

3. IN DEFENSE OF THE AUTONOMY OF RIGHTS

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ABSTRACT. Several philosophers, including most prominently Theodore Benditt, have recently urged that the discourse of rights, widely thought to be a central, if not foundational feature of moral and political thought, is in reality a mere "redundant" appendage—a discourse that holds no distinctive place in moral or legal reasoning owing to the fact that it is thoroughly derivative because collapsible into other forms of moral or legal language. In this paper I attempt to (1) flesh out this "Redundancy" Thesis (*RT*) and (2) identify and criticize at least two general arguments that might be thought to give rise to it: the claims that rights reduce (respectively) to duties (the Correlativity Thesis) or to permissions (the Permissibility Thesis). I try to show how and why these arguments fail and why they do not therefore support *RT*.

I

The theory of rights can best be regarded as addressing itself fundamentally to two kinds of problems: foundational and structural. The foundational problem concerns the familiar question of how to justify claims of right: What kind of argument can be constructed which would show that persons have rights and to what types of considerations would the premises of such an argument appeal? The structural problem concerns the less familiar question of how appeals to rights, assuming that they are philosophically well-founded, can define and structure moral thought. How can specific prescriptions, proscriptions, and permissions be derived from assertions of right? How is the language of rights to be related to and integrated with other forms of moral language—the dutiful, the permissible, the good and virtuous? These two types of questions are of course not wholly independent of one another; and answers to one overlap with and suggest answers to the other at various points. Nonetheless, each identifies concerns and sets tasks central to the project of understanding and explaining the discourse of rights.

For the most part, philosophers have quite naturally been preoccupied with foundational questions, and the difficulties here are well known.¹ Recently, however,

several philosophers have drawn attention to a structural problem which warrants careful scrutiny, as it challenges not only the widely shared assumption that the concept of a right is fundamental to moral thought, but calls seriously into question the very coherence of the idea of rights as a distinct normative category. This problem turns on the claim that the language of rights is "redundant" and holds no distinctive place in moral discourse owing to the fact that it is thoroughly derivative because collapsible into other forms of moral language. This position has been supported most clearly by Theodore Benditt,² though others have been attracted to it.³ I propose in what follows to flesh out the alleged problem of "redundancy" and to identify and criticize at least two general arguments that might be thought to give rise to it. Neither argument has, in its most complete form, been endorsed by any supporter of "redundancy", though both have been strongly suggested by various writers. The first argument begins with the familiar claim that rights are the "logical correlatives" of duties and proceeds to the conclusion that assertions of right are redundant because everywhere equivalent to claims about the duties of others—that which they morally must do or from which they morally must refrain. The second argument seeks to absorb propositions about the rights of persons into the larger language of the morally permissible and the morally impermissible—the right and the wrong—by insisting that propositions of the form 'X has a right to do p' mean no more than 'X's doing p is (all things considered) morally right'. For convenience, I shall refer to the general position jointly supported by each of these arguments as the "Redundancy Thesis" (*RT*). The arguments in support of *RT* constitute a direct assault upon the assumption of what could be called the *autonomy of rights*: the view that the language of rights makes a distinctive contribution to normative discourse, that it embraces a form of moral life not sufficiently captured by talk of the morally dutiful or permissible. My purpose here will not be to explicate all that might be meant by the assumption that rights are autonomous in this sense (for example, that moral theory is fundamentally right-based)⁴; instead, I shall attempt to defend the autonomy of rights indirectly by attacking *RT*. To this end, I shall try to show, in respect of each of the foregoing arguments, that it is erected upon complex and subtle assumptions about the concepts of right, duty, liberty, permissibility, and their conceptual ties. My object will be to show how and why these assumptions are false, and therefore why they do not establish the truth of *RT*.

It will be useful, before proceeding, to formulate more precisely the several claims or theses with which I shall be concerned. Let us define a "rights-statement" as a statement to the effect that some person has a right either to do or have something; a "duty-statement" as the statement that some person has a duty either to refrain from or to perform some act; and a "permission-statement" as a statement to the effect that some act may permissibly be done or forborne. The "Correlativity Thesis" (*CT*), on which the first argument for "redundancy" turns, can then be expressed in this way:

CT: For every rights-statement, R, there is some duty-statement, D, such that R is logically equivalent to (entails and is entailed by) D.

The "Permissibility Thesis" (*PT*), on which the second argument relies, may be expressed:

PT: For every rights-statement, *R*, there exists some permission-statement, *P*, such that *R* is logically equivalent to (entails and is entailed by) *P*.

Lastly, the "Redundancy Thesis" (*RT*) can be put this way:

RT: If, for any rights-statement, *R*, *R* is equivalent to (entails and is entailed by) some duty-statement, *D*, or some permission-statement, *P*, then *R* is eliminable in favor of *D* or *P*.

With these definitions in hand, I turn first to the argument from the correlativity of duty.

II

Conceptual analyses of the language of rights commonly invoke at some point the familiar supposition that rights are the "logical correlatives" of duties. To assert, for example, that I have a right to vote, or to welfare aid, or to performance under the terms of a contract, is simply to affirm that some individual, group, or institution is under a duty to me in respect to those things. Such a duty might be a duty to do certain things for me or merely to refrain from doing certain things to me. So conceived, *CT* is often taken to express a necessary truth about the concept of a right.⁵

The effect of endorsing correlativity, it is claimed, is to concede that rights are "redundant" (Gewirth, 1982, 14-15) since, as Theodore Benditt has recently put it,

[i]f rights and duties are merely two sides of the same coin—that is, if in all cases there is just a single relationship which can be looked at either from the side of the one who must do or refrain from doing something (the duty-holder), or from the side of the one to whom that performance is owed (the right-holder)—then rights are redundant in that we are talking about no more, when we talk of rights, than we were already talking about in talking of duties. Rights are just extra baggage, adding nothing to the moral enterprise (Benditt, 1982, 6-7).⁶

The rights of *X* exist merely as the shadows cast by the duties of *Y*; they are therefore "superfluous" and thus ought simply to be dispensed with on grounds of conceptual economy (Hart, 1982, 181-2). At the very least, rights-statements are in principle eliminable from normative discourse however cumbersome this might prove to be in practice (Brandt, 1959, 433-4).

Now, for *CT* to entail *RT* it must be the case that duty-statements are indispensable to normative discourse in a way that rights-statements are not (Benditt, 1982, 7-8; Hart, 1982, 181-2). That is, it must be held that while *CT* is true, its converse is false: it is not the case that, for every duty-statement there is some rights-

statement such that the former is logically equivalent to the latter. It seems intelligible to speak, and indeed philosophers and jurists often do speak, of persons having various duties which yet lack corresponding rights. Among such duties are often included, for example, the duty of charity or the duty to promote the good (McCloskey, 1965, 121); self-regarding duties, such as the duty of self-improvement or the maximization of one's talents (Ross, 1930, 49-50); duties made criminally sanctionable, such as the duties to stop at a red light, pay one's taxes, or refrain from littering (Feinberg, 1980, 138)⁷; and duties in the form of responsibilities, such as the duty of an official to chair a meeting or keep proper records, or of an employee to take inventory or sweep the floor. In none of these cases does it seem plausible to say that propositions expressing such duties are simply equivalent to propositions affirming the rights of others; for something can be my duty in any of these senses for reasons other than that it is owed to someone else as a matter of right. It misdescribes such situations to say that you have a right that I maximize my talents or pay my taxes. You are not in the position of a claimant in respect of my doing such things: you have no standing to complain that by refraining to do them I have wronged you, in the sense in which I would wrong you if I failed to carry out my part of a contractual agreement to which we were parties.⁸ These and similar examples show, it is claimed, that the language of duty, broadly construed, is indispensable to a proper characterization of various normative situations. But as no similar showing can be made in respect to the language of rights, this establishes that the reduction can proceed in one direction only: from rights to duties.

The difficulty with the foregoing argument for *RT* can easily be stated. If it can be held that the language of duty is normatively fundamental and thus indispensable to a characterization of certain normative situations because there exist contexts in which persons have duties without corresponding rights, then the same must be admitted of rights themselves, as there equally appear to be contexts in which we speak of persons having rights where there are no corresponding duties—in other words, *CT* is no more true than its converse. That this is so I shall now try to explain.

There are rights-statements that are not equivalent to any duty-statement: that is, there are contexts in which one can have a right either to treat persons in certain ways or to act in a certain manner where having such rights neither entails that others are under a duty to allow themselves to be treated in those ways nor that others are under a duty to refrain from interfering with such activities. Suppose, for example, that A unjustifiably assaults B. Most of us would judge that B has a right to defend himself. Plainly, it makes little sense to suppose that B's right to self-defense consists in a right that A allow himself to be assaulted in return by B. Nor, as might be imagined, can such a right be reduced to the duties of others not to interfere with B's conduct (or perhaps, if one is willing to acknowledge the existence of "positive" rights, in a right to the active assistance of others on B's behalf). To see this we must ask: from what precisely are we to suppose that others are under a duty to refrain? The answer would seem to be: anything which is such that doing it would interfere (unjustifiably) with B's conduct. Hence all forms of direct physical interference, such as restraining B or otherwise rendering him immobile, as well of course as knocking him out, killing him, and so on, are activities from which others would be obligated to refrain. The difficulty here, however, is that the duties of others to refrain from re-

straining B or knocking him out or killing him, exist independently of B's right to defend himself in the situation imagined in the sense that the former could (and presumably do) obtain even in the absence of the latter. Therefore, the presence of such duties of non-interference cannot be constitutive of B's right of self-defense. To put the matter another way, prior to A's assault B presumably is under a duty not to attempt to injure A. But A's conduct alters the situation: B now has a right to strike back. Yet surely it would be strange to explain the nature of B's right by supposing that it consists of claims against an indefinite number of other individuals that they not do certain things to B (or that they do certain things for B) which have somehow been conferred upon B through A's conduct. The better (because simpler) explanation was that given by Hohfeld: to affirm that B has a right of self-defense is to say that B is *privileged* to defend himself—that is, he enjoys a normative status in respect of A which is such that A is not entitled to B's forbearance from doing certain things, e.g., striking at him (Hohfeld, 1964, 35-60).

Various contexts reveal the existence of other classes of rights with a similar (Hohfeldian) structure.⁹ This can most easily be seen by appeal to talk of rights in other rule-governed institutions, for example, rights in games. In the game of chess, for instance, the rules provide that, under certain specific conditions, players have the right to castle; the rules of football grant participants the right to tackle members of the opposing team; the rules of boxing grant to each contestant the right to strike at the other in certain ways. Of none of these rights does it seem plausible, to suppose that having them amounts to having something due or owed to one, after the manner of *CT*. My rights to castle in chess, tackle in football, and punch in boxing surely do not consist in claims against my opponents that they let me do these things, much less that they actively assist me in their accomplishment. Nor do such rights consist in claims that other participants not interfere with that conduct to which I have a right. From the fact that I have a right to castle it does not follow that my opponent is under a duty not to interfere with my castling (say) by capturing my rooks, or by interposing one of his own pieces. To say that I have a right to throw punches in the boxing ring does not entail that I have a claim that my opponent not bring it about that I can no longer do so, (say) by knocking me out. In other words, it is simply false to say, in these cases, that other players owe it to me not to interfere with my rightful conduct in normally permissible ways, that is, ways consistent with the governing rules of that institution.

Now it may be objected that B's right of self-defense *does* correlate with the duties of others: the duties of various authorities to refrain from punishing B for what would normally be a punishable offense. The right of self-defense, in other words, can be understood as an immunity from prosecution from what would otherwise be an assault. The other examples cited (castling in chess, punching in the boxing ring) can be handled in a similar way. But it is crucial to see that even if B's normative status can be described as an immunity from prosecution (disqualification, and so on) this still does not preserve the truth of *CT*; for the statement that B is thus immune entails no duty-statement but rather, as Hohfeld argued, the statement that certain authorities are "disabled"¹⁰ from—that is, lack the power or competence to—act in specifiable ways.¹¹ That the rights-statement "B has an immunity respecting acts of self-defense" is not equivalent to any duty-statement becomes clear once we realize

(as is argued shortly) that those types of rights-statements which *are* logically equivalent to duty-statements are ones in which the duty has the characteristics of an obligation which has arisen in a special way—a performance or forbearance due or owed to another as a result of some prior transaction or special relationship. But these factors are not present in the cases we are now considering. The police and officers of the court do not *owe* it to me not to arrest and prosecute me for striking another in self-defense, they simply lack the power or competence to arrest and prosecute individuals for non-criminal or permissible conduct.

Similarly, it would be silly to regard the fundamental rules of the game of chess, for instance, as nothing more than a specification of circumstances under which the match referee owes it to the players to refrain from penalizing them, as if the whole point of the game were to impose an unusual set of restrictions upon the conduct of the only real "player"—the referee. The rules simply do not operate to create such obligations; rather, they confer a complex set of rights and powers—powers to make "moves" by transferring a piece from one square to another, to "capture" an enemy piece, to "promote" a pawn once it reaches the last rank; rights to castle, claim to draw, and so on. Neither privileges nor immunities are equivalent to duties to refrain from prosecuting, punishing, disqualifying or penalizing.

Defenders of *CT* might further complain that the "right" of self-defense (and other putative "rights" mentioned) fall short of being rights in the fullest sense of that term. This allegation may initially appear unconvincing—after all, much of the variety and richness of the vocabulary of rights seems no less fitting here as elsewhere. Privileges can be granted or conferred, acknowledged, exercised, enjoyed, surrendered, abridged, or extinguished. They can also be asserted, claimed, or insisted upon (though situations in which such performances would be called for might not often arise). It can be replied, however, that whether it is appropriate to describe these privileges as rights turns, not simply on such facts about the "surface grammar" of rights-statements, but also and more importantly on the *theory* of rights which best explains that grammar: an account of the function(s) subserved by the language of rights within moral life and thought which explains why a moral discourse lacking rights must be inferior to one possessing them. In this the reply is surely correct, though even a sketch of such a theory is beyond the reach of this essay. For present purposes, however, it may suffice to observe that the argument against *CT* will be met only by a theory of rights in which the explanation for the special contributions of rights to moral discourse altogether precludes counting privileges as genuine rights. Among the most promising candidates for such a theory is Joel Feinberg's well-known analysis of rights in terms of the activity of claiming.¹² Having a right, on this view, is having a claim, which entails a corresponding duty or obligation; and *having a claim* is being in a position *to claim*—an activity crucially related to the idea of respect for persons and hence to the underlying value, as well as the essential nature, of rights. If a theory of this kind is defensible, it will weigh powerfully against counting privileges as rights. I have argued elsewhere, however, that Feinberg's account fails to fix upon a notion which illuminates at once both the essential nature of rights and their distinctive importance, as the activity of claiming, which is supposed to play that unifying role, lacks any important connection with the idea of having a right.¹³ Assuming that the argument is correct, then until a more promising account of this kind is developed

we have as yet no compelling reasons of general theory for denying that privileges comprise one category of genuine rights-statements.

It cannot, of course, be denied that there does exist a distinct and narrowly defined range of situations in which rights-statements are equivalent to duty-statements; that is, situations where it is appropriate to say that one individual *owes* some conduct or service to another as the latter's *due* either as a consequence of some prior transaction or agreement (e.g., a contract) or through recognition of certain special relationships (e.g., that of parent to child), or as might arise if one party owes compensation for harm sustained by another (e.g., as a result of tortious or wrongful conduct).¹⁴ Yet even of this class of cases it simply makes no sense to suppose that the fact of correlativity entails the truth of *RT*.

Consider the following pair of propositions:

- (a) I have a right that you pay me the five dollars you promised to return.
- (b) You owe it to me to pay me the five dollars you promised to return.

Proponents of *RT* maintain that the mere fact of the strict (logical) correlativity of (a) and (b) entails that (a) is "redundant" and therefore eliminable in favor of (b). If correct, of course, this argument would prove too much, as it would just as readily follow that (b) is redundant (since the entailment relation here is mutual). Quite apart from this, however, the argument involves a basic confusion. From the fact that propositions of the form of which (a) is an instance are everywhere replaceable by propositions of the form of which (b) is an instance it does not follow that rights have therefore been shown to be "eliminable". All that has been established is that a certain way of describing our rights may be dispensed with. Propositions (a) and (b) serve to mark a "moral relation" in which you and I stand; and it is the fact of such a relation which is of moral significance here, not the manner in which it is described. As further support of this assertion, consider the following. It is commonly assumed by rights-theorists that appeals to rights, whatever their specific content, have an argumentative or justificatory force which is such that they typically override countervailing considerations (say, of collective welfare) in a decisive way (Dworkin, 1977, xi; Nozick, 1971, 33). Assuming for the moment that this is correct, it is not at all clear that the assertion that you owe me something (an education, proper housing, forbearance from assault) is any more lacking in such argumentative force than the assertion that I have a right that you provide me with these things or forebear from those activities. There is no reason to suppose that propositions of the form of which (b) is an instance *function* in normative discourse in any way different from propositions of the form of which (a) is an instance, and this because they describe the same normative state of affairs (albeit from two different perspectives). The dispensability of either form of description is merely a trivial consequence of the "relational" nature of these rights (that is, rights-correlative-to-duties). This fact no more shows that such rights are spurious or superfluous than the fact that "Y is to the left of X" is everywhere replaceable by "X is to the right of Y" shows that there are no genuinely spatial rela-

tions. The fact that correlativity holds for a suitably defined class of rights, far from dispensing with them, is properly an expression of their essential nature—of the fact (if it is a fact) that persons stand in relations of right.

What has led the proponent to *RT* astray is a conception of *CT* derived from an uncritical use of 'duty' and its various cognate expressions. Such usage divides broadly into two camps. (1) We sometimes use 'duty' (or 'obligation') to mark the state of affairs which obtains when one person owes some performance or forbearance to another as the latter's due. To say that something is my "duty" in this sense is not only to identify it as something that I must do, but simultaneously to endorse a specific kind of reason for doing it: I must do this because I owe it to you to do so. (2) In another sense, however, we say that such-and-such is someone's "duty" where we mean to convey the idea that it ought or should or must be done where we do not thereby limit the types of moral reasons to which appeal could be made in supporting such an assertion. In this sense, 'duty' is used to express moral prescriptions or proscriptions which, if true, may be true for any number of reasons having nothing to do with one person's owing some performance or forbearance to another. Here we might say, for example, that it is our duty to refrain from polluting the environment or wasting natural resources because this maximizes aggregate utility. Recognizing this distinction reveals what is wrong with the argument for *RT*. We have seen that, in order to be able to support *RT*, the general position we have been considering must hold both that *CT* is true and that its converse is false. But there is an equivocation at the root of this argument: *CT* is true only if 'duty' is taken in the first, narrow sense; but the converse of *CT* is false only if 'duty' is construed in the second, broad sense.

The "redundancy" of rights cannot therefore be established on the basis of *CT*. Some philosophers have maintained, however, that a cogent argument for *RT* can be made out along the second of the two general lines I sketched at the outset.

III

Theodore Benditt has recently defended the following as the first condition of adequacy for any acceptable theory of rights:

It must be the case that if a person has a right at a time *t*, then he is within his rights in acting, or insisting, on his right,

where one "acts within his rights" only if his conduct is permissible (Benditt, 1982, 40; 11). Hence, if I have a right to do *p* at *t*, then it must be permissible for me to do *p* at *t*—it cannot be the case that I morally may not do *p* at *t*.¹⁵ I have referred to this claim as the "Permissibility Thesis" (*PT*). As formulated earlier, *PT* straightforwardly entails *RT*: the fact that every rights-statement is equivalent to some permission-statement means that the former is eliminable in favor of the latter.

PT seeks to reduce all statements about the rights of persons to statements about what those persons may rightly or permissibly do; and the pull of this reductivist analysis rests partly, as with all reductivist programs, in its theoretical economy. It

could be argued, for example, that such analysis greatly simplifies the task of explaining the role of appeals to rights in justifying conduct, since the question of what rights a person has against others would be settled on this account by the answer to the question of what each is morally permitted to do (or omit doing). Additionally, several considerations in support of *PT* may be adduced from observations about ordinary usage. To begin with, propositions of the form "You have no right to do p" are often treated as though they were meant to convey no more than "It is not right that you do p"; and once one has assimilated these propositions it is quite natural to make the further move of assimilating their contradictories, and of supposing that "You have a right to do p" simply means "It is right (allowable, permissible) that you do p".¹⁶ Furthermore, when a course of action that one has elected to pursue is variously criticized as reckless, indecent, or even wrong, it is not uncommon for the person criticized to respond that she had a right to perform the act in question, where this is meant to convey at least that performing the act was not wrong. This observation is further buttressed by the use of the interrogative "By what right you do p?" as a request for reasons justifying the conduct in question. These considerations together suggest that appeals to rights are commonly conceived to function in this way: to assert a right to do something or have it done is thereby to justify one in doing it or in insisting upon its being done. In other words, the mere fact of having a right to do something is sufficient to legitimate (but not enjoin) the doing of it; and this of course is just what *PT* expresses.

Quite apart from considerations of conceptual economy and ordinary usage, however, the principal justification for *PT* derives from a set of intuitions regarding certain types of cases—those in which the exercise of a right appears to conflict either with other rights or with other relevant concerns (say, of a consequentialist sort). One such case, much discussed in recent literature, is due to Joel Feinberg:

Suppose that you are on a backpacking trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private property. You smash a window, enter, and huddle in a corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace to keep warm. Surely you are justified in doing all these things, and yet you have infringed the clear rights of another person (Feinberg, 1980, 230).

Another such case is presented by Benditt:

I have a right to enter my house, but if a terrorist is holding a hostage inside whom he threatens to kill if anyone enters, then something seems to happen to my right to enter . . . Imagine me walking up to my door. A policeman blocks my way, saying that I may not enter. I say, "It's my house, isn't it", and the policeman says, "Yes, it is". I then say "Since it's my house I have the right to enter, don't I", and he agrees that I do. I continue with "So that means that

I have the real, actual, no-fooling right, here and now, at this instant to enter my house", and he again agrees. So I say "All right, here I go", but as I start toward the door, I am again blocked and met with the reply, "Sorry, you can't go in there . . ." (Benditt, 1982, 34, 36).

On their face, such cases seem to present a puzzle: If I have a right to enter my house, then how can it not be permissible for me to do so? And if the cabin owner has a right that others not trespass, then how can it be permissible for you to break in when the blizzard strikes? This puzzle is often expressed, tacitly or explicitly, as a consequence of the Correlativity Thesis: If the cabin owner has a right that you not trespass then (by *CT*) you have a duty not to trespass, and this must mean that doing so would not be permissible. How, then, can you have a right to do that the doing of which would be impermissible?

PT endorses a strategy for dealing with these troublesome cases: if I am morally required not to enter my house while a terrorist is threatening hostages inside, then I have no right to enter. "It is a contradiction to maintain", Benditt insists, "both that I have a right, then and there, to enter and that I am, then and there, morally required not to enter" (Benditt, 1982, 36). Benditt recognizes that this strategy implies a certain view of rights-statements and of their role in moral reasoning, and this he attempts to spell out. Consider the following argument:

- (1) I have a right to the use and enjoyment of my property.
- (2) Walking through my front door while a terrorist is holding a hostage inside whom he threatens to kill if anyone enters is an instance of using and enjoying my property.
- (3) Therefore, I have a right to walk through my front door while a terrorist is holding a hostage inside whom he threatens to kill if anyone enters.

Benditt holds that the conclusion of this argument must be false, as it is morally impermissible of me to walk through my front door under the prevailing circumstances, and one cannot have a right to do at a particular time and place what it would be impermissible to do at that time and place (*PT*). Consequently, something must have gone wrong with this argument; and as the premises don't appear, at any rate, to be obviously false, Benditt concludes that the argument must be invalid. His reasoning may, perhaps, be put as follows. The underlying structure of the foregoing argument has the form:

- (1') I have a right to ϕ .
- (2') Doing r is an instance of ϕ ing.
- (3') Therefore, I have a right to do r .

It is clear, Benditt thinks, that (3') is not entailed by (1') and (2') for every value of r . In particular, (3') does not follow from the premises provided that r is, all things considered, morally impermissible; and this, Benditt insists, has some startling implications for our conception of how appeals to rights figure in moral reasoning. The inference from (1') to (3') is typically conceived as a way of deriving "particular" rights-statements from "general" ones—that is, as a way of "particularizing" (1') by indexing it to the morally relevant features of specific persons, times, and circumstances (my right to walk through the front door while a terrorist . . .). But the process of deriving (3') from (1') is, in many cases at least, bogus, because the property "having a right to . . ." does not attach to all instances of ϕ ing, but only to those that have a certain further property (i.e., the property of being morally permissible). All of this suggests, Benditt concludes:

That it is a mistake to invoke rights in a justificatory role—that is, to think that we have a (general) right to [enter onto our property] *in the sense that it is because we have this right that we have the right actually to do a given particular act . . .* Rights do exist—as the conclusions, but not the premises, of certain arguments (Benditt, 1982, 40-1).

On Benditt's view, I have no genuine, abstract rights: for these simply collapse into a conjunction of "particularized", concrete ones—rights which play only a "conclusory" role in moral reasoning.

The effect of *PT* and of the conception of particularized rights-statements designed to fit with it, is thus to define the truth-conditions for propositions of the form "I have a right to ϕ " in such a way that they are true when and only when an instance of ϕ ing is, all things considered, morally permissible. Propositions of the form of which (1') is an instance are therefore simply a convenient shorthand for what might be called an *exhaustive rights-statement*, where such a statement mentions all and only those circumstances in which it would be permissible or allowable to do ϕ . So, for example, "I have a right to enter onto my property" is merely shorthand for "I have a right to enter onto my property if (and only if) r ", where what gets substituted for ' r ' is an exhaustive enumeration of just those cases in which an instance of the act of entering onto my property is permissible. I shall refer to such rights as "specified", since the conditions under which they may permissibly be exercised are specified by their exhaustive descriptions.

The theory of specified or particularized rights, I shall now argue, forestalls an immediate objection to *PT*; but it does so only at the price of rendering appeals to rights nugatory. The following objection may be put to *PT*. It is simply false that merely having a right to do something is sufficient to justify or legitimate the doing of it. Suppose that I come into a large sum of money, and rather than loan it to a destitute friend I proceed to gamble it away; or imagine instead that I donate a large portion of the money to the Ku Klux Klan. Plainly, it seems, I have a right to dispose of my money in either of these ways. Yet it seems incredible to suppose that the mere fact of my having a right to give to the Klan provides me with a morally sufficient reason for doing so. More particularly, it is not the least inconsistent with the supposi-

tion that I have a right to gamble away my funds or hand them over to the Klan to maintain (as at least some of us would maintain) that my doing these things would not be merely callous or indecent, but wrong. I ought not to throw my money away frivolously when it could help others in desperate need, nor ought I to give it to those who might use it for unjust purposes, and all this even though I have a right to dispose of it in just these ways. Acting on the basis of a right, it seems, is not always acting rightly.¹⁷ To this, supporters of *PT* may respond as follows. It is an immediate consequence of allowing that the truth-conditions of all genuine (particularized, specified) rights-statements are defined so that "I have a right to ϕ " is true when and only when an instance of ϕ ing is permissible that the foregoing objection is misconceived; for the examples here given of rights not rightly exercised are in fact not examples of rights at all. It is not simply that in these cases my rights to give my inheritance to the Klan or to gamble it away at Las Vegas should yield to morally more urgent concerns. It is rather that I mustn't have had such rights in the first place, since presumably their exhaustive descriptions do not mention or specify the circumstances defining such cases. Therefore those situations do not constitute counterexamples to *PT*. Conceiving of rights in this way it could be urged, both accommodates and further supports the conviction that I can't have a right to do that from which I am required to refrain. This does not end the matter, however; for the proponent of *PT* has purchased immunity from the objection at the cost of disallowing that appeals to rights ever function as moral reasons supporting or opposing the truth of various moral claims.

Suppose we are concerned to determine whether, for example, it is morally permissible to donate funds to the Klan. According to the conception of particularized rights, the situation looks like this. If it turns out that the injustice of the end to which my funds will likely be put is of greater moral consequence than my claim to give to the party of my choice, then this means that I don't have the right to do so; more generally, whether I have a right to engage in an activity under any given description—e.g., a "right-to-give-money-to-the-Klan"—is precisely a function of whether it is, on balance, permissible to engage in that activity under the description—"giving money to the Klan". This way of putting the matter starkly reveals the futility of appeals to "specified rights", and this in two ways. First, it would be pointless to assert that persons have rights to engage in certain activities as a factor bearing on the question of whether they ought to be allowed to do so; for correctly to assert that persons do have such rights requires that we resolve the issue upon which the appeal to such rights is supposed to have a bearing: we cannot truly assert that persons have rights to act in these ways without having determined whether the circumstances in which their acts take place are specified by an exhaustive description of their rights—without, that is, having determined whether it is permissible for persons so situated to do these things.

Second, if the only cases in which it can correctly be said that I have a right to do p are just those cases in which it is, on balance, permissible to do it—that is, precisely those cases in which the claim that my doing p is morally licit is not outweighed by factors of greater moral moment—then the assertion of a right seems to lose its point: it is difficult to see how the appeal to a right can, as is often supposed, blunt the force of competing considerations if its meaning or content is defined in such a

way as never to conflict with them. The effect of building into the context of my rights a specification of all and only those circumstances in which such rights are permissibly exercised is to shape the contours of my rights so as precisely to accommodate, and hence never to conflict with, competing more urgent concerns. In short, appeals to specified rights cannot meaningfully be advanced as genuine reasons supporting or opposing the truth of specific normative claims, such as that you may do *p* or that I must refrain from *q*. And it should require little argument to show that this result is strikingly at odds with our ordinary way of thinking and talking about rights. For whatever else we believe about rights we certainly do think that appeals to rights play some role in moral and legal evaluation—that assertions of right do function in the rational justification of moral action. Now, to say this is not of course to furnish an account of the precise manner in which rights-statements, as a special class of normative reasons, function within normative discourse as a whole; but the recognition that they do constitute such a class of reasons is a requirement that any reasonable theory of rights must satisfy.

Framed in terms of Benditt's discussion, the question at which we have arrived is simply whether any sense can be imparted to the idea that rights play a merely conclusory role in moral reasoning. If rights-statements simply report normative conclusions which have already, so to speak, been arrived at, then it is difficult to see what point such statements could have. Surely they could not have that function which they are commonly taken to have—that of justifying certain normative prescriptions and proscriptions. To deny that the role of rights in moral reasoning is to deny them any real role at all.¹⁸

While not explicitly endorsing it, Philip Montague has recently advanced an argument which, if correct, would support PT. The problem as Montague sees it is this: How can I properly be said to have a right to do that the doing of which others may permissibly prevent? Recurring to Benditt's hostage case, if we say that I have a right to enter my house while the hostage is being held inside, and if this right is "Hohfeldian", then others are obligated not to prevent my entry; but the result of conjoining this with the claim that others may permissibly prevent me from entering makes no sense as "the statement that everyone is obligated to refrain from preventing [my entering] but that someone is permitted to do so seems clearly to be inconsistent" (Montague, 1985, 366). This argument depends upon the assumption that "You are obligated to prevent me from entering" is simply equivalent to "It is morally impermissible for you to prevent me from entering", but I see no reason to accept this. Montague's argument is inattentive to the distinction between the two types of usage of 'duty' or 'obligation' noted in the previous section. For Montague, a right is Hohfeldian just in case it is equivalent to the duty or obligation of another—but by this he means that the duty in question must express an all-things-considered moral prescription (the second of the two kinds of usage isolated above): "Whether X is permitted to do *y* depends on just those considerations which determine whether X has a duty to not do *y* . . ." (Montague, 1984a, 83). But a proper reconstruction of the "correlativity" doctrine (as we have seen) points us in precisely the opposite direction: strict correlativity holds only where the duty involved is narrowly, rather than broadly construed. Thus, "You are obligated to refrain from preventing my entry" and "It is permissible for you to prevent my entry" are not inconsistent.

Montague elsewhere has adopted a different line. Assume that the proposition "I have a right to enter and it is permissible for you to prevent my entry" is coherent. If so, then by preventing me you infringe my right and thus (in some sense) wrong me. And from this it follows that you owe me an apology, or at least an explanation. But, says Montague, it is impossible to act in a way that is both fully justifiable or permissible *and* for which one owes an explanation or apology. Hence it follows (contrary to our assumption) that you couldn't have been acting permissibly. The *reductio* of the initial assumption (that the foregoing proposition is coherent) is thus established (Montague, 1984b, 14-15). I confess I see no incompatibility here. If I promise to take you to a play, but I don't show up because I stopped to ferry an accident victim to the hospital, it seems to me that I do owe you an explanation if not an apology (together perhaps with a promise to take you out another time) despite the fact that rendering aid was, on balance, the right thing to do. To hold otherwise is to adopt a view of moral justification whereby the fact of my being justified in helping the victim makes it as if I had no competing commitments or undertakings in the first place. This cannot be right, and Montague's arguments therefore do not buttress *PT*.

As I have construed it, *PT* is principally a response to cases in which assertions of right conflict, either among themselves or with other considerations. It is worth noting that a different argument for *PT* might be thought to flow from certain observations about human action and what it means to have a right to perform such actions. It is a familiar theme in the theory of action that a given "act" can fall under a variety of descriptions of differing levels of specificity.¹⁹ This is important for the theory of rights because we often argue from highly abstract or general rights-statements (a right to free speech, to life, to equal concern and respect) to more specific, concrete ones (my right to say so-and-so on this occasion, your right not to be shot by Jones, my right to trial by a jury of peers); yet the movement from abstract to concrete rights is complicated by the fact that a given act may fall both under the description of an abstract right and simultaneously under a host of other descriptions. Suppose, for example, that I have an abstract right to the use and enjoyment of my property. Now imagine that I own a gun and that, by pulling the trigger of my gun, I will kill Jones. Under the description "pulling the trigger of my gun" my action is an instance of using (and perhaps enjoying) my property; yet it simultaneously falls under the description "killing Jones" and perhaps "murdering Jones". Does my abstract right attach to my action even under these descriptions? More generally: if I have an (abstract) right to perform an action under a certain description, do I thereby have the (concrete) right to perform that action under any other description under which that action falls? The initial temptation here is to say No. After all, we don't really want to allow that my (abstract) right to use and enjoy my property comprehends a right to commit murder. It is precisely at this point that the appeal to *PT* becomes so natural: murdering Jones is morally impermissible, so I can't have a right to do it; that is, I cannot have a right to perform an act under any description such that the act would be impermissible under that description.

Now, once we free ourselves of the idea that having a right to do something must mean that doing it is always morally permissible (and the interference of others always morally impermissible) then the result that my right does attach to descriptions

such that under them its exercise would be impermissible seems less odd. Quite apart from this, however, the preceding argument may be directly challenged in the following way. If I have a right to use and enjoy my property then this provides you with at least some reason to forbear from interference. And such reasons are transitive with respect to the means by which their realization is to be achieved. Hence, if you have a reason to forbear from interfering with my use and enjoyment of my property, then you also have a reason to refrain from interfering as I pull the trigger of my gun—not an overriding reason, of course, but a reason nonetheless. To acknowledge the presence of such reasons, however weak, is to acknowledge the force of my right. Thus, it is false that I can have no right, however weak, flowing from my stipulated abstract right of property, to pull the trigger, kill Jones, and murder Jones. Joseph Raz has objected to this argument on the ground that, unlike having a reason, the property of having a duty (in the narrow sense of owing something to someone), and thereby also that of having a right, does not transfer to the means by which its fulfillment is to be achieved: if I have a right that you be in London by noon then you have a duty, as well as a reason, to be in London by noon; and moreover, assuming the 10 o'clock train will get you to London by noon, you have also a reason for taking the 10 o'clock. But you do not, says Raz, have a duty to take the 10 o'clock—after all, perhaps the 10:15 will do as well. And this means that I don't have a right that you take the 10 o'clock (Raz, 1984, 45). Similarly, my right to use and enjoy my property means that you have a duty, and therefore also a reason, not to interfere. And this affords as well a reason not to interfere as I pull the trigger—but not a duty not to interfere. Thus the acknowledgement of a reason not to interfere in these circumstances does not constitute an acknowledgement of any right. Raz's argument fails, however; for if the property of having a duty never transfers to the means by which its fulfillment is to be realized then the affirmation that you have a duty not to interfere with me in the use and enjoyment of my property is vacuous: you have a duty not to interfere, but no duty not to do anything which could count as interference. The most that such reflections can establish is that your duty in cases such as these (involving the availability of a plurality of means as regards the fulfillment of some duty) must transfer to a disjunction of subordinate duties: your duty to take the 10 o'clock or the 10:15 or . . . The right correlative to such a duty would then be a disjunctive right in the same sense. Thus your obligation not to interfere with my use of my property becomes an obligation not to realize any of the means through which such interference could be effected, and my correlative right a right that those means not be effected. My point is then simply that this (disjunctive) right, however weak, holds despite the fact that it is a right to (variously) pull the trigger, kill Jones, and murder Jones, the last of which is (we are assuming) morally impermissible. Thus, the existence of multiple act-descriptions does not generate an argument for *PT*.

There are two ways in which supporters of *PT* could attempt to preserve it in the face of the difficulties so far raised, and each begins by invoking a distinction.

The first line of response allows that, though my moral right to give to the KKK does not entail that doing so would be, all things considered, morally right or permissible, this is so because the right is not an all-things-considered right but a presumptive or *prima facie* right.²⁰ Introducing the distinction between *prima facie* and all-things-considered rights permits us to say this: the rights-statement "All things

considered, I have a right to give to the Klan" *does* entail the permission-statement "All things considered, it is morally permissible to give to the Klan", while the statement "*Prima facie*, I have a right to give to the Klan" entails "*Prima facie*, it is permissible to give to the Klan. The truth of *PT* is preserved in either case.

The problems with this response are two. First, there is no more reason to suppose that a presumptive (*prima facie*) right sets up a presumption of rightness, any more than a conclusive (all-things-considered) right is conclusive of rightness. It is not immediately obvious that any of us would endorse even the presumptive legitimacy of donating to an organization like the Klan, even assuming a *prima facie* right to do so. Nor is there much reason to think that "All things considered, it is permissible or right to give to the Klan" follows from "All things considered, I have a right to give to the Klan", unless of course the latter has been defined in such a way that the former follows as a trivial consequence. Yet this is precisely what happens with the introduction of the *prima facie*/all-things-considered distinction, and this raises the second difficulty. Affirming that I have a *prima facie* right is affirming that I have a right-to-something-unless-overridden-by-competing-considerations. Plainly, this amounts to no less than a re-introduction of the notion of an exhaustive rights-statement and the corollary conception of specified rights, for which serious difficulties have already been raised.

Another avenue open to supporters of *PT* is to press the distinction between *moral* rights and permissions and *legal* rights and permissions. What *PT* actually states, they might urge, is that every *moral* rights-statement is equivalent to some *moral* permission-statement, and every *legal* rights-statement is equivalent to some *legal* permission-statement. With this distinction in place, the force of my counterexample to *PT* can be seen to dissipate: for, though I have a legal right to give to the Klan, it *would* be legally right (that is, permissible) for me to do so; equally, while it would be morally wrong (that is, impermissible) to give, it is at least somewhat plausible to say that I have no moral right to give.

As regards moral rights, this response is unconvincing. The expression "You have no (moral) right to give to the Klan" is ambiguous. In one sense, as I indicated earlier, it does not withhold the ascription of a right, but merely asserts that giving is (or would be) wrong. Hence, while "You have no right to give" is in this sense plausibly true, it is irrelevant to the truth of *PT*, as no rights-statement is involved. On the other hand, when it *is* meant to withhold the ascription of a right, "You have no right to give" is not plausibly true but almost certainly false. Unless we are prepared to say that under no theory of rights can a person have a moral right freely to exchange her property with another, there is no reason to think that I cannot have a moral right to support the Klan, even if I ought not to. Only a prior commitment to *PT* would lead one to think otherwise.

Turning to the case of legal rights and permissions, it is concededly difficult to locate clear counterexamples to *PT* in legal discourse. Indeed, it is tempting to say that I cannot have a *legal* right to do anything with is a contravention of law—that is, nothing will *count* as a legal right to do or have something if the doing or having of it is unlawful. The law of gift extends to me the right to donate my funds to the Klan;

but that right does not comprehend gifting them illegal drugs or unregistered firearms. First Amendment doctrine protects my right to speak at a Klan rally; but that right does not extend to take in incitement to imminent lawless action. What makes *PT* plausible with respect to legal discourse is the suspicion that legal rights are, fundamentally, specified rights—that the interpretation by the courts of, for example, First Amendment law, involves an increasingly refined approximation to an exhaustive statement of First Amendment rights: those circumstances in which one may and in which one may not engage in certain forms of expression. But we have already seen that the theory of specified rights, while it makes *PT* trivially true, can make no sense of rights as elements in normative reasoning. Therefore, if *PT* holds for legal discourse only trivially in this way, it has not been defended against the objections I have advanced.

Finally, it may be contended that, in light of all of the foregoing, *PT* emerges as no more implausible than its denial; for my argument against *PT* has driven us to the view that persons can properly be said to have rights (however weak) to do things obviously wrong—and this, it may be insisted, is just absurd. In so far as it amounts simply to a reassertion of, rather than an argument for *PT*, this contention has no force. Furthermore, *PT* is less plausible than its denial, for it requires that we construe rights-statements in a way which allows them no meaningful role in moral reasoning. We should, therefore, reject *PT* and with it the second of the two main arguments for *RT* with which we began.

In arguing that we should reject *PT*, I do not of course mean that it is never permissible to exercise one's rights or to insist that others respond appropriately to them. Indeed, were this so appeals to rights would truly be "superfluous" in a way more damaging than that contemplated by *RT*: not because their purpose or point may be realized in other forms of moral language, but because there is no purpose to realize. If rights have a profound role to play in moral thought the reasons for action to which they give rise must often be sufficiently compelling as to be decisive on the issue of the permissibility of their exercise and the wrongness of their infringement. How and why appeals to rights should carry such decisiveness in moral argument, if at all, is a central question for a theory of rights; all that the rejection of *PT* establishes, however, (and hence all that I have argued) is that such decisiveness cannot be built in to the truth-conditions of rights-statements themselves.

IV

This essay has been concerned with a question that arises at the intersection of the foundational and structural parts of the theory of rights: How can persons properly be said to possess rights at all if the language of rights, on the one hand, and the language of the dutiful and the permissible, on the other, are so related that the former threatens to collapse into the latter? At stake here is what I have called the assumption of the autonomy of rights, and I have tried indirectly to buttress it by seeking to uncover and defuse various arguments and assumptions which support its denial—*RT*. I have sought to show that a cogent argument for the "redundancy of rights" can be sustained by appeal neither to the Correlativity nor the Permissibility

theses. Of course this result does not entail that no cogent argument for *RT* can be made, but it does cast considerable doubt on the project. □

ENDNOTES

¹ See, for example, the essay collected in Waldron, 1984; and MacIntyre (1981), 67-8.

² See Benditt, 1982, chaps. 3 and 4.

³ See works cited in note 6 below.

⁴ See Mackie, 1976; Raz, 1984; Sumner 1984.

⁵ See, for example, Arnold, 1978, 76; Benn and Peters, 1959, 88; Brandt, 1959, 436; Fried, 1978, 81; Gewirth, 1982, 47-8; Held, 1984, *passim*, but esp. 170; Lamont, 1946, 108; Regan, 1983, 271-6; Shue, 1980, chaps. 1 & 2.

⁶ For other versions of this argument, see Arnold, 1978, 83; Gewirth, 1982, 14; Hart, 1982, 181-2; Tuck, 1979, 1-6.

⁷ For a wealth of similar examples see Benditt, 1978, 164; Dias, 1976, 38; Flathman, 1976, 57, 92-3.

⁸ In the case of duties made criminally sanctionable the claim that there do exist correlative rights is usually made only by those operating with controversial theories of political obligation. See Hart, 1979, 21; Rawls, 1964, 9-10.

⁹ In so speaking of these rights (e.g., the right of self-defense) as rights with a Hohfeldian structure—that is, as Hohfeldian privileges—I might be thought to have misunderstood Hohfeld, as he explicitly reserved the expression 'right' for only those cases in which *CT* holds (cases involving what Hohfeld alternatively calls 'claims') (Hohfeld, 1964, 36-38). Hohfeld plainly realized however, as did others who followed him, that the term 'right' is used in everyday moral and legal discourse to cover a variety of distinct normative concepts, including privileges and immunities, for example, as well as claims (Hohfeld, 1964, 36). It is in this sense that privileges form one class of "rights with a similar (Hohfeldian) structure". (Hohfeld's restriction of the term 'right' to those cases involving claims and reciprocal duties was largely stipulative, and intended purely as a means of furthering conceptual clarity—his chief aim.)

¹⁰ See Hohfeld, 1964, 60-3.

¹¹ Indeed, the deontic language of 'must', 'shall', 'duty', and so on, is sometimes used where the context reveals that no duty is being imposed, but rather an immunity conferred. Witness, for example, various phrases and expressions in the Constitution: "Congress shall make no law" respecting an establishment of religion; "No state shall" impair the obligation of contracts; "No state shall" deny to anyone the equal protec-

tion of the law. These clauses function so as to limit the power or competence of certain political institutions (e.g., federal and state legislative bodies) to interfere with the lives of citizens in certain ways.

12 See Feinberg, 1980, 143-58; Feinberg, 1973, 55-69.

13 See Adams, 1987.

14 These situations do not exhaust the category of "rights-correlative-to-duties"—i.e., Hohfeldian "claim-rights"—but they do seem to represent the paradigmatic instances. See Hohfeld, 1964, 38; 71.

15 For further endorsements of this claim see Mackie, 1976, 351; MacCormick 1979, 165; Nickel, 1977, 1117; Steiner, 1977, *passim*.

16 Some writers shift subtly back and forth between the assertion that it is right that x do something or have it done and the claim that x has a right to do that thing or have it done. Ayn Rand, for example, writes as follows: "if man is to live on earth, it is *right* for him to use his mind, it is *right* to act on his own free judgment, it is *right* to work for his values and to keep the product of his work. If life on earth is his purpose, he has a *right* to live as a rational being . . ." Rand, 1961, 94-5.

17 Jeremy Waldron has recently argued for this claim on different grounds, which may be summarized as follows. The way to see that

1. P has a moral right to do A

and

2. P's doing A is morally wrong

describe compossible states of affairs is to see that 2 is compatible with

3. It is morally wrong for anyone to interfere with P's doing A

which is a consequence of 1, and incompatible with

4. It is morally permissible for someone to interfere with P's doing A

which contradicts 1. See Waldron, 1981. While I agree that (1) and (2) are not contradictories, this argument is insufficient to establish that contention, since (as I argued above) it is not a conceptual truth about rights that they always entail duties of non-interference; and this is in effect to argue that (3) is not a consequence of (1) and that (4) does not contradict (1).

18 This result is made all the more difficult for Benditt given that his third condition of adequacy for any theory of rights holds that rights make a distinctive contri-

bution of moral reasoning (Benditt, 1982, 40). Not only does Benditt's own theory fail (apparently) to satisfy this condition, but the argument of the text suggests that any theory which endorses *PT* must fail to satisfy it. (Since *PT* is, effectively, Benditt's first condition, his set of adequacy conditions is internally inconsistent: condition (3) cannot be satisfied if the role of rights in normative reasoning is merely conclusory—as it must be if *PT* is true.)

¹⁹ I don't believe that anything turns, for present purposes, on whether we speak of a single "act" under various descriptions—à la Anscombe and Davidson—or of a person exemplifying various act-properties—à la Goldman. For a discussion of these views see Goldman, 1970, chap. 1 & 2.

²⁰ For discussions of the distinction between *prima facie* and absolute or conclusive rights see, for example, Benditt, 1982, 34-9; Brandt, 1959, 438-9; Feinberg, 1973, 73-5; Frankena, 1965, 216-7; McCloskey, 1976, 110. See also Ross, 1930, 48-64.

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