is triggered. So, on the rights-as-defaults model, for the case of **Slur**, the right to free speech is operative, meaning that one does have the right to say a slur – but the speech is all-things-considered impermissible because morality dictates that the default rule concerning offensive speech takes priority, perhaps by appeal to the value of not using derogatory language towards others.

In the case of **Slur**, on the rights-as-defaults model, the act is within the scope of the right to free speech. In other words, we can say, simultaneously, that the agent has the right to do what is wrong, in the sense that it would be a legitimate exercise of the right to free speech to say a

[128] There is a complication here as will become clear in the discussion of **Danger** and as I make clear in the full model of rights-as-defaults in the previous chapter, that merely having the premise of a default present in the information provided by a case is insufficient to claim a default is triggered and a right operative. The additional condition, that the default is not excluded, will become clear in **Danger**.

slur, but that it is overridden and so all-things-considered impermissible. Importantly, there is no default triggered in the case whose conclusion is that the act is permissible and whose premise states that the act is impermissible. In other words, there is no distinct right to do wrong – and it is unnecessary to reach the desired conclusion. The slur is within the scope of the exercise of free speech but is not permitted for moral reasons which take greater priority. The agent has the right to do what is all-things-considered wrong but should not.

Now consider **Danger**. In the legal version of the case, such speech although falling under the broad heading of "political", is not protected. As a moral case, while tackling the speaker to the ground seems a step too far in **Slur**, it seems permissible in **Danger**. Third-party intervention, to prevent a stampede which will likely maim and kill many, seems at least permitted if not required. The desired conclusion is that the agent has no right to do this act which, on the rights-as-defaults model, means it is one in which an agent's right is not operative in the scenario. However, as stated, the speech is political and so the right to free speech seems operative because its premise would be triggered. To accommodate the intuition that it should not be, however, given the circumstances, requires an additional technical component – that of an exclusionary default, or a default rule that tells one to exclude another default rule from consideration entirely.

Exclusionary defaults are a method of capturing the notion of undercutting defeat.[129] The kind of defeat so far discussed, overriding, is often called rebutting defeat and I have illustrated it above with the penguin case. Learning that the bird before you is a penguin does not lead you to doubt the connection between "being a bird" and "flying", but rather narrows the relevant information to the more important "being a penguin" to conclude the creature does not fly. In

[129] Pollock 1987 p. 485

contrast, undercutting defeaters are reasons which cast doubt on the relation between a defeasible generalization's premise and conclusion, thereby nullifying its role in deliberation. To use Pollock's illustrative case, suppose you are looking at an object and it appears red to you.[130] That an object appears red warrants concluding the object is red, by default. However, suppose you learn the object is being lit by red lights and only objects which are not red appear red when those lights shine on an object. Learning about the red lights is a reason which undercuts the usual connection between perceiving an object as red and concluding it is red – the perception no longer warrants the conclusion given the facts.

To capture the notion of undercutting defeat, the rights-as-defaults model, situated in a default logic, interprets undercutting defeat as exclusionary default rules. These default rules have some information, such as "red lights are on the object and makes only non-red objects appear red", which is taken to imply, by default, that you should exclude another default from consideration. Further, if a default is excluded in a case, then it is not triggered – because the nature of "exclusion" is essentially removal from consideration. Learning about the red lights means "appearing red" no longer gives me any reason to draw the conclusion that the object is red. We can symbolize them broadly as: $Premise \rightarrow Out(d_\alpha)$. The conclusion, $Out(d_\alpha)$, should be read as "exclude the default rule, δ, named by d_α, from consideration." With this in mind, we can return to the reasoning provided in **Danger** that such speech is not protected.

In the legal case, whether speech is protected or not depends on a variety of factors including both content and context of the speech. Speech may be political in content, and therefore presumptively protected, however such speech in contexts where danger is imminent, the class of speech known as "incitement", is one where those protections do not apply to the

[130] Ibid.

political speech.[131] In other words, that the speech occurs in a context where imminent lawless action or harm will occur undercuts the protections for the political speech. Such speech, therefore, is not protected despite its political nature.[132]

To return to the realm of morality, our moral theory likely endorses a similar response in **Danger**. Further, since this appears to pass a commonsense threshold for harm, interference is warranted and permissible. You may choose your preferred account – whether consequentialist in terms of public good on balance or a deontological defense via appeal to the rights of others present. In any case, what is present in **Danger** is that the context is one where the usual protections do not apply, and it is this severing of the connection between political speech and protections found in the default rules constitutive of the right to free speech which explains why interference is warranted. So, we have an exclusionary default, δ_{Imm}, where $\delta_{Imm} = Imminent\ Harm \rightarrow Exc(d_{Pol}) \wedge Interfere$. We do not need to specify a priority ordering between these defaults to reach the desired conclusion. In **Danger**, according to this reasoning, the default, δ_{Pol}, will be excluded, and so it is not technically triggered. If it is not triggered, then the right is not operative. And if the right is not operative, then the action is not within the scope of the exercise of the right to free speech. Interference is permitted, perhaps even required, and this instance of speech is not one of the agent's exercises of their free speech right. Consequently, the agent has no right to do wrong in **Danger.**

To summarize the argument so far, on the rights-as-defaults model, a right is a modifiable collection of defaults with a specific structure given by the background normative system or theory. A right is operative just in case some default constitutive of the right is triggered in a

[131] This original formulation belongs to Justice Holmes in *Schenck* but here I draw on Killion 2019.
[132] The full account of the legal reasoning is multifactoral, and I cannot address it here. For a full account of the multifactoral analysis of speech, see Tsesis 2016.

scenario, and it is triggered just in case the premise of the default is satisfied by the information of the scenario and the default is not excluded. A right is overridden just in case some default constitutive of it is operative and defeated, in the rebutting sense. In such cases, an agent has the right to do what may be wrong, all things considered, because the act is within the scope of an operative but defeated right. However, in instances in which a default constitutive of a right is excluded in a case, the agent lacks any sense of a right to do wrong in the case because the right is not operative in such a case. As a result, the agent has a right to do wrong in **Slur** but not in **Danger.** The asymmetry from the law is, on the rights-as-defaults model, preserved for moral cases. As a result, parity of reasoning can be preserved between the two normative systems – the desired outcome and one which makes the account preferable to those which require symmetry between the two cases.

Importantly, there is no need to posit an independently existing right to do wrong on this approach. If rights are defaults, then such a right would have defaults with premises that some act is all-things-considered impermissible and conclusions that it is permissible to do that act. First, no moral theory I can think of would endorse such a default rule since it would seemingly fail to give one guidance about what to do. The default rule's premise and conclusion conflict with one another making it quite useless. Second, the modifier "all-things-considered" is, in the default logic, not a property of some act but rather a property of the conclusions which fall out of the deliberation scenario. There is no sensible way, I can see, of formulating the premise described for such a default. Something *becomes* all-things-considered permissible via the deliberation of a scenario – and the act must be both permitted and not defeated to qualify as

such. So, the rights-as-defaults model does not support an independently existing right to do wrong nor does it need it to reach our desired conclusions.[133]

Lastly, this model allows for a novel revision of the distinction between infringing and violating a right. Generally, the distinction is as follows: a right is infringed just in case one acts permissibly contrary to the right in a case and violated when one acts contrary to it but in a manner which is impermissible.[134] However, as we have seen, a right can be defeated in two different ways – overridden or excluded (undercut). So, we can now make this notion more precise and say that a right is infringed in a case if and only if it is operative, overridden, and the act is contrary to the conclusion of the default constitutive of the defeated right; and a right is violated just in case it is operative, not overridden, and the act is contrary to the conclusion of the default constitutive of the operative and undefeated right. As a result, **Danger** is neither a case of infringement nor violation – but one where the right is simply not operative. And interestingly, our agent in **Slur** is now morally required to infringe his own right – but this is not unreasonable. Simply because I may be permitted to do something, and others should not interfere, does not entail my performing the act would be morally permissible all-things-considered.[135] Although I may choose not to donate to charity, I really should, and I should not let the fact that I would be within my right over my property to fail to do so as sufficient to justify not being charitable.

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[133] Enoch 2002 p. 363 argues that there can be all-things-considered rights to violate all-things-considered duties but never provides a precise account of what an all-things-considered right is. On my model, the answer is simple: there is no such thing as a that kind of right – but there may be cases where a right is undefeated and so, all-things-considered, operative, and applicable. So, I reach a similar desired conclusion concerning the possibility of a right to violate one's duties without needing to posit a different kind or species of right.

[134] Thomson 1977 p. 10; Thomson 1990 p. 122

[135] Waldron, for example, views rights or the fact that some act is "within one's rights" to not provide a reason at all for the performance of the action. My definition of infringement is consistent with this view. See Waldron 1981 p. 28.

III. Applications of Revised Infringe/Violate Distinction

Maintaining the legal asymmetry between legal cases analogous to **Danger** and **Slur** in the moral domain by using the rights-as-defaults model and revising the infringing/violating distinction provides other advantages concerning rights and wrongness. Consider the following moral case from Thomson.[136] You are rich and own a large, locked freezer full of steak. I see a child next to the freezer who will perish from a protein deficiency if I do not feed her as quickly as possible. I have no way to reach you and so, without your permission, I break the lock on your freezer, remove a steak, cook it as fast as possible and give it to the child thereby saving her life. Since the property is not mine, and I did not attain your permission in advance, my destruction and use of your property is contrary to the duty your private property right imposes on me. Have I done something wrong, in some sense? Have I infringed your right? Violated it? And in either case, do I owe you compensation?

The general intuition appears to be, at least, that such an act is morally permissible. If it is permissible, and one accepts the infringement/violation distinction, then this case is one of moral rights infringement. Although the act was all-things-considered permissible, Thomson maintains that I owe you compensation for the damages.[137] Using the framework above, we would say that your property right was operative in the case, and so not excluded by competing considerations, yet overridden and defeated by another default rule, perhaps about saving the lives of children whenever possible for very little cost or harm to others.

To get compensation, we would have to accept another claim, mainly, that when a property right is infringed, meaning the default constitutive of the right is operative but

[136] Thomson 1977 p. 10-11.
[137] Ibid.

overridden, then I owe you compensation for damages. However, this claim is not understood, generally, as a default rule – but instead a material conditional because, it is claimed, damages to property caused by an agent[138] would be a violation if compensation in the future did not occur.[139] It is not a default rule because it suggests that, since violation is doing what is all-things-considered impermissible, there will be no instance where some reason justifies failing to pay compensation – and so whenever rights infringement occurs, compensation *must* follow. Such a formulation is, clearly, not a defeasible generalization.

At first glance, it may appear that this characterization is symmetrical to the law. For example, in *Vincent v Lake Erie*, the Minnesota Supreme Court found a boat owner liable for damages to the dock the boat was tied to when a sudden, vicious storm blew in. The Minnesota Supreme Court ruled that, although the boat was docked lawfully, and the storm so vicious and sudden that no one could have been expected to anticipate it, meaning the crew of the ship, the Reynolds, was not negligent, ordered damages be paid by the owners of the ship to the owners of the dock. The dock sustained damage from (1) the crew's use of ropes owned by the dock owners after the initial lines failed which (2) resulted in saving the ship in a manner which caused damage to the dock. By analogy to the moral case above, then it would appear, at first glance, that there is a symmetry between our moral intuitions in the steak case and US legal precedent. There are, however, two reasons for why this symmetry is *not* the case and why we can, and should, reject the material conditional concerning compensation in favor of another default rule concerning compensation when a property right is infringed.

[138] In what follows I am assuming the damages to property are the result of actions of another agent capable of being held responsible for the action and so leave out damages as a result of "acts of God" and similar phenomenon.
[139] Obderdiek 2004 p. 331; Thomson 1977 p. 11; Feinberg 1978 p. 102.

First, it is not true that, in the law, the permissible destruction of private property necessarily warrants compensation. It is well established in the US that if, in the course of exercising police or regulatory powers, representatives of the state or government agents damage property or reduce its value, they do not owe compensation.[140] For example, if zoning laws change, or a type of business that had been legal is outlawed, compensation is not owed to those businesses owners for the loss of property value. In addition, in cases of public necessity where private property must be destroyed to avert disaster or great harm to the public, similarly, no compensation is owed when the state's representatives take such actions.[141] At the very least, this should cast doubt on the endorsement and interpretation of the need for compensation as necessary to prevent violating an individual's property right when it is permissibly infringed.

One could respond that such cases are different than both the steaks case and *Vincent* since they concern the actions of private citizens only. This response, however, only leads to my second point – that *Vincent* is not analogous to the steaks case. As Christie has pointed out, a variety of philosophers, lawyers, and even the Restatement of Torts, appear to have missed a crucial aspect of the court's reasoning in *Vincent*. The decision turns on using property to save property and not merely damaging property permissibly *simpliciter*.[142] The key piece of reasoning which is more consistent with previous cases, including *Mouse's Case* which held that a fellow passenger throwing someone's property overboard to save a ship from sinking does not owe compensation,[143] can be found in Justice Lewis's dissent in *Vincent* and is worth quoting:

> "The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondents' dock pursuant to contract, and that the vessel was lawfully in position at the time the additional cables were fastened to the dock, and the reasoning of

[140] Sax 1964 p. 36-37 provides an overview of relevant cases. An account of the history of these "regulatory takings" and the evolution of the meaning of "police power" can be found in Barros 2004.
[141] *Boland v City of Rapid City;* Oberdiek 2004 p.337.
[142] Christie 2006 p. 4-5.
[143] Ibid. p. 7.

> the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own…The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability."[144]

In effect, compensation was owed in Erie not merely because the dock was damaged, but because the dock was damaged when the crew of the Reynolds used stronger ropes owned by the dock owners to fasten the ship to the dock resulting in damage that would not have occurred otherwise. In essence, the use of another's property to preserve one's own property requires compensation.

On this understanding of the reasoning in *Vincent*, the analogy to the moral case of steaks breaks down. In taking a steak of yours, as a private citizen admittedly, to save the life of a child on the brink of death, I do not preserve my own property using your property. And although I am a private citizen, the case appears more like those of public necessity or regulatory takings where compensation is not owed for property damage.[145] Once again, it would seem there is an asymmetry between the law and morality concerning compensation for permissible infringement of one's right to private property. And once again, the right-as-defaults model can accommodate it.

Contrary to Thomson and Feinberg, as discussed above, given that, in the law, compensation is not owed for every instance of permissible infringement of property, the relationship between permissible infringement and owing compensation is better construed as another default rule constitutive of the right to private property as opposed to a material

[144] *Vincent v Lake Erie* p. 460-461.
[145] One may object and insist that, even in the case of public necessity, compensation should be owed. However, consider that were this the norm, then it could severely hamper the functioning of government to protect its citizens. I, for one, would not like my government to not save my life for fear of the cost of doing so.

conditional defining conditions to avoid violating that right. On my account, we can understand it as a default rule, δ_{Comp}, where:

$$\delta_{Comp} = Property\ is\ Permissibly\ Infringed\ or\ Violated \rightarrow Pay\ Compensation$$

As a default, the same remarks from the previous section apply. There will be cases where, perhaps, compensation cannot be paid due to the cost being exorbitant and out of the realm of possibility for the one who owes it. In such instances, the compensation default may be overridden. In addition, there may be cases, such as public necessity, where the usual connection between property infringement/violation and the owing of compensation do not apply – and so an exclusionary default concerning, say, an instance of the exercise of police powers would exclude the compensation default explaining the relationship between the two.

Given this formulation, returning to the steaks case, we have three options, supposing it is a case of permissible infringement: (1) I owe you compensation for the damaged lock and the steak I took (δ_{Comp} defeats any competing considerations and is not defeated); (2) I do not owe you compensation because I cannot afford to compensate you (δ_{Comp} is overridden); (3) I do not owe you compensation because of the extraordinary circumstances of necessity concerning the child (an exclusionary default kicks in which excludes the compensation default making the right inoperative). Given the facts so far, we may remove (2) from consideration. Something like (3), via an appeal to some vague notion of necessity, is analogous to the legal cases concerning police powers and the doctrine of necessity discussed earlier.[146] And if one thinks this is the case, then one can conclude that compensation is not necessarily owed in steaks – but that this does not violate your property right. Instead, it is simply one of a myriad of possible circumstances in

[146] Another possibility could be construing this case as an instance where a Lockean style *proviso* kicks in given that I can feed the child using surplus which, if taken from you, presumably, does not increase your chances of going hungry like the child was.

which the right is not operative because the default rule concerning compensation constitutive of the right is excluded.

I do not wish to argue for a particular position between (1), (2), and (3), but only wish to highlight the possibility of each position being coherent but requiring different justifications with different structures. How one answers depends on one's moral theory. But, on all three, it is at least logically possible to retain a parity of reasoning between the legal cases and similar moral cases. In other words, a symmetry between rights reasoning in the law and morality is retained. In addition, construing compensation as an additional default rule rather than a necessary condition of permissible infringement allows us to say, definitively, that what I do when I infringe rights, in general, is not wrong – in any sense of the word. Whether I owe you compensation does not turn on attributing some morsel of wrongness to an act which is all-things-considered morally correct, but on independent reasons which determine when, why, and how much compensation is owed in a case.

IV. Conclusion

In this paper, I demonstrate how a right-as-defaults model of fundamental rights can offer a revised account of the infringement/violation distinction of rights. Using this distinction, I show how an asymmetry between cases, one where we may say you "have the right to do wrong" and one where we say you "lack the right to do wrong", can be maintained in both legal and moral reasoning. The asymmetry between cases is maintained in a manner that preserves a symmetry in reasoning between moral and legal domains. In addition, this is accomplished without adding to the list of rights individuals possess a new right – there is no need to claim there is a discrete right to do wrong to reach the desired conclusions.

Using the model and the revised infringe/violate distinction, I then showed how being able to model the two different ways a right can be defeated provides a new line of response to questions concerning compensation for moral rights infringement. On my account, one does *nothing* wrong when one infringes a right. Whatever appears as residual obligations does not require residue, in any metaphysical sense, but simply another default rule constitutive of the right. However, understanding entitlement to compensation as another default rule constitutive of the right to private property also allows us to explain why there can be instances of permissible infringement which do not require compensation. As a result, a symmetry of reasoning and possible outcomes is maintained between legal rights and moral rights which had previously appeared to not exist. Whichever theory you support, I hope to have at least shown that a greater variety of options are available in handling such cases than previously thought in a manner consistent across legal and moral discourse.

Appendix: Right-as-Defaults Model and Accompanying Proofs

This appendix provides a workable but partial model of the right to free speech situated in default logic. First, let's define a default theory or default logic, following Horty 2012 with the addition of permissions and obligations in our object language:

- Assume a background ordinary logical system with the connectives for conjunction, ∧, disjunction, ∨, negation, ¬, material implication, ⇒, "T" for a trivially true proposition, and P for permissibility. PX is to be read as "X is permissible." Lastly, we can define obligation, OX, in the usual way as $\neg P \neg X$. We will assume the list of propositions about permissibility and obligation are listed by the background normative system.
- Where ε is a set of propositions and X is an individual proposition, $\varepsilon \vdash X$ means that X is derivable from ε by ordinary classical logic.
- The logical closure of ε, $Th(\varepsilon)$, can now be defined as: $Th(\varepsilon) = \{X : \varepsilon \vdash X\}$
- A default rule, δ_X, wherein for some two arbitrary propositions X and Y, $\delta_X = X \rightarrow Y$, meaning that Y follows X by default.
- Two functions which pick out the parts of default rules such that $Premise(\delta) = X$ and $Conclusion(\delta) = Y$.
- A predicate, $Out(d)$, meaning that some default, δ, is to be excluded from consideration in a scenario S.
- For some set of defaults, S, we can get the conclusion set: $Conclusion(S) = \{Conclusion(\delta): \delta \in S\}$
- A priority relation, $<$, concerning the priority ordering between defaults which is transitive and irreflexive.

Variable-Priority Exclusionary Default Theory: A variable priority default theory is a structure Δ=⟨W,D⟩ where W is a set of propositions, D is a set of default rules, δ_X, where each $\delta_X \in D$ has a unique name d_X, the background language contains the predicate Out, and the set W contains each instance of priority between defaults that is irreflexive, $\neg(d < d)$, and transitive, $(d < d' \wedge d' < d'') \Rightarrow d < d''$, with the names of each default in D.

Scenario: A scenario, *S*, is based on a default theory, Δ, and is a subset of the defaults in the theory. In symbols, $S \subseteq D$.

Derived Priority Ordering: Given a variable-priority exclusionary default theory, $\Delta = \langle W, D \rangle$, and a scenario, *S*, based on this theory, the priority ordering $<_S$ for the scenario based on the theory is: $\delta <_S \delta'$ just in case $W \cup Conclusion(S) \vdash d < d'$.

Exclusion: Let Δ be a fixed priority default theory and *S* a scenario based on the theory. The set of excluded defaults in the scenario based on the theory, $Excluded_S$, are:

$$\delta \in Excluded_S \text{ just in case } W \cup Conclusion(S) \vdash Out(d).$$

Triggered: Let Δ be a fixed priority exclusionary default theory and *S* a scenario based on the theory. The set of triggered defaults in the scenario based on the theory:

$$Triggered_{W,D}(S) = \{\delta \in D : \delta \notin Excluded_S \text{ and } W \cup Conclusion(S) \vdash Premise(\delta)\}.$$

Conflicted: Let Δ be a fixed priority exclusionary default theory and *S* a scenario based on the theory. The set of conflicted defaults in the scenario based on the theory:

$$Conflicted_{W,D}(S) = \{\delta \in D : W \cup Conclusion(S) \vdash \neg Conclusion(\delta)\}.$$

Defeated (Rebutting defeat): Let Δ be a fixed priority default theory and *S* a scenario based on the theory. The set of defeated defaults in the scenario based on the theory:

$$Defeated_{W,D,<}(S) =$$

$$\{\delta \in D : \text{there is a default } \delta' \in Triggered_{W,D}(S) \text{ such that}$$

(1) $\delta < \delta'$

(2) $W \cup \{Conclusion(\delta')\} \vdash \neg Conclusion(\delta)\}$.

Binding: Let Δ be a fixed priority default theory and *S* a scenario based on the theory. The set of binding defaults in the scenario based on the theory, then the defaults that are binding in *S* are those such that:

$$Binding_{W,D,<}(S) = \{\delta \in D : \delta \in Triggered_{W,D}(S),$$
$$\delta \notin Conflicted_{W,D}(S),$$
$$\delta \notin Defeated_{W,D,<}(S)\}$$

Stable Scenario: Let Δ be a fixed priority default theory and *S* a scenario based on the theory. *S* is a stable scenario based on Δ just in case:

$$S = Binding_{W,D,<}(S).$$

Proper Scenario: Let Δ be a fixed priority default theory and *S* a scenario based on the theory. *S* is a proper scenario based on this theory just in case *S* is a stable scenario based on this theory.

Extensions: Let Δ be a fixed priority default theory. ε is an extension of the theory, Δ, for some proper scenario *S* based on this theory, such that:

$$\varepsilon = Th(\{W \cup Conclusion(S)\}).$$

Right: A Right, R_α, is a subset of defaults in D, where at least one default is such that $\delta \in R_\alpha$, $Premise(\delta) = X$ and $Conclusion(\delta) = PY \wedge P\neg Y \wedge \forall ZO\neg I(Z,Y)$ where $\forall ZO\neg I(Z,Y)$ means "For any agent Z, Z ought not interfere with the Y-ing"; and at least one default in R is a variable priority default.

Operative$_{def}$ = A right R, is **operative** in a scenario, *S*, based on a default theory, Δ, just in case there is some default, $\delta \in R$, such that $\delta \in Triggered_\Delta(S)$.

Overridden$_{def}$ = A right, R, is overridden in a scenario, *S*, based on a default theory, Δ, just in case the right is operative in S and there is some $\delta \in R$ such that $\delta \in Defeated_{\Delta}(S)$.

Infringement: A right, R, is *infringed* in a scenario, *S*, based on a default theory, Δ, just in case the right is overridden in *S*.

Violation: A right, R, is *violated* in a scenario, *S*, based on a default theory, Δ, just in case (1) the right is operative in *S*, the (2) right is not overridden in *S*, $(3)\neg PX \in \varepsilon_{\Delta}(S)$, and $(4)\ X \in \varepsilon_{\Delta}(S)$.

The right to free speech contains, at least, a default concerning political speech, δ_{PS}, and another default, δ_{Del_1}, concerning the priority ranking between speech which is political and another default about speech being offensive (whose conclusion is that such speech is impermissible).

Right to Free Speech (R_{FS}):

$$R_{FS} = \{\delta_{PS} = PolSp(X) \rightarrow P(X) \wedge P\neg(X) \wedge \forall Y \neg I(Y, X),$$

$$\delta_{Del_1} = T \rightarrow d_{off} < d_{PS}, \ldots \delta_n\}$$

Offense (Δ_{Off})**:** A speech act is political/ideological but highly offensive to a listener, Y, because of its inflamed rhetoric and group-targeted insults (*Texas v Johnson*). Is such speech protected? The court says "yes" because free speech is assigned higher priority.

Need: One default that political speech is protected, by default, δ_{PS}; one default that offensive speech is not permitted, by default, δ_{Off}; one default that represents that, political speech is taken to have a higher priority than merely offensive speech. The hard information contains the political nature of the speech, $PolSp(X)$, and the fact that a listener(s), Y, finds it offensive, written as $\exists Y Off(Y, X)$ meaning "There is some Y such that Y finds X offensive."

Let Δ_{Off} be a default theory where:

$W = \{PolSp(X), \exists YOff(Y,X)\}$

$D = \{\delta_{PS} = PolSp(X) \rightarrow (PX \wedge P\neg X \wedge \forall YO\neg I(Y,X)),$

$\delta_{Off} = Off(Y,X) \rightarrow \neg PX,$

$\delta_{Del_1} = T \rightarrow d_{Off} < d_{PS}\}$

Proper Scenario $= \{\delta_{PS}, \delta_{Del}\}$

Derived Priority Ordering: $\delta_{Off} < \delta_{PS}$

$\varepsilon_{\Delta_{Off}} = Th\{PolSp(X), \exists YOff(Y,X), d_{Off} < d_{PS}, (PX \wedge P\neg X \wedge \forall YO\neg I(Y,X))\}$

$PX \wedge P\neg X \wedge \forall YO\neg I(Y,X) \in \varepsilon_{\Delta_{\text{Off}}}$

Abridged Proof:

Eight scenarios: $S_0 = \emptyset, S_1 = \{\delta_{PS}\}, S_2 = \{\delta_{Off}\}, S_3 = \{\delta_{Del_1}\}, S_4 = \{\delta_{PS}, \delta_{Off}\},$

$S_5 = \{\delta_{PS}, \delta_{Del_1}\}, S_6 = \{\delta_{Off}, \delta_{Del_1}\}, S_7 = \{\delta_{PS}, \delta_{Off}, \delta_{Del_1}\}.$

Given the hard information in $W, S_0, S_1, S_2, S_3,$ and S_6 are out because they lack the triggered defaults in those scenarios.

$S_4$and S_7 are out because the conclusions of the defaults conflict and so cannot be binding.

$S_5$is good because δ_{PS} is triggered, not conflicted with itself, and not defeated in S_1.

Conclusion: Offensive political speech is *within* one's right to free speech, protected, and defeats offensiveness considerations.

Incitement (Δ_{Incite})**:** Consider a speech act which is political/ideological but advocates for violence in front of an already angry and armed mob. The government has a responsibility to take steps to ensure public safety if violence appears imminent. The court has ruled that speech-acts in a context in which violence is imminent aimed at bringing about violence/lawless action are not considered protected. The usual protections do not apply when threats to public safety or lawless action are imminent given the nature of the speech.

Need: One default that political speech is protected, by default, δ_{PS}; one default that an act, X, which encourages a lawless or criminal act, Z (*AdvLawless(X,Y)*), is impermissible and it is permissible for an agent, Y, to interfere, δ_{Inc}; one default that to ensure public safety or protect the peace, δ_{Prot}, if an act of political speech advocates for lawless action and the speech act is imminently likely to result in said lawless action it encourages, then the usual protections for political speech do not apply, by default. Further, we add to the hard information that the act of doing X makes Z a likely consequence and that if the act is impermissible, there is an agent, Y, who is permitted to interfere.

$$W = \{PolSp(X), AdvLawless(X,Z), Likely(X,Z), \neg PX \Rightarrow \exists Y PI(Y,X)\}$$

$$D = \{\delta_{PS} = PolSp(X) \rightarrow (PX \wedge P\neg X \wedge \forall Y O\neg I(Y,X)),$$

$$\delta_{Inc} = AdvLawless(X,Z) \wedge Likely(X,Z) \rightarrow \neg PX$$

$$\delta_{Prot} = PolSp(X) \wedge AdvLawless(X,Z) \wedge Likely(X,Z) \rightarrow Out(d_{PS})\}$$

Proper Scenario $= \{\delta_{Inc}, \delta_{Prot}\}$

$$\varepsilon_{\Delta_{\text{Inc}}} = Th\{PolSp(X), AdvLawless(X,Z), Likely(X,Z), \neg PX \Rightarrow \exists Y PI(Y,X) Out(d_{PS}), \neg PX\}$$

$$(\neg PX \wedge PI(Y,X)) \in \varepsilon_{\Delta_{\text{Inc}}}$$

Abridged Proof:

W would trigger all three defaults except when δ_{PS} and δ_{Prot} are together because the latter excludes the former.

Cannot have δ_{PS} and δ_{Inc} together because they conflict.

Only scenario left is $\{\delta_{Inc}, \delta_{Prot}\}$ since each individually would leave out a binding default.

Conclusion: Political speech likely to incite imminent violence or lawless action is not protected speech – the usual protections do not apply to that type of political speech. Such speech is both not protected, and interference is permitted.

Captive (Δ_{Cap})**:** A speech act is political/ideological and highly offensive to many who hear it due to its content and occurs in a residential area where those who are in their own homes cannot help but hear the political rhetoric. According to the court, such speech is considered protected speech, but the government may impose restrictions on where such speech is permitted to occur to protect the privacy of homeowners. Protected speech acts are not entitled to be listened to by others – and the right to privacy justifies limits on where protected speech acts can occur. (See *Frisby v Schultz 1988*)

Need: One default that the speech is political and therefore protected, by default, δ_{PS}; In the hard information, we will add that the speech is political in character, $PolSp(X)$; there is a potential listener, Y, who is in their home, Home(Y), and does not want to listen to speech act X; if those two conditions are satisfied, then by default the act X is impermissible, by default, because no one can be forced to listen to unwanted speech in their own home. Call this default δ_{Home}. If the speech is found to be impermissible, then it is permissible for an entity, Z, to interfere with the performance of the speech act X. δ_{Home} is one default constitutive of the right to privacy, $R_{Privacy}$; and a default stemming from government interest in respecting and protecting the rights of homeowners, δ_{PH}, assigns higher priority to the default constitutive of the right to privacy over the default concerning political speech.

$$W = \{PolSp(X), \exists Y Home(Y), \exists Y \neg Want(Y,X), \neg PX \Rightarrow \exists Z PI(Z,X)\}$$

$$D = \{\delta_{PS} = PolSp(X) \rightarrow \big(PX \wedge P\neg X \wedge \forall YO\neg I(Y,X)\big),$$

$$\delta_{Home} = \big(\exists Y Home(Y) \wedge \neg Want(Y,X)\big) \rightarrow \neg PX$$

$\delta_{PH} = T \rightarrow d_{PS} < d_{Home}\}$

Derived Priority Ordering: $\delta_{Off} < \delta_{PS} < \delta_{Home}$

Proper Scenario = $\{\delta_{PH}, \delta_{Home}\}$

$\varepsilon_{\Delta_{\text{Cap}}} = Th\{PolSp(X), \exists Y Home(Y), \exists Y \neg Want(Y, X), \neg PX \Rightarrow \exists Z PI(Z, X), \neg PX,$

$d_{PS} < d_{Home}\}$

$\neg PX \wedge \exists Z PI(Z, X) \in \varepsilon_{\Delta_{Cap}}$

Abridged Proof:

The hard information triggers all the defaults and none excludes another.

But δ_{Home} conflicts with and defeats δ_{PS}.

So, only $\{\delta_{PH}, \delta_{Home}\}$ is a scenario containing all the binding defaults in that scenario. In that scenario, δ_{PS}, which represents the right to free speech in this case, is triggered but defeated.

Conclusion: Political speech, even if offensive, when aimed at someone in their home who does not want to listen to it, is protected in the sense that the right to free speech, or the default, δ_{PS}, constitutive of the right is operative in the scenario. The speech is protected, and so within one's right to free speech, unlike in the incitement case. But because of the location of the speech, the right to privacy defeats the right to free speech in such a case. As a result, a city ordinance banning picketing at or about a specific residence is permitted, or interference is permitted in such a case by government entities, because it protects the right to privacy in such cases even though it does infringe on the right to free speech. But this is the expected result since "even protected speech is not equally permissible in all places and at all times." (*Frisby v Schultz* 1988 p. 479 based on *Cornelius v NAACP Legal Defense and Educational Fund, Inc*)

Key Results:

1) In Δ_{Off}, the right to free speech is operative, not overridden, and neither infringed nor violated. The right to free speech defeats competing considerations. This is a case where the right "wins out."
2) In Δ_{Inc}, the right to free speech is not operative because the usual protections are undercut in contexts where the speech act encourages lawless action in a manner which makes such acts imminently likely to occur. Such cases are cases of "unprotected speech" and interference neither infringes nor violates the right to free speech because the right is simply not operative in such cases. This is a case where the right is undercut, and not operative, even though the speech is political.
3) In Δ_{Cap}, the right to free speech is operative and overridden because it is defeated by privacy concerns for individuals in their own homes. In such a case, the right to free speech is permissibly infringed because it is operative but overridden by the right to privacy. Such a case is one where the right to free speech applies, but conflicts with and is defeated by the right to privacy. As such, the right may be infringed.
4) 1-3 represent the three possible interactions of the right to free speech with circumstances the court has recognized. All three can be captured in a way that retains the defeasible nature of rights and illustrates how rights can conflict with competing considerations including, but not limited to, other rights.

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