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TWO MEN AND A PLANK

Claire Oakes Finkelstein*
University of Pennsylvania Law School

I. INTRODUCTION

Can two individuals, each of whom needs a certain resource for his survival, have equal and conflicting rights to that resource? If so, is each entitled to try to exclude the other from its use? An old chestnut of moral and legal philosophy raises the problem. Following a shipwreck, two men converge simultaneously on a plank floating in the sea. There is no other plank available and no immediate hope of rescue. Unfortunately the plank can support only one; it sinks if two try to cling to it. Is it permissible for each to attempt to secure his own survival by pushing the other off the plank?

The example first appears in the writing of the Roman stoic Hecaton, who takes the position that the men are obligated to draw lots. It is permissible to push the other off the plank only if he has received the short straw in a lottery and refuses to cede his place.[1] Cicero is next to take up the problem, followed by Grotius, both of whom disagree with Hecaton. They maintain that the duty to avoid inflicting harm on another outweighs the entitlement to fight for one's survival. They think it is not permissible to push the other off the plank even if he has drawn the short straw in a lottery.[2] By the time we come to Pufendorf, however, we have reached precisely the opposite conclusion from Cicero and Grotius, and indeed have moved far beyond Hecaton. Pufendorf advances the general proposition that "If two men are in immediate danger of both perishing, one is

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1. Hecaton, *Moral Duties*, *in* CICERO, DE OFFICIIS bk. III, xxiii. (trans. Walter Miller, Harvard University Press 1913, rpt. 1975)

2. *Id*. The Loeb translation of the relevant passage in Cicero is as follows: "Hecaton gives the argument on both sides of the question; but in the end it is by the standard of expediency, as he conceives it, rather than by one of human feeling, that he decides the question of duty." *See also* bk. III, vi, § 29, where Cicero suggests that a wise man may not steal food from a worthless man, even if the wise man would otherwise perish of hunger.

For GROTIUS, see THE RIGHTS OF WAR AND PEACE (trans. A. C. Campbell, Hyperion Press 1979) ch. II, § viii, where he says that where two individuals are in an equal state of necessity, and neither has priority over the other, the "plea of necessity" does not furnish an excuse.

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allowed to do anything to hasten the death of the other (since the other would perish anyway) in order to save himself."[3] Moreover, Pufendorf thinks that *even* if one has drawn the short straw in a lottery, one is entitled to resist being pushed off the plank when the other attempts to enforce the bargain. The plank problem has shifted from a problem of distribution to one of individual right.

The rights-based approach finds its way into subsequent reflection on the nature of the legal defense available to a defendant under these circumstances. Both Bacon and Blackstone are inclined to see pushing the other off the plank as justified. Both appear to agree with Pufendorf that, as Bacon puts it, "necessity carrieth a privilege in itself," and that one who pushes the other off the plank is entitled to do so.[4] They disagree only about the nature of the justification at issue. Bacon makes the strange suggestion that the privilege here is similar to self-defense but *stronger.* [5] Blackstone, by contrast, thinks that pushing the other off the plank is a *kind* of self-defense.[6] But both think there is an entitlement to push the other off the plank, a privilege that allows an agent fully to justify, not merely excuse, his doing so.

It is not until Kant, however, that we come to the modern position on the plank problem. On the modern view, the problem is removed from the realm of right and becomes a problem in the theory of punishment instead. According to Kant, neither has the right to push the other off the plank, because such an act can never be consistent with the moral law. His brief argument is that if it *were* permissible, the doctrine of Right would be "in contradiction with itself."[7] He gives no further explanation, but it is not hard to see what he has in mind. If there were a right to kill out of necessity, the victim would have a right to resist, for he has done nothing to merit the attack. The attacker, in turn, would have a right to resist the victim's self-defense, since he too is acting on a claim of right. The problem with allowing a right to kill out of necessity, then, is that each may be rightfully opposed even when acting with right. Any moral law that produced this result seems to simultaneously endorse and condemn, permit and prohibit,

3. SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW, Bk. I, §§ 20–1(ed. James Tully, Cambridge University Press 1991)

4. THE WORKS OF FRANCIS BACON 343 (Shedding, Ellis & Heath eds., 1859). Bacon concludes that "if a man steals viands to satisfy his present hunger, this is no felony nor larceny."

5. Bacon might have been driven to this position by the awkward legal status of self-defense: "So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither se defendendo nor by misadventure, but justifiable." The problem was that *se defendendo* and *per infortunium* were still extra-judicial in Bacon's time, in the sense that a defendant wishing to avail himself of either of them could do so only by way of royal pardon.

6. He explains this curious position by saying that "their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life." 4 WILLIAM BLACKSTONE, COMMENTARIES *186.

7. IMMANUEL KANT, THE METAPHYSICS OF MORALS (trans. Mary Gregor, Cambridge University Press 1991). app. ii, 235.

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a given act. Kant therefore concludes that neither man on the plank has a right to push the other off it.

Nevertheless, Kant thinks that although there is no moral right to push one's fellow off the plank, there can be no legal punishment for doing so. He says:

> [T]here can be no *penal law* that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he has saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an evil that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an evil that is *certain* (drowning). Hence the deed of saving one's life by violence is not to be judged *inculpable* (*inculpabile)* but only *unpunishable* (*impunibile)*, and by a strange confusion jurists take this *subjective* impunity to be *objective* impunity (conformity with law).[8]

There are several problems with Kant's argument in this passage, but they are not presently of concern to us.[9] What *is* of concern is the distinction Kant implicitly draws between the culpability of a deed and its punishability. This distinction is variously expressed as that between conduct rules and decision rules, or more familiarly, between justifications and excuses. What someone does by right, or according to rules of conduct, he is justified in doing. A person who is excused, by contrast, has no such claim. He is merely shown mercy, but the act is still prohibited, and he is still guilty. The crucial move Kant makes is to say that pushing the other off the plank cannot exist in the realm of right, since an assignment of right must be consistent. If such an act is to be exempt from punishment, it can only be by mercy or excuse, never by right or justification.

In law, the treatment of plank-type cases as involving at best an excuse has become standard as well. The House of Lords endorsed it, for example, in the famous case of Regina v. Dudley and Stephens.[10] The Lords expressed their sympathy for the defendants, who had killed and eaten the ship's cabin boy after spending many days stranded in a lifeboat following a shipwreck. But the judges concluded that the law could do nothing for

8. *Id*. at §§235–236.

9. In brief, the problems are as follows. First, Kant's argument that necessitous killing cannot be deterred is a dubious one. There are punishments worse than death, and one need only threaten to inflict them with sufficient certainty to induce compliance in a rational agent. Second, his claim that undeterrable conduct ought not to be punished is problematic. Why should the State fail to punish an individual to the full extent he deserves just because his evil conduct was inevitable, given his strong, self-interested motivation? That seems an unduly utilitarian consideration for a retributive theory of punishment. Admittedly, if it were literally impossible for a person to conform his behavior to the law, one might feel punishment was unwarranted. But presumably a person of goodwill could conform to a penal law with moral content, even if this required him to act in the face of compelling considerations of self-interest.

10. 14 Q.B.D. 273 (1884).

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them. There is no principle, they said, that would exonerate a defendant who kills someone not presently threatening him for the sake of preserving his own life. They considered, but quickly rejected, Bacon's position that "necessity carrieth a privilege in itself." But having closed the front door on Bacon's approach, they let it in the back, by suggesting that the Crown pardon the defendants on precisely the grounds they had rejected in law.[11] In short, the modern approach allows a defense of necessity under these circumstances, but it does so by relegating the defense to the domain of pardon, a showing of mercy rather than an assertion of right.[12]

The history of our problem suggests that the modern approach to rights did not so much settle the plank example as find itself *driven* to a certain solution by worries about inconsistency. I think there are good reasons, however, to allow that each has a right to push the other off the plank. First, it is not clear that Kant is correct that recognizing conflicting rights makes morality inconsistent. Second, what if morality *is*, after all, inconsistent? We cannot proceed by simply eliminating that possibility *ab initio*, at least not if we also have good grounds for structuring notions such as right and duty in the ways that ultimately lead to inconsistency. For both of these reasons, Kant's claim seems to require reexamination.

In Section II, I offer reasons for thinking the plank case a conflict of rights. By this I mean that each is fully entitled, not merely excused, to push the other off the plank. I also mean that each has a right, and not merely a liberty, to do so. Once the thesis of conflicting rights is in place, I confront, in Section III, the suggestion that the recognition of conflicting rights makes morality inconsistent, and I attempt to identify the assumptions that lead to that conclusion. In Section IV, I take up the problem of inconsistency in the context of so-called "moral dilemmas." Just as Kant argued that to admit conflicting rights would make the moral law inconsistent, many have argued that to recognize the possibility of conflicting obligations would do the same. I argue in favor of one of the solutions that has been proposed to the problem of inconsistency in the context of moral dilemmas. In Section V, I attempt to make that solution applicable to the problem of conflicts of rights. I conclude that allowing that each has a right to push the other off the plank does not force us to think that morality is inconsistent. Finally in Section VI, I consider briefly what agents faced with a conflict of rights ought to *do*. For it is one thing to show that evenly balanced conflicts do not violate the rules of logic; it is quite another to see how to respond to conflicts of this sort. I argue that because any solution to such a

11. The Queen obliged, commuting their sentences to a six month prison term for each.

12. In contemporary jurisprudence, the pardon power is now judicial (as well as executive), and is built into the structure of what are usually thought of as "excuses." The excuses, however, retain their character as individualized concessions of mercy. George Fletcher, for example, insists that justifications are distinguishable from excuses by the fact that justified acts are "objectively right." Excused acts, by contrast, remain wrongful, and thus the grounds for exoneration must operate by way of mercy rather than right. GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 10.1 (Boston: Little, Brown 1978).

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conflict is morally arbitrary, it does not in fact matter *what* a person in such a conflict does.

My argument that it is possible for rights to be equal and opposing without rendering morality inconsistent thus takes a distinct position in the history of the plank problem: I side with Pufendorf, Bacon, and Blackstone against the House of Lords and Kant. That is, I think a person who will otherwise die has the right to kill another, where the other is equally endangered and has no stronger claim of right, if by doing so he can save his own life. This paper attempts to show that this simple and appealing way of thinking of conflicting entitlements has been wrongly dismissed by modern rights theory because of an incorrect understanding of the requirements of consistency in the theory of rights and obligations.

II. WHY THE PLANK CASE IS A CONFLICT OF RIGHTS

Before Kant raised the specter of inconsistency, the prevailing understanding of rights positively endorsed conflicts. We see this with Pufendorf, who inherited his permissive approach to conflicts of rights from Hobbes. Hobbes would have readily assented to the proposition that each man clinging to the plank has a right to push the other off it.[13] Admittedly, it is precisely because he thought that rights could conflict that Hobbes is often charged with lacking the concept of a right altogether and with labeling as "rights" what are really only liberties.[14] But whatever the truth about Hobbes, we need not be restricted to seeing conflicts in terms of conflicting liberties. I shall instead adapt Hobbes to my own purposes and explore the possibility that full-blown claim-rights can conflict. In this section, I shall argue that each man clinging to the plank has a right, not just a liberty, to push the other off it, and that these conflicting rights can be in perfect equipoise. We will then consider the implications of this conclusion for the theory of rights and duties.

Before I turn to the argument for conflicting claim-rights in this case, I wish to explain why I do not think we should treat each man on the plank as having a mere liberty to push the other off. The model for conflicting liberties is the case of economic competitors struggling over market share. Each does things to harm the other as the only way to help himself, but neither has a right that the other refrain from doing such things. But struggling over the plank is not like struggling over market share, for one

13. This is clear, among other things, from his repeated suggestion that while the sovereign can do his subjects no injustice or injury, a subject nevertheless has the right to resist if the sovereign comes to kill him, injure him, or place him in chains. THOMAS HOBBES, LEVIATHAN ch. 14, §8 & §29; *see also* ch. 21, §12, §13, & §15.

14. There may nevertheless be grounds for drawing a rough distinction between rights and liberties in Hobbes's account. It would be the distinction between entitlements in civil society (whether themselves natural or civil) and the entitlement each has in a state of nature to advance his own survival. The former have characteristics that make them right-like in a modern sense, while the latter is a mere absence of restraint.

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simple reason: Pushing a person off the plank is killing him, and people generally have a right that others not kill them. That is, killing another human being is not something we are at liberty to do. But does the claim that we are not at liberty to kill not conflict with the suggestion that each may push the other off the plank? And so if we deny the possibility that each has a liberty to push the other off the plank, are we not also denying that it is permissible for each to do so? Not necessarily. Sometimes it is permissible to kill someone who has a right not to be killed, namely when one has a justification for killing. In such cases, the privilege one person has to kill *overrides* the other person's right not to be killed. When might this be so? One situation might be if there were great utilitarian gains from killing, so that many more people would be saved than lost. Another might be if the agent must kill to protect a right he has, and the right he is protecting is more stringent than the other person's right not to be killed.[15]

Now in this case, we cannot be talking about the first sort of justification, because there is no net savings of lives. So if it is permissible for each to push the other off the plank, it must be because by doing so, each protects a right he has, which right is more stringent than the other's right not to be killed. What would be the argument that there *is* such a right, and what would make us think it so stringent if it exists? The basic thought is that a person whose life is in imminent danger has broad latitude to do what is necessary to save his own life. While we normally do not think this includes making use of another person's body who is not aggressing against us, as Pufendorf argued, matters are different if the person he would kill is already destined for death.[16] We might also note that by pushing the other person off the plank, the agent is redistributing a harm that initially threatened two people to one person instead. There are other ways of explaining the intuition that it is permissible for each to push the other off the plank. It will no doubt seem a failing to some that I do not defend this intuition in greater depth. But I am not here so concerned to argue for the substantive claim of permissibility as to make room for it by showing that the fact that the rights are equal and conflicting does not give us reason in itself to reject the assignment of right.

The contemporary rights theorist would side with Kant in denying that each person has a right to push the other off the plank. If we leave aside any substantive objections she might have to the claim that it is permissible for each to favor his own life in such a case, what could be the basis for her rejection of equal and opposing rights? The fact that an equal distribution

15. Notice that pushing the other off the plank is significantly different from merely continuing to cling to the plank in this regard. For clinging to the plank is not killing someone; it is merely failing to save. Assuming there is no duty to rescue in such a case, then the person who continues to *cling* to the plank requires no special justification for doing so, and each is at liberty to continue to cling even if it means the death of the other.

16. True, there is a scenario in which he is *not* destined for death, but this scenario would require one to sacrifice oneself by relinquishing the plank, and surely there is no obligation to do *that*.

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of right would render morality inconsistent is not *itself* a reason to object to the assignment, for, as I argued above, morality might turn out to be inconsistent. So although avoiding inconsistency may be what motivates the rights theorist to reject equal and conflicting rights, it cannot itself be an adequate reason for doing so. Is there any other way she can rule out equal conflicts of rights? One standard more would be to reject the claim I have just made, namely that a permission to kill another person can operate in the face of a contrary right on the part of that person not to be killed. That is, the rights theorist typically does not think it possible for one person's right to φ to coexist with another person's right that others refrain from φ-ing. The rights theorist of course recognizes that sometimes people have a right to kill and that humans are not normally at liberty to kill one another. But, at least traditionally, she has explained such cases by saying that the victim has forfeited the right not to be killed.[17] That, for example, is typically what is said about self-defense: It is permissible for one person to kill another in self-defense only on the assumption that the aggressor forfeits the right not to be killed by attacking. Assuming that a person innocently clinging to a plank has not forfeited his right not to be killed, the rights theorist might say that no one could have a right to push him off it. And so the rights theorist will have no choice but to deny the substantive intuition and say that it is not permissible for either to push the other off the plank.

It seems, then, that there are two ways we can treat the plank case. Either we can allow that each person has a right not to be killed, but that each person also has a right to push the other off the plank that overrides the right of the other not to be killed. Or we can treat the right not to be killed as incompatible with a right on the part of someone else to kill, in which case, assuming neither on the plank has forfeited the right not to be killed, it cannot be permissible for either to push the other off. I shall argue that although the second approach is the more standard one in the theory of rights, it is in fact quite problematic. My argument will proceed as follows. First, I shall argue that if the rights theorist allows that rights can ever conflict, she will have to allow that one person's right to push the other off the plank can coexist with a non-forfeited right on that person's part not to be killed. She will therefore have to allow that each person could have a right to push the other off the plank, and that these rights are equal and opposing. But what if the rights theorist attempts to deny the existence of conflicts of rights of any sort? Second, then, I shall argue against the rights theorist who thinks she can dispense with conflicts all together. I shall argue that if the rights theorist tries to eliminate all conflicts from her theory of rights, she will end up depriving the notion of a right of its efficacy in judgments of moral permissibility.

17. This was Locke's view of the matter. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 16 (C. B. Macpherson ed., Hackett Publishing Co. 1980).

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Let us first turn to the rights theorist who allows that there can be conflicts. Judy Thomson, for example, has a series of starving or otherwise needy children whose survival interests are pitted against owners of meat lockers or property owners who live next to hospitals. Consider the case in which a child will die unless the parent trespasses on someone's land to get to a hospital.[18] Let us assume the reason the parent may trespass is that the child has a *right* to cross the land, and the parent is facilitating the exercise of that right.[19] The owner, on the other hand, has a right to exclude people from his land, and this right extends to the parent with the sick child.[20] Thomson seems willing to allow that there is a conflict between the child's right to cross the land and the owner's right to exclude the child from the land. She puts the point by saying that in crossing the land, the child *infringes*, but does not *violate*, the owner's right, given that the child has a justification for crossing the land. But if the child's right to cross the land can conflict with the property owner's right to exclude the child from the land, there would be no reason in principle to reject the idea that one person's right to push the other off the plank could conflict with the other's right not to be killed. That is, if the fact that the property owner has a right to exclude the child is not itself a reason for denying that the child has a right to cross it, then how could the fact that each person has a right not to be killed be a reason for denying that each has a right to push the other off the plank? Indeed, we have no reason to think Thomson herself would deny it. And if each person can have a right to push the other off the plank, and if each person's right overrides the other's right not to be killed, then, since we have no reason to favor one person's right over the other's, we do indeed have equal and conflicting rights to push the other off the plank.

But we might imagine a rights theorist of Thomson's persuasion responding that it is one thing to allow for a conflict of rights where one right overrides the other, and quite another to allow for conflicts in which conflicting rights turn out to be in equipoise. (After all, it is rights in equipoise that are most objectionable from the standpoint of inconsistency.) In particular, here she might insist that the right each has not to be killed overrides the right of the other to push him off the plank, just as the child's right to cross the land overrides the property owner's right to exclude her. In this case, all we would be left with is two prevailing rights not to be killed, which are not in conflict with one another. Since the right each had to push the other off the plank is overridden, neither would be permitted to push the other off. But this would be a substantive argument about the strength of the respective rights involved. There is no reason in principle that the right to push the

18. THOMSON, THE REALM OF RIGHTS 105 & ff. (Harvard University Press 1990).

19. One could also say that the reason the parent may cross the land is that there are great utilitarian gains from her doing so. But it seems as compelling, if not more so, if the child's entitlement is based instead on a right she has, and I do not think Thomson would reject the formulation.

20. Shortly we will consider a different version of the owner's right, one that allows him to exclude everyone except the parent with the sick child.

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other off the plank should turn out to be so weak. Indeed, if the right to push the other off the plank did lose out in a contest with the right each has not to be killed, that would only really concede the possibility of equal conflicts of rights, since it would suggest the possibility of a different sort of case in which the rights turned out to be in equipoise.[21]

What, then, if the rights theorist switches strategies and tries to deny the possibility of conflicts of rights altogether? She might say that although it appears that two rights are in conflict when one person's entitlement is based on survival and another person's is based on ownership, there is in fact no conflict. The stronger entitlement *extinguishes* the weaker entitlement by making it ineligible to count as a right. If the rights theorist takes this position, she will easily be able to deny that one person's right to kill can conflict with another person's right to be killed, and so to deny that each man clinging to the plank has a right to push the other off it. For to say that each man has a right not to be killed would be tantamount to saying that neither has a right to push the other off the plank. The rights theorist would then once again conclude that neither man clinging to the plank is permitted to push the other off it.

There are several different strategies the rights theorist could use to eliminate conflicts. According to a view we might call Specification, while the parent may have the right to cross someone's land to rush her sick child to the hospital, the property owner's right to exclude people from his land does not extend to a parent with a sick child. On this view, there is no need to compare the two rights with regard to *strength* in order to resolve the conflict. There is already an exception built into, say, the property owner's right, which covers the case of the parent with the sick child. This approach would apply to equal conflicts as well. In the plank case, for example, the proponent of Specification could say that each person's right to the plank already contains an exception for the case in which someone else's life depends on using the same plank. Thus neither has a right to push the other off the plank, since the right to preserve oneself by seizing the plank for oneself contains an exception for another person's claim to self-preservation when the two cannot both be satisfied.

While conflict-dissolving approaches like Specification do successfully eliminate conflicts, they are not costless. Their main drawback is that in determining whether someone has a right, one must first determine that person's moral position relative to the positions of those with whom that person would conflict. That is, such strategies determine whether it would ultimately be permissible for the person to act as the right allows *before*

21. There is an additional wrinkle here. It may seem otiose to speak of a right to push the other off the plank if that right is overridden, just as it may seem otiose to speak of the child's right to cross the land when *it* is overridden. But it is not incoherent to speak of a right in either case. The overridden right might continue to make itself felt: For example, if it were possible for the victor in the struggle over the plank to compensate the vanquished, he might well have an obligation to do so.

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making the assignment of right. For example, in determining whether the property owner has a right to exclude the sick child from his land, this view first considers whether it is *permissible* for the owner to exclude the child, in order to decide whether there is an exception to the owner's right of exclusion. But then it is difficult to see what work the notion of a right is doing. For the judgment about the strength of the underlying claims can itself tell us what it is permissible to do—it could, for example, tell us that the sick child may cross the land. The fact that the child has a *right* to cross the land is not itself doing any work towards the conclusion that the child *may* cross it.[22] So on this view, it will not be possible for us to explain why agents may do various things in terms of the fact that they have rights.

I have argued that each man clinging to the plank has a right to push the other off it. A familiar line in contemporary rights theory, however, would deny this on the grounds that each also has a right not to be killed, and that the two rights are not compatible. I have argued against this response in two stages: First if the rights theorist allows that there can sometimes be conflicts of rights, then she cannot in principle deny the possibility that each person has a right to push the other off. Whether there is such a right, and what its strength is relative to other rights, is entirely a substantive matter. It is not one that can be ruled out on structural grounds. Second, if the rights theorist instead tries to deny that rights can ever conflict, she will encounter a further problem. Presumably she wishes rights to have an independent bearing in moral assessment, so that they might contribute to judgments of moral permissibility. But the strategies available to her to eliminate conflicts all determine the existence of a right in terms of the relative strength of the underlying claims. And once the relative strengths of the underlying claims have been settled, there is no longer any need for the assignment of rights. For any question of permissibility can be answered by examining the claims on which the assignment of rights is based. For this reason, on the view that would eliminate conflicts, rights cannot themselves contribute to judgments of moral permissibility.

III. CONFLICTS OF RIGHTS AND INCONSISTENCY

If each person has a right to push the other off the plank, there is indeed a threat that morality is inconsistent. For we can then reason as follows:

1. I have a right to push you off the plank.
2. You have a right to push me off the plank.

22. Thomson appears to agree. She complains that on the "no conflicts" view, the rights a person has are settled by what it is permissible for people to do. Thomson, *Rights and Compensation*, in RIGHTS, RESTITUTION AND RISK at 70 (William Parent, ed., Harvard University Press 1986). She says that "to take this line is to commit oneself to the view that rights do not have an independent bearing in moral assessment of action." *Id.*

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3. You have a right to push me off the plank ⊃ I have a duty to refrain from interfering with your right to push me off the plank
4. Pushing you off the plank would interfere with your right to push me off the plank.
5. I have a duty to refrain from pushing you off the plank.
6. I have a right to push you off the plank ⊃ ~ {I have a duty to refrain from pushing you off the plank}.

∴ {I have a duty to refrain from pushing you off the plank}
∧ ~ {I have a duty to refrain from pushing you off the plank},

a contradiction.

The first thing I wish to do is head off an objection to premise 4. Why, someone might say, does my pushing *you* off interfere with your pushing *me* off? Could each of us exercise our rights to push each other off simultaneously, without either of us interfering with the other person's right to do the same? If the right really were *just* the right to push the other off the plank, of course we could. But the right is shorthand for a more extensive right, namely the right to dispossess the other to obtain exclusive control of the plank for oneself. And this is truly a right that cannot be exercised without interfering with the other party's exercise of the same right. So when I say that each person has a right to push the other off the plank, let us read, "the right to gain exclusive control of the plank by dispossessing the other." For simplicity's sake, I will just speak of the "right to push the other off the plank."

The crucial premises are 3 and 6. Each of these represents a standard assumption of the modern understanding of rights and duties. It is when these two assumptions are combined with a conflict of rights that we have inconsistency. The question we must now ask is whether we can reject either assumption.

Premise 3 is arguably the most central defining characteristic of the modern approach to rights, namely the correlativity of rights and duties. Let us call it the "Correlativity Thesis."

> *The Correlativity Thesis.* If I have a right, there is at least one person who has a duty that corresponds to my right.

My formulation of the Correlativity Thesis is deliberately vague in order to accommodate the many different forms the right and the corresponding duty can take. The right can be a right to do something, a right *not* to do something, or even just a right to a thing. The duty, accordingly, can be a duty not to interfere with a person's doing something, a duty not to force a person to do something, or a right to do or to refrain from doing something. For example, if you promise to pay me ten dollars in exchange for some service I render you, you create a right in me to receive ten dollars, and place yourself under a duty to pay me the ten dollars. My right to

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receive ten dollars is correlated with a duty on your part to pay it. In this case there appears to be an analytic connection between my right and your duty: Saying that I have a right as against you to receive ten dollars just *means* that you have a duty to pay me ten dollars. In other cases, however, the relation between the right and the duty is more attenuated. If the property owner has the *right* to exclude people from his property, on whom does the correlative duty fall? Hohfeld suggested it falls on each and every person who might attempt to cross the land.[23] But in this case as well, it is part of what we mean when we say the property owner has a *right* to exclude people from his land that at least some others have a duty not to cross the land.

It seems unlikely that we can dispense with the Correlativity Thesis and still be articulating a theory of rights. In particular, without the connection with duty, we will fall prey to Hobbes's problem and end up collapsing rights into liberties. For what would it mean to say that I have a right to be paid ten dollars by you if you do not have a duty to pay me? Even where the relation between the right and the duty is more attenuated, it is hard to see what having a right would amount to if it were not correlated with a duty. Would it really make sense to say that the property owner had a right to exclude people from his land if it turned out that no one had a duty to refrain from crossing his land? So I think that we cannot dispense with the correlativity of rights and duties without fundamentally changing the subject: A right without a correlative duty is simply not a right.

Let us now turn to premise 6, the premise that moves from the existence of a right to do something to the absence of a duty to refrain from doing it. Like premise 3, this premise also seems to be essential to the nature of rights, and it is hard to see why one would want to question it. Indeed, it seems to enjoy a kind of axiomatic status in the modern conception of rights. We might articulate it as follows:

> *The Right-Duty Principle*. If I have a right to do something, then I have no duty to refrain from doing it.

The Right-Duty Principle is based on an intuition that I take to be common in the theory of rights, namely that if a person has a right to do something, it is *permissible* for her to do it. For assuming that it is permissible for a person to do something if she has no duty not to do it, then saying that a right to φ is incompatible with a duty not to φ says precisely that. Like Correlativity, it is hard to see how we would still be articulating our common understanding of a right if we denied this thesis. Imagine someone told you he had a right to make as much noise as he wanted, but he nevertheless had

23. WESLEY NEWCOMBE HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 91–96 (Yale University Press 1923). Others think it more general than that, namely that it is a right against the whole world rather than a right against each individual person in that world. But Hohfeld restricted rights against the whole world to a "right in rem," namely a right in a thing rather than a right that someone *do* something or *refrain from doing* something.

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a duty to be silent. One might think he did not know what it means to say a person has a right.

The problem with combining the assumption of conflicts of rights with the above two principles can be brought out rather swiftly. Return to the property owner with the right to exclude people from his land. We said that the property owner has a right to exclude the sick child even if the child's right to cross the land overrides that right. If the child's right overrides the property owner's right, then it looks as though we ought to say (assuming correlativity) that the child's right to cross the land places the property owner under a duty to refrain from excluding her. The property owner, for example, may not quickly lock the gate when he sees the child coming, or tell his security guards to expel the child as she tries to cross the land. So although the property owner has a right, he also has a duty to refrain from exercising the right. What this shows us is that if rights can conflict, then either rights cannot impose duties on others (and premise 3 is false), or having a right cannot be incompatible with having a duty to refrain from acting on the right (and premise 6 is false).

Suppose, then, we deny that rights impose duties, that is, deny Correlativity (premise 3). We would then, for example, deny that the property owner has a duty to refrain from trying to exclude the child, even assuming that his right to exclude her is overridden by her right. That is, someone might want to argue that it *is* permissible for him to tell his security guards to evict the child when she tries to cross his land. We would then be treating any conflict of rights as a conflict down to the ground: Saying a person has a right to something or to do something would mean that she is entitled to act on the right even if the right is overridden by a stronger right. And this would allow us to retain the compatibility of a right with an absence of duty and so to preserve the Right-Duty Principle. But this approach seems problematic. One reason is that it then seems hard to explain what we mean when we say that the child's right is *stronger* than the property owner's right. Doesn't saying that the child's right is stronger mean that the child's right should win out? But in what sense does the child's right win out if the property owner may simply proceed as though she did not in fact have the right to cross his land in the first place? We *could* locate the superior status of the child's right in the position of a third party: Arguably, if the child's right overrides the property owner's right, a third party should be permitted to assist the child but not the property owner. But while this seems to be true, it would be odd to think a third party constrained from assisting the property owner if the latter were not constrained himself.

The alternative is simply to accept that the property owner can have a right to exclude the child compatibly with having a duty not to exercise that right. That is, the alternative is to reject the Right-Duty Principle (premise 6) and say that it is perfectly possible for the property owner to have a right to exclude the child from his land at the same time that he has a duty not to exercise the right. The first problem we will encounter

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if we go this route is that it will require that we reject another principle, one that is also usually assumed in discussions of rights.

The Right-Liberty Principle. If I have a right to φ, then I am at liberty to φ.

Why does rejecting the Right-Duty Principle entail rejecting the Right-Liberty Principle? Assume that a liberty is an absence of a duty not to do, as we did initially. If I have a liberty to φ, that means I do not have a duty to refrain from φ-ing. But if a right can coexist with a duty not to do, then a right cannot entail a liberty. The question, then, is whether we can accept this conclusion.[24] One reason *not* to accept it is the following. A liberty implies that a person has no duty to refrain from doing what she is at liberty to do. But if a right can coexist with a duty not to act as the right allows, then oddly it looks as though a right is weaker than a comparable liberty. Having a right, on this view, would be compatible with its being impermissible to act on the right. This would not be true of a liberty. So one problem with rejecting the Right-Duty Principle is that it seems to be making an assignment of right less significant than an assignment of a liberty.

We have now mapped out the terrain in its entirety. We have seen that the problem of inconsistency is a product of three assumptions: First, that rights can conflict; second, that rights are correlated with duties; and third, that a right entails an absence of a duty not to act as the right allows. We have seen that it would be extremely difficult to reject any of these assumptions. The first seems necessary if rights are to do any work in judgments of moral permissibility, and the other two seem to be essential premises in articulating our common conception of rights. But we have shown that although any two of these assumptions are compatible with one another, we cannot assume all three together without also accepting that morality is inconsistent. Assuming that we are not prepared to do that, we must choose which of the three to reject. We should notice, moreover, that we did not need the assumption of equal conflicts of rights to come to this conclusion. Even unequal conflicts produce the difficulty, because the bearer of the weaker right will clearly have a duty not to act on his right, given that it is overridden, if rights are ever correlated with duties.

In considering this problem, it may help to turn to the problem of inconsistency in another context, namely that of conflicting obligations. For there have been a number of suggestions for avoiding the inconsistency produced by allowing that obligations can conflict. My hope is that one of them may prove of use in thinking about conflicts of rights. In the next section, I shall argue that one solution in particular is helpful in the arena of conflicting duties, namely the solution that rejects the "agglomerativity" of duties. In Section V, I shall return to the problem of conflicting rights,

24. Joel Feinberg, for example, explicitly rejects it, since he insists that a right entails a liberty. Joel Feinberg, *The Nature and Value of Rights*, J. VALUE INQUIRY 4 (1970).

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and I shall argue that the equivalent of the non-agglomerativity of duties on the rights side will be the rejection of the Right-Duty Principle.

IV. INCONSISTENCY AND MORAL DILEMMAS

The problem of inconsistency has been explored extensively in the literature on moral dilemmas. Suppose, to take a shopworn example, I promise Michael a banana and I promise Heidi a banana, and to my horror I discover that I have only one banana. To eliminate any possible underbrush, let us say I make promises to them simultaneously, for example in a joint e-mail. Neither Michael nor Heidi can claim priority over the banana. What am I to do?

I could begin by asking if either Michael or Heidi will release me from my obligation. But assuming that neither will give me a release, there seems to be no way to avoid breaching my obligation to someone. Alternatively, if I have a way of compensating one of them, say Michael, I should give the banana to the other, namely Heidi. But that does not solve my problem, for it remains the case that I have violated my duty to Michael in favor of satisfying my duty to Heidi. If it is the case that whatever I do I will end up violating an obligation to *someone*, then morality must be inconsistent. For the following argument seems correct in that case.

1. I have a duty to give Michael a banana.
2. I have a duty to give Heidi a banana.
3. I cannot give Michael and Heidi both a banana.
4. Ought to $\varphi \supset$ Can φ.
5. Cannot {give Michael and Heidi a banana} $\supset \sim$ Ought {give Michael and Heidi a banana}.
6. I have a duty to give Michael a banana $\supset$ I ought to give Michael a banana.
7. I have a duty to give Heidi a banana $\supset$ I ought to give Heidi a banana.
8. Ought {give Michael a banana} $\wedge$ Ought {give Heidi a banana} $\supset$ Ought {give Michael and give Heidi each a banana}.

$\therefore$Ought {give Michael and give Heidi a banana}.
$\wedge \sim$ Ought {give Michael and Heidi a banana}.

If people can have conflicting obligations, then morality may turn out to be inconsistent in the same way we observed with conflicting rights.

There is by now a standard litany of responses to this problem. Most of the answers are designed to dispel the sense of conflict, that is, to suggest that I need not violate one or the other of my obligations. We have already seen one of the responses in the context of conflicts of rights. That view, called Specification, says in this context that I did not really promise Michael and Heidi each a banana. Instead I promised Michael a banana-if-I-had-one-assuming-I-made-reasonable-efforts-to-obtain-one. Similarly, I did

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not promise Heidi a banana. Instead, I promised her a banana-if-I-had-one-assuming-I-made-reasonable-efforts-to-obtain-one. Assuming I did make reasonable efforts to obtain two bananas, I do not violate my obligation to one when I give the banana to the other. Specification would thus resolve the problem by rejecting premises 1 and 2.

A second view, let us call it Prima Facie, says that when I promised each a banana, I acquired only a *prima facie* duty to give each a banana. I did not acquire an all-things-considered obligation to give a banana to Heidi and to give a banana to Michael. Among other things, ought implies can, and I cannot give a banana to both Michael and Heidi.[25] This view allows that I can have conflicting prima facie duties, but it denies the possibility of all-things-considered conflicts. This solution would thus also reject 1 and 2, calling the duties in question prima facie rather than all-things-considered duties. If "ought" in premises 6 and 7 tracks our all-things-considered obligations, Prima Facie would say that it is not the case that I ought to give a banana to either of them, since I have only a prima facie duty with respect to each.

A third view treats duties as disjunctive obligations; let us call it "Disjunction." Disjunction maintains that there are two ways I can satisfy my obligation to Michael: Either I can give him a banana, or I can pay him compensation. I do not breach my duty to give him a banana if I compensate him instead. Disjunction thus rejects premises 1 and 2 as well. It says that I have a duty {to give Michael a banana *or* to pay him compensation}, and the same with respect to my duty to Heidi in premise 2.

Yet another view drives a wedge in between a person's obligations (all things considered) and what he *ought* to do (all things considered). Let us call it the "No-Ought" view. It may be the case that I have an all-things-considered duty to give Michael a banana because I have promised him one, and that I have an all-things-considered duty to give Heidi a banana because I have promised her one. Nevertheless, if I cannot satisfy both obligations, it is not the case that I *ought* to satisfy both, because "ought" implies "can." What I ought to do is to pick a good method for choosing one of the obligations to fill (flip a coin or draw lots), and then try to pay the other compensation. Unlike Disjunction, the No-Ought view does not maintain that I can satisfy the obligation itself by paying compensation. Rather, *if* I cannot satisfy the obligation, I *ought* to pay compensation, just as I *ought* to apologize, *ought* to find an equitable way of distributing the banana, and so on. But while in such a case I ought to give the banana to one and compensate the other, it is still not the case that I *ought* to give the banana to both. So the No-Ought view would reject premises 6 and 7, and as a consequence 8. What I ought to do follows from some procedure for choosing among my various duties.

There are serious and, as far as I can tell, unsolved difficulties with each of

25. Phillip Montague provides a compelling defense of this approach. Phillip Montague, *When Rights are Permissibly Infringed*, 53 PHIL. STUD. 347–366 (1988).

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these views. A common objection to Specification is that it is not possible to identify in advance the myriad situations in which an obligation is subject to exception, and so not possible, on this view, to specify the exact nature of the obligation itself. A second problem is that it leaves the "moral residue" of failing to meet an obligation unaccounted for, meaning the ongoing obligation to compensate or make amends to a person toward whom one has violated an obligation. Suppose I have one banana and the monetary equivalent of a banana, say a dollar. Am I not obligated to give the money to Michael if I give the banana to Heidi? And if I have no way of compensating Michael, do I not at the very least owe him an apology? If, however, I have not breached any duty to Michael, then compensation, apologies, and any other way of making amends are all unnecessary. But this does not square with the way we tend to regard the duty to compensate in such a case.

Prima Facie is perhaps more promising, but whatever its other advantages, I think it cannot solve the problem of conflicting duties that are in equipoise. For if my obligation to give Michael the banana is exactly as strong as my obligation to give Heidi the banana, the prima facie conflict between these duties can never be resolved in favor of an all-things-considered duty to give the banana to one or the other. By hypothesis, whatever consideration applies to one will also apply to the other. Thus it looks as though either I have an all-things-considered obligation to both—which makes the conflict return—or I have only a prima facie obligation—which means I am not really in the final analysis obligated to give *either* a banana. The first outcome makes Prima Facie unhelpful and the second makes it anarchistic.

Prima Facie arguably also has difficulties accounting for moral residue. On this view, as on Specification, I have no all-things-considered obligation to the person to whom I deny the banana. So if I have a continuing moral obligation of some sort, either it must be based on an unfulfilled all-things-considered obligation, or it must be based merely on an unfulfilled prima facie obligation. If the proponent of Prima Facie takes the former position, there can be no moral residue with respect to my breached obligation to Michael if I give the banana to Heidi. If, on the other hand, he takes the latter position, then *any* breach of duty would result in a continuing obligation, perhaps with a duty to compensate.[26] This would make the scope of the moral residue too broad.

There are drawbacks to Disjunction as well. First, compensation is not always possible. If instead of bananas we are divvying up lives, and I have an

26. Montague, however, points out that there are many such cases in which we do not think compensation is owning, for example where Michael is himself the (culpable) cause of my having only one banana. *Id.* Moreover, he suggests that moral residue does not always lead to a duty to compensate. I might, for example, merely have a duty to explain my behavior to Michael if I fail to give him the banana. But it seems to me that Prima Facie must then be accompanied by a theory of when a failure to satisfy a prima facie obligation leaves moral residue. I myself do not see how the dissolution of conflicts of duties into reasons for and against assertions of conclusive duties will square with our intuitions about moral responsibility for breaches of duty.

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obligation to save each of two people and can save only one, I cannot compensate the one I do not save. In this case, I breach an obligation whatever I do. Even philosophers intent on denying the existence of both conflicts of rights and conflicts of duties allow that there is a problem here. Hillel Steiner, who otherwise denies the possibility of conflicts altogether, says about this case: "I think I'm going to have to concede that, if there isn't [a way to redress either one], then in this sort of double duty case—and only in this sort of case—it's correct to describe my choice as defaulting on one of my two enforcement duties."[27] But this is precisely what any serious moral dilemma looks like. Think of Sophie, who is required to give up one of her children to the Nazis on pain of having both killed. She has an obligation to each child, let us assume, to save *him*, and no way of meeting both of these obligations. There is no way of compensating the child she fails to save. In this case, there *would* be a conflict of duties, and it would not be possible to satisfy one duty without breaching the other. The curious implication of Disjunction, then, is that a person's moral standing may depend on the contingent fact of whether the obligation he breaches is of the compensable variety. On this view, people who restrict themselves to promises involving bananas, rather than lives, are likely to end up in better moral standing.

Second, a regress threatens. If I have a duty to compensate Michael for failing to give him a banana, what happens if I fail to compensate him? Since compensation is itself a duty under these circumstances, it looks as though I could satisfy my duty to compensate him by compensating him for failing to compensate him. But what is the compensation owed for breaching a duty to compensate? And what is the compensation owed for breaching *that* duty? Does the person in breach owe interest for each subsequent duty breached? Or does the value of the duty violated decrease with each iteration? And what is the "statute of limitations" on compensating for breaches of duties to compensate? Can I not avoid being in breach simply by endlessly intending each time to compensate for the previous duty breached?

The No-Ought view strikes me as closer to the mark, and indeed the solution to which I am drawn has much in common with it. But I nevertheless find the No-Ought view a bit mysterious. If its proponent is willing to say that an agent can be simultaneously obligated to A and obligated to B, where A and B cannot both be done, then why not say the difficulty lies in the fact that people ought in general to honor their obligations, in conjunction with the fact that the agent has two obligations and cannot satisfy them both? More importantly, it still is not clear how the No-Ought view proposes to deal with conflicting obligations in equipoise. If the obligation to A and the obligation to B are of equal strength, then if I ought to A, it looks as though it is also true that I ought to B. Once again, the conflict reemerges at the level of *ought*. Finally, this view also seems to have a problem with

27. HILLEL STEINER, AN ESSAY ON RIGHTS (Blackwell 1994).

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moral residue. For it is hard to see on this account why compensation should be made for a breached obligation. If it is not the case that I ought to keep my obligation to Michael, then *why* ought I to pay him compensation? Why do I have to make amends for failing to do something that it is not the case that I *ought* to do?

The alternative to these various accounts is to accept the conflict of duties as in some sense ineliminable. That is, some philosophers accept that morality can require agents to embark on one course of action at the same time that it requires them to embark on another, where the two cannot both be done. Some think that this supports skeptical or relativist conclusions about morality, because it shows that morality cannot be thought of as anything like a system or code. But others think that moral dilemmas do not entail inconsistency in morals.

In an early piece on moral dilemmas, Bernard Williams points out that the supposed inconsistency is not strictly a product of the fact that I have an obligation to A and I have an obligation to B, and A and B are incompatible.[28] For there is no inconsistency unless the two obligations are conjoined in the assertion that I have an obligation to {A ∧ B}. He thus suggests that we reject the "agglomerativity principle." From the fact that I have two distinct obligations, we cannot necessarily conclude that I have an obligation to carry out their conjunction. Bas Van Fraassen makes what I take to be a similar suggestion.[29] He proposes that "it ought to be the case that A" is true if and only if there is an imperative in force that would not be fulfilled if *not*-A were also true. Thus there is no logical contradiction if someone has both an obligation to A and an obligation to B, where A and B are mutually exclusive, if there are two separate imperatives in force that correspond to each obligation: A provides the conditions under which the first imperative is satisfied, and B provides the conditions under which the second imperative is satisfied, but there is no imperative for which {A ∧ B} provides the conditions of satisfaction. Thus the solution that rejects agglomerativity would accept the above argument intact, with the exception of premise 8. That is, from the fact that I have an all-things-considered duty to give Michael and Heidi each a banana, and that I *ought* to give each a banana, it does not follow that I ought to give both of them a banana. Indeed, we know that it is *not* the case that I ought to give both of them a banana, since we can infer it from the fact that I *cannot* give both a banana.

In the next section, I shall attempt to exploit this suggestion in the context of conflicts of rights. My thought is that just as obligations are not agglomerative, rights are not either. This will no doubt seem a strange suggestion, for unlike in the case of obligations, there is no single person who could be in possession of a right that combines each party's separate

28. Bernard Williams, *Ethical Consistency and Moral Dilemmas, in* PROBLEMS OF THE SELF (Cambridge University Press 1973).

29. Bas Van Fraassen, *Values and the Heart's Command,* 70 J. PHIL. 5–19 (1973).

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right to push the other off the plank. But I am nevertheless inclined to think that the reason the modern conception of rights cannot accommodate unresolvable conflicts is that it in effect attempts to agglomerate them: It treats the question of conflicting entitlements as a case of a single, composite right, just waiting to be distributed. But rights are not composite; they arise independently, and so there is no guarantee that they will not conflict. The fact that one person has a right thus does not entail that no other person has a right that conflicts with it. What exactly it will mean to say that rights are non-composite, however, is far from obvious.

V. NON-AGGLOMERATIVITY AND RIGHTS

So far we have noted only the fact that both conflicts of rights and moral dilemmas appear to lead to inconsistency. We have also noted that the same moves are available in both literatures to try to eliminate the conflict: The various conflict-dissolving approaches we considered in the context of moral dilemmas—Specification, Prima Facie, Disjunction, and No-Ought—have all been argued for as often in the context of conflicts of rights as they have in the context of moral dilemmas. These do not by themselves seem adequate grounds for thinking that a solution to moral dilemmas would be applicable to conflicts of rights. There is, however, something that makes the hypothesis of a shared solution for conflicting rights and duties more compelling. This is the fact that it is possible to *embed* a conflict of rights in a moral dilemma, in such a way that the solution to the one seems to imply a solution to the other. All we have to do is to take a conflict of rights and add a third party who is equally obligated to each of the two combatants. In such a case, we can assume parity of solution between the moral dilemma and its embedded conflict of rights: If a third party watching us struggling over the plank, for example, *ought* to save me at your expense, then my right should triumph over yours. If, on the other hand, he *ought* to save you at my expense, then your right should triumph over mine. And presumably if the third party is equally obliged to save both of us, then neither of us is obligated to cede to the other.

My argument will be that *if* we can think of a third party to a conflict of rights as having two separate, conflicting, and ineliminable duties, we can also think of the rights on which each of these duties is based as remaining intact. If neither duty extinguishes the other, then neither right should extinguish the other. So if non-agglomeration allows us to retain both duties without using one to cancel out the other, non-agglomeration should also allow us to retain both rights. But what concretely does rejecting agglomerativity mean for the embedded conflict of rights? Let us return to the argument that produced an inconsistency in the case of a conflict of rights.

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1. I have a right to push you off the plank.
2. You have a right to push me off the plank.
3. You have a right to push me off the plank ⊃ I have a duty to refrain from interfering with your right to push me off the plank.
4. Pushing you off the plank would interfere with your right to push me off the plank.
5. I have a duty to refrain from pushing you off the plank.
6. I have a right to push you off the plank ⊃ ~ {I have a duty to refrain from pushing you off the plank}.

∴ {I have a duty to refrain from pushing you off the plank
∧ ~ {I have a duty to refrain from pushing you off the plank}.

Notice that one cannot apply non-agglomeration to the conclusion itself in order to solve the inconsistency. For the conclusion of the argument is of the form A ∧~ A, which truly *cannot* be accepted without rendering morality inconsistent. The form of contradiction that non-agglomerativity solves is a proposition of the form Duty A ∧ Duty {~ A}, or, as we had before, Ought A ∧ Ought {~ A}, which *is* consistent as long as the two conjuncts are not combined into Ought {A ∧~ A}. The only reason we were able to eliminate the inconsistency in the case of the moral dilemma, whose conclusion was also of the form Ought A and ~ Ought A, was that one of the steps in deriving that inconsistency was of the form Ought {A ∧~ A}. We were able to reject this premise by rejecting agglomerativity.

Let us now see if we can make the non-agglomerativity solution applicable to rights by adding a third party. Imagine that in the original plank case there is a lifeguard who is watching us struggling over the plank. The lifeguard, let us say, is obligated to save me and he is obligated to save you. And let us also imagine that the only way he can save either of us is to push the other off the plank with a long pole he happens to have. Applying the Correlativity Thesis, we can say that the lifeguard's duty to secure the plank for each of us is a function of the right each of us has to use the plank for our own survival. Here is a representation of the lifeguard's situation:

1. I have a right to push you off the plank ⊃ Lifeguard has a duty to secure the plank for *me*.
2. You have a right to push me off the plank ⊃ Lifeguard has a duty to secure the plank for *you*.
3. Lifeguard cannot secure the plank for both you and for me.
4. Ought to φ ⊃ Can φ
5. Cannot {secure the plank for you and me} ⊃ ~ Ought {to secure the plank for you and for me}.
6. Lifeguard has a duty to secure the plank for me ⊃ Lifeguard *ought* to secure the plank for me.
7. Lifeguard has a duty to secure the plank for you ⊃ Lifeguard *ought* to secure the plank for you.

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8. Ought {secure the plank for me} ∧ Ought {secure the plank for you} ⊃ Ought {secure the plank for you and me}.

∴ Ought {secure the plank for you and for me}.
∧ ~ Ought {secure the plank for you and for me}.[30]

At the level of the conflict of rights, we eliminate the inconsistency by rejecting the agglomerativity of duties in step 8. We thus conclude simply that the lifeguard ought to secure the plank for me and the lifeguard ought to secure the plank for you. That he ought to do each of these things is based on the duty he has to each of us. And the duty he has to each of us is based on the right each of us has to use the plank for our own survival. So we each have a separate right to the plank, and based on that right, the lifeguard has a separate duty to each of us. What he does *not* have is a duty to save both of us, conjoined from the duties he has to save each of us.

How exactly does this help us with our original inconsistency, the one that we had before we embedded the conflict of rights in a moral dilemma? It turns out that if we reject agglomerativity, we have also implicitly rejected *either* Correlativity *or* the Right-Duty Principle. For if the lifeguard can have a duty to rescue me, when you have a right that he rescue you, then we must say either of two things: Either your right that the lifeguard rescue you does not place the lifeguard under a duty to rescue you (violating Correlativity), or your right that the lifeguard rescue you does place him under a duty to rescue you, but the fact that he has that duty does not preclude my having a right that he rescue me instead (violating Right-Duty). This confirms the conclusion we reached in Section III, namely that assuming rights can conflict, we must choose to reject either Correlativity or Right-Duty if we wish to avoid inconsistency. Which one, then, should we reject? I shall argue that the better solution is to retain Correlativity and reject Right-Duty. I have no arguments to add in favor of Correlativity over and above those I made in Section III. I shall have to make my case, then, by trying to show that we have ample reason to reject Right-Duty. Because I think we cannot reject Correlativity and we must reject Right-Duty, I understand rejecting agglomerativity in duties to translate into a rejection of Right-Duty in rights.

We should begin by asking ourselves why the Right-Duty Principle seemed so plausible initially. That principle seemed plausible because we assume, in general, that if a person has a duty to refrain from doing something, it is not permissible for him to do it. We therefore thought that a right to φ could not possibly be compatible with a duty to refrain from φ-ing, because then the fact that a person had a right could not possibly make it permissible for him to φ. So we were implicitly assuming another principle that is quite central to the modern rights theorist.

30. Here I have framed the inconsistency in terms of *ought* rather than *duty*, simply to keep the parallel with the case of the moral dilemma, which relies on the Ought-implies-Can Principle.

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The Ought-Duty Principle. If I have a duty to do something, and no duty to refrain from doing it, then, all things considered, I *ought* to do it.

It was an implicit commitment to this principle that made the Right-Duty Principle seem necessary and obviously correct.

But there are good grounds for thinking that the Ought-Duty Principle is false. First, consider the following counterexample. Sometimes it is permissible not to act on a duty for the sake of a supererogatory act. I have promised to meet you for coffee, and I have thereby incurred a duty to do so. But on my way to the coffee shop, a child is hit by a car, and only I can rescue her. I have no obligation to rescue the child, but we nevertheless think it permissible for me to do so instead of meeting you for coffee.[31] While I have a duty to meet you for coffee, it is clearly permissible for me to violate that duty, even though the act I perform instead does not itself represent the fulfillment of a duty. So the fact that I have a duty, and no countervailing duty, still does not entail that adhering to the duty is what I *ought* to do.

The implications for the Right-Duty Principle can be directly drawn: If I may turn away from a duty to perform a supererogatory act, it seems reasonable to think that I may do so in order to exercise a right. For surely I have a greater claim to exercise a right than to perform a purely beneficent act I have no right and no duty to perform. It therefore looks as though it may sometimes be permissible for me to exercise a right rather than adhere to a duty. If this is true, then the Right-Duty Principle is also false. In this way, the falsity of the Ought-Duty Principle should lead us to reject the Right-Duty Principle as well.

Here is a second argument against the Ought-Duty Principle. If that principle were correct, it would turn out that we could not allow for conflicts of rights and also allow that a person in such a conflict may sometimes *act* on a right. And while this is not dispositive, because we could always deny that there are ever any conflicts of rights, it is compelling if we also have good reasons for allowing that there are conflicts of rights. Here is why. Normally we think of rights as waivable. Indeed, it is often part of the test for calling something a right that it can be waived. If the sick child truly has a right to cross the owner's land, then she *may*, but need not, cross the land. If the owner has a right to exclude people from his property, then he *may*, but need not, exclude people from his property. But if rights are

31. Frances Kamm has pointed out in an extremely interesting paper that this should cast doubt on the strength of the obligation itself. Suppose I were faced with a choice between rescuing the child and watching a football game. In this case, to say I have no duty to rescue the child means that it would be perfectly permissible to choose the football game over the rescue. But to say I have an obligation to meet you for coffee means that it would not be acceptable for me to sit home watching a football game rather than meet you for coffee. If I may rescue the child rather than meet you for coffee, however, and I may watch football rather than rescue the child, then why may I not watch football rather than meet you for coffee? Frances Kamm, 2 Morality, Mortality (Oxford University Press 1996) ch. 12.

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waivable, then a person ought always to side with a duty rather than with a right. That is, in a case of conflict, each person can satisfy all of his obligations and violate no one's rights only if each waives the right that conflicts with the other party's right. Similarly, although we might say that each person has a right to push the other off the plank, we also must conclude that neither may act on his right and, consequently, that neither may push the other off. For it looks as though each person on the plank can satisfy all his obligations and violate no one's rights by waiving the right he has to push the other off it.

This, however, leads to peculiar results. For if the child's right is stronger than the landowner's, for example, why should she be barred from acting on it by the fact that the landowner has a right that conflicts with it? This result will look even stranger in other cases, in particular, cases involving third parties. Suppose there is a third party watching the sick child trying to cross the property owner's land. And suppose the owner has built a big fence. Might a third party not cut a hole in the fence to assist the parent with the child? Or suppose the third party observes us struggling over the plank in the modified case, knowing that I need it to live, but that you only want it because you own it. Might the third party not shove you off the plank in *this* case? According to the above logic, the third party still ought not intervene, ought not cut the hole in the fence, ought not shove you off the plank. For the third party would satisfy all her obligations and violate no one's rights if she simply stayed out of the fray. But this seems quite definitely to reach the wrong result. Sometimes it *is* permissible for a third party to intervene in a conflict of rights, namely to assist the person with the stronger right. The foregoing considerations strike me as sufficiently compelling to say that someone's having a duty to do something does not itself entail that he *ought* to do it.

What this second argument shows is that if we wish to be able to say that one person's right imposes a duty on another person, then we must also have a way of saying that sometimes a person is not ultimately obligated to act on the duty. That is, we must be able to say this if we also wish to allow for conflicts of rights, because otherwise *both* people in a conflict would be barred from acting on their rights. And once we have allowed that a person could have a duty but not be obligated to act on that duty, we no longer have any reason for denying that a person could have a right and a duty not to act on the right. There would be no reason to deny this, because the existence of the duty would not by itself make it impermissible to act on the right.

Before we reject the Right-Duty Principle, however, recall that we had reason to think doing so would lead to some highly counterintuitive results in other domains. In particular, recall that rejecting the Right-Duty Principle leads us ultimately to reject the Right-Liberty Principle and so ultimately to break the connection between rights and permissions. We noted the odd consequence that this makes a right seem stronger than a liberty, for a

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liberty entails a permission, but a right does not. I think, however, that we can dispel this concern. For I would argue that we have as good a reason to think this shows the strength of the notion of a right as to think it shows its weakness. We could just as well put the point by saying that the notion of a right persists *even in the face of a prohibition on action*. That is, we could just as well say that a right is so strong that it continues to exist even when a comparable liberty would be extinguished by the opposing duty. To say that a right can conflict with a duty, then, may point to the ability of the notion of a right to withstand opposition by duty.

Suppose, then, we do reject the following three principles: the Ought-Duty, the Right-Duty, and the Right-Liberty Principles. What, exactly, will we say about cases of conflicting rights? The child and the property owner each have rights—the child to cross the land, the property owner to exclude the child from his land. Since we are retaining correlativity, each right imposes a duty on the other not to interfere with the exercise of the right. In this case, however, the child's right to cross the land is more stringent than the property owner's right to exclude the child. That means that the duty the child's right imposes on the property owner is more stringent than the duty the owner's right imposes on her. The result is that the child *may* cross the land, and the property owner may *not* do anything to prevent her from doing so. His right is overridden by her right and hence by the duty he has not to act on his right.

There may seem to be a remaining problem, however, when we attempt to apply this solution to the plank case. Since the right each has to push the other off the plank is of equal strength, does that not suggest that these rights do not override the duty each has not to interfere with the exercise of right? Since the right to life each has is equally strong, how could the right to push the other off the plank trump the other person's right not to be killed? Are we not forced to conclude that each person's right to push the other off the plank is exactly in equipoise with the other person's right not to be killed? In Section II we considered an argument by the rights theorist to the effect that the right not to be killed is actually *stronger* than the right each has to push the other off the plank, as a strategy for defeating the possibility of an equal conflict of rights. Our problem here is different, because we are now prepared to allow equal conflicts. Our problem now is that we seem to have reason to think that the *sub*-conflict—the conflict between each person's right to push the other off the plank and the right each has not to be killed—might itself be equal. And if this is so, then we cannot think that the main conflict—the conflict between each person's right to push the other off the plank—is compatible with thinking that each *may* push the other off the plank.

But I would argue that each person has an agent-relative permission to break the tie between the right he has and the duty he is under by favoring his own right. That is, each person can prefer his own survival needs to the survival needs of the other party and so choose to exercise his right over

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obeying his duty. We might put the point by saying that there is a discount from the right to the corresponding duty, meaning that the duty I have not to push you off the plank is a weaker echo of your right to push me off. But I will not explore this idea further here. For the relative strengths of the rights and duties is not a formal matter but one to be settled by substantive principles of justice. Here I merely wish to indicate the direction in which a solution to this substantive difficulty would lie.

Rejecting the Ought-Duty, the Right-Duty, and the Right-Liberty Principles may seem a radical solution to the problem of inconsistency due to conflict of rights. Nevertheless, I think it is not as radical as it may seem. For all we have done by rejecting these principles is to make explicit what is involved in saying that a right can be overridden yet remain in force. And the "logic of override," as we might call it, turns out to be pervasive in our moral theory, even outside the area of rights. We talk, for example, about having a good reason for breaking a promise or for violating a prohibition, without thinking that the promise or the prohibition has no force under the circumstances. We also talk about an exception to a rule, where the exception dictates a different answer from the rule itself, without leading us to find the rule inapplicable to the case.[32] There are, to be sure, ethical systems that reject the logic of override. Utilitarianism, at least act-utilitarianism, cannot allow it, for if the only kind of reasons there can be are reasons of utility, then any overriding reason must revise the underlying prohibition. On the other end of the spectrum, a system of absolute prohibitions also cannot allow for a logic of override. For what it means to say a prohibition is absolute is that it cannot be overridden. But any ethical system that allows that there can be more than one sort of reason that pertains to a possible action, one prohibiting the action and the other permitting or recommending it, has implicitly accepted the logic of override. For once we are committed to the idea that two different and conflicting sets of reasons can be "in force" simultaneously, we are also committed to the idea that one of these sets of reason can be overridden.[33]

There seem to me to be other intuitive benefits to rejecting this trio of principles. The first has to do with the issue of "moral residue." By allowing rights and opposing duties to coexist, we are able to say that a right is overridden and still make sense of the moral residue the losing right exerts. For example, the child may have a duty to compensate the property owner

32. For an argument that exceptions to rules involve conflicting background principles, see Claire Finkelstein, *When the Rule Swallows the Exception*, *in* RULES AND REASONING: ESSAYS IN HONOUR OF FREDERICK SCHAUER (Hart Publishing Company 1999) (reprinted in 19 QUINN. L. REV. 505 (2000)).

33. There are even theories of legal justification that deny the logic of override. Some criminal law scholars, for example, think that a justification must be incorporated into the prima facie prohibition. Instead of thinking of murder as intentional killing, with an exception for self-defense, they want to think of murder as intentional-killing-not-in-self-defense. This is not, however, the ordinary way in which the relation between rules of prohibition and justifications are conceived.

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for any damage she causes in crossing the land. And if it were possible for the winner in the struggle over the plank to compensate the loser, he would have a duty to do so. In other words, we derive the same benefit for the theory of rights from rejecting the above trio of principles that one obtains from rejecting agglomerativity for the theory of duties. Both solutions deal with the problem of inconsistency without extinguishing one side or the other of the conflict. By enabling us to preserve the normative force of the unsatisfied right or unfulfilled duty, they thus allow us to capture the sense in which the situation is truly a conflict.

Finally, analyzing conflicts of rights in this way also gives us a better way of understanding many ordinary cases than rights theorists have been able to suggest so far. For example, we want to say that the right to self-defense can make killing permissible in the face of a prohibition on killing. It seems better to explain this by saying that the right in such cases overrides the duty to refrain from doing what the right requires, than to try to find grounds for claiming that the aggressor forfeits the right not to be killed. For there are famous difficulties with the idea of forfeiture are here, chief among them the fact that it is sometimes permissible to kill a person, like a child or an insane person, whom we can only think of as having forfeited his right with a great deal of distortion.

VI. CONCLUSION: RESOLVING DILEMMAS/CONFLICTS OF RIGHTS

The argument of the preceding five sections has been that conflicts of rights do not necessarily lead to inconsistency. But the focus on inconsistency may seem to leave out something crucial. For we still have no guidance on how to *resolve* a conflict of rights. What should an agent who confronts such a conflict actually *do*? While it is not the point of this paper to suggest anything like a method for resolving conflicts of rights or for acting in the face of conflicts that are unresolvable, there may be some lessons for practical reasoning we can draw.

Let us begin by asking what a person facing a moral dilemma ought to do. Unfortunately, rejecting agglomerativity gives us no practical guidance. It only says that the person facing a moral dilemma is not faced with a logical problem, whatever else he faces. I think, however, that we can infer something about what morality requires in such a situation from our discussion so far. For if there are non-combinable moral imperatives, the choice of which one to satisfy cannot be made through the application of moral principles at all. If morality does not tell us what to do, then any solution to the problem is morally arbitrary, as long as we pick *one* of our obligations to fulfill. (It is presumably worse to violate two moral duties than to violate one.) In other words, in these cases, no second-order substantive principle is available to resolve the first-order standoff. The only available principle

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of resolution is a procedural one, such as flipping a coin or just picking one at random. Sophie, when forced to choose between her children, must simply pick one, since she cannot resolve the matter on the basis of rational principles. If she must "pick" rather than "choose," it does not matter what procedure she uses, because all are morally arbitrary. Any procedure she might adopt is akin to flipping a coin.

In this way, a person who faces a choice between comparable alternatives, where all the relevant principles are in equipoise, is arguably in the same position as the person who faces a choice of incommensurable goods, where the relevant principles cannot get a grip at all. To say that the goods are incommensurable means that the agent cannot choose among them according to principles of rationality. He must simply "pick" rather than "choose." And if this is correct, then any direction he takes is as good as any other, as long as he takes some direction. For both agents, because there is no superior outcome, there is no superior method for selecting one option over the other.

What would it mean to say that parties to a conflict of rights should simply "pick" rather than "choose"? It suggests that as in Sophie's case, any method for resolving a conflict of rights will do, because it is morally arbitrary whether one person wins the plank or the other does. The contestants for the plank might decide to flip a coin or draw lots. They might find a neutral judge to choose between them. Or they might just continue to do battle until one person wins.

But, someone might say, are not the men clinging to the plank *obligated* to flip a coin? This would, after all, return us to the earliest position on the plank case—Hecaton's view that the parties are obligated to draw lots. In Sophie's case, however, I suspect that *she* has no obligation to toss a coin to decide between her two children, since any choice she makes between them is already random, from a moral point of view. True, unlike Sophie, the men clinging to the plank do not randomize their solution, because each will prefer to assign the plank to himself. One might therefore think *they* have an obligation to toss a coin or draw lots, even if Sophie does not. But I think the men on the plank have no obligation to flip a coin or draw lots. For nature has arranged her own lottery. If physical strength, wit, or luck assigns the plank to one over the other, it is only as though God chose to resolve his dilemma by flipping a coin.

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