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Two Conceptions of Rights

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Rights play an important role in moral, political, and legal debate, as illustrated by conceptions of them as constraints on pursuit of the good and as trumps in relation to considerations of majority preference and collective goals. But we can and do think of rights in two quite different ways, even if we don't always fully recognize or attend to the difference. On one conception, rights are important *inputs* to normative debate that often, but not always, determine the outcome of that debate. Rights, on this conception, are *contributory*, contributing important *pro tanto* reasons to a debate requiring adjudication. The contributory conception of rights represents them as potentially *defeasible* moral factors, especially important and presumptively decisive *pro tanto* reasons for the resolution of a practical question. Another conception represents rights as the *outcome* of debate about the entitlements of parties to the debate. On this conception, rights are those entitlements that deserve to win the debate. Rights, on this conception, are *resultant*, rather than contributory. Unlike contributory rights, resultant rights are verdictive and *indefeasible*.

Some philosophers are *monists* about rights, recognizing only contributory or resultant rights. But the ways in which we think, talk, and argue about rights suggest that we can and should be *pluralists* about rights, recognizing both contributory and resultant rights. The important point is not to confuse them. Some philosophers make claims about rights that are not easily reconciled with their monism. If rights are only resultant, it's hard to recognize conflicts of rights and rights that may be overridden. If rights are only contributory, it's hard to recognize rights that are verdictive.

Once we see the difference between contributory and resultant rights, we should expect their content to diverge. In general, we will have more contributory rights than resultant rights, and some contributory rights will not be resultant rights. Moreover, though some normative contexts presuppose resultant and indefeasible rights, several important claims about rights

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and their significance presuppose the contributory and defeasible conception. For this reason, the contributory and defeasible conception of rights might be regarded as primary and the resultant and indefeasible conception of rights as derivative.

My discussion will have the following structure. After a few preliminaries (section 1), I will provide a fuller account of the contrast between these two conceptions of rights (section 2). I go on to explain how some adjudicative contexts employ a conception of rights that is resultant and indefeasible (section 3). However, many other contexts employ the contributory conception. First, moderate deontology treats rights as contributory and defeasible (section 4). Second, the existence of conflicts of rights presupposes the contributory conception in which rights are defeasible. Basic human rights are contributory rights that can conflict, though the correct resolution of those conflicts allows us to identify *fine print* rights that are verdictive and indefeasible (section 5). Third, constitutional rights are best understood as contributory rights. In particular, the conception of individual rights ingredient in Equal Protection and Substantive Due Process analysis requires the defeasible conception of rights (section 6). Moreover, when existing contributory rights are inadequate to resolve normative conflicts, we may be led to recognize *new* contributory rights, as illustrated in the constitutional recognition of rights to association, privacy, and same-sex marriage (section 7). Finally, the appeal to rights as a justification of adjudicative outcomes presupposes the contributory conception of rights, inasmuch as the resultant conception would render such appeals circular (section 8). In fact, we should view resultant rights as the proper weighing and outcome of potentially conflicting contributory rights and other morally relevant factors.

1. Preliminaries

First, my main focus here is on the *metanormative* question of what rights are, as distinct from the *normative* question of what rights we have and the *deliberative* question of how rights function in normative reasoning and debate. Nonetheless, I don't know how to make progress on the issue of what rights are without making assumptions, if only defeasibly, about what rights we have and how they function in normative reasoning and argument. While our assumptions about what rights we have and how they function in normative reasoning are revisable, our conception of what rights are should be broadly faithful to familiar and plausible views about their content and role.

Second, rights are potentially heterogenous inasmuch as rights can be conceived as claims, permissions, authorities, and immunities, and rights can be held by individuals and groups. Though the issues I want to raise here are quite general, applying to any of these kinds of rights, it will simplify an already complex discussion to focus on *individual* rights in the form of *claims against other*s that generate duties for others to act or refrain from acting in specified ways toward the right holder.[1]

Third, so understood, rights are *directed* claims—claims directed at other individuals or institutions that the right holder be treated in some ways and not in others. Rights can include *negative* demands for noninterference with a person's liberties and opportunities or *positive* demands for individuals or institutions to provide her with opportunities, resources, or services.

Finally, I am interested in the nature of rights in multiple normative contexts—moral, political, and legal. We can distinguish moral, political, and legal rights by the *source* of the right. Moral and political rights are rights that individuals have against others or the state antecedent to positive law, whereas legal rights are rights that individuals have only as the result of positive law. Though we can distinguish moral, political, and legal rights by their sources, we need to understand what their common structure is. This metanormative question can and should be distinguished from the normative question of what rights we have. But my discussion will sometimes draw on common assumptions about which moral and political rights we have and which existing legal rights are morally and politically defensible.

2. Resultant and Contributory Conceptions of Rights

Rights are important claims in moral, political, and legal reasoning and debate. In particular, individual rights are important moral factors that constrain the operation of other moral factors. Robert Nozick articulates this idea when he contrasts goals and constraints and understands rights as *side-constraints* on the pursuit and promotion of valuable goals.[2] In the

[1] Following Hohfeld, legal theorists sometimes analyze rights into four main kinds—privileges, claims, powers, and immunities. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1920). For useful discussion, see Michael Moore and Heidi Hurd, "The Hohfeldian Analysis of Rights" *The American Journal of Jurisprudence* 63 (2018): 295–354. My focus here is on claim-rights and the associated duties they impose on others.

[2] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 28–33.

absence of rights, promoting the good is a reason for action. However, rights constrain the permissible pursuit of good consequences, such that it is wrong to violate rights, even if that produces good consequences.[3] Similarly, Ronald Dworkin regards individual rights as *trumps* on appeals to majority preference and collective goals.[4] In the absence of rights, majority preference or collective good might be good reasons for action. But rights trump these other kinds of reasons, making it impermissible to violate rights for the sake of majority preference or collective goods.

But these claims about the importance and role of individual rights in relation to other moral factors are compatible with two conceptions of rights. In particular, we might conceive of rights as important contributory moral factors that have defeasible moral significance or as indefeasible moral factors that carry the day in moral argument and debate.

On the one hand, we might conceive of rights as *conclusions* of debates about the entitlements of individuals. The correct resolution of such a debate would settle how individuals may act and what they are owed from others. These verdicts would be all-things-considered assessments. As such, the resulting rights would be *final* and *indefeasible*. On this conception, rights are also *inviolable*. In *A Theory of Justice* John Rawls claims that rights and justice constrain and defeat claims of general utility and connects this claim about rights with inviolability.

> [W]e distinguish as a matter of principle between the claims of liberty and right on the one hand and the desirability of increasing aggregate social welfare on the other; . . . we give a certain priority, if not absolute weight, to the former. Each member of society is thought to have an inviolability founded on justice or, as some say, natural right, which even the welfare of everyone else cannot override. Justice denies that the loss of freedom for some is made right by the greater good shared by others. The reasoning which balances the gains and losses of different persons as if they were one person is excluded. Therefore in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests.[5]

[3] It's not clear to me whether Nozick thinks that rights *defeat pro tanto* reasons to promote the good or *disable* them.

[4] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), esp. ch. 7.

[5] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), pp. 27–8.

Here, Rawls ascribes inviolability, in the first instance, to persons. But if personhood is the ground of rights, it seems that the rights of persons should be inviolable as well.[6]

On the other hand, one might conceive of rights as important *inputs* into normative debates that often, but not invariably, determine the outcome of those debates. On this conception, rights are *pro tanto* contributory factors. One might view individual rights the way W.D. Ross thought of *prima facie*—or better, *pro tanto*—duties.[7] They are moral factors that make an invariant contribution to the moral valence of the situations in which they occur, giving parties in those situations *pro tanto* reasons for action. Absent interference from other morally relevant factors, contributory factors determine what one ought to do all-things-considered (or, as Ross said, "sans phrase"). But where a situation is morally complex, involving multiple moral factors, the force exerted by a given moral factor F1 might be overridden by other moral factors F2–F3. This shows that contributory moral factors generate *pro tanto* moral reasons that are *defeasible.*

Of course, some contributory moral factors create modest reasons for action that are easily overridden by other moral factors in a situation. For instance, beneficence is a morally relevant factor that gives me reason to do things that benefit others. But at least some reasons of beneficence create modest reasons for action that are easily defeated by considerations of rights, justice, or the cost to the agent. If we want to capture the idea that rights constrain or trump the pursuit of other contributory factors, the contributory conception cannot understand rights as just one minor contributory moral factor among many. Instead, the contributory conception of rights must understand them as *especially important* contributory factors that *typically control* the resolution of the practical situation in which they are present. On this contributory conception, rights are *presumptively decisive* moral factors about the important claims of individuals against other individuals and institutions that bear on the resolution of practical questions about people's entitlements.[8]

[6] Of course, one might try to ground rights in personhood without the assumption of inviolability.

[7] See W.D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930), esp. ch. 2. Ross discusses rights in the first appendix to ch. 2, but that discussion does not engage his distinction between *prima facie* duties and duties *sans phrase.*

[8] In "*Pro Tanto* Rights and the Duty to Save the Greater Number" (this volume) Benjamin Kiesewetter defends a conception of *pro tanto* rights that has much in common with my contributory conception. However, he imposes constraints on *pro tanto* rights that I do not accept for contributory rights. Moreover, he is a monist insofar as he thinks that rights are *pro tanto* claims, whereas I am a pluralist insofar as I recognize both contributory and resultant rights.

3. Adjudication and Resultant Rights

It is possible to view rights as the outcome of correctly adjudicating competing interests and claims. This perspective on rights requires the resultant conception. One illustration of this conception of rights is John Stuart Mill's conception of rights in Chapter V of *Utilitarianism*.[9] There, he develops a conception of justice and rights that is part of an indirect utilitarian conception of duty. In particular, Mill links duty and sanctions.

> For the truth is, that the idea of penal sanction, which is the essence of law, enters not only into the conception of injustice, but into that of any kind of wrong. We do not call anything wrong unless we mean to imply that a person ought to be punished in some way or other for doing it — if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency. [CW X 246]

Here, Mill defines wrongness and, by implication, duty, not directly in terms of the nature of the action or its consequences but indirectly in terms of appropriate responses to it. This commits him to claiming that one is under an obligation or duty to do something just in case failure to do it is wrong and that an action is wrong just in case some kind of external or internal sanction—legal punishment, social censure, or self-reproach—ought to be applied to its performance. Sanctions determine when conduct is wrong, which allows Mill to say that an act is one's duty just in case its omission would be appropriate to sanction. In this way, the sanction test distinguishes duty from expediency (*CW* X 246–48). Not all suboptimal or inexpedient acts are wrong, only those in which one ought to apply some sort of sanction (at least, self-reproach) to them.

Justice is a proper part of duty. Justice involves duties that are correlated with rights (*CW* X 246–48).

> Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as a matter of right. [CW X 247]

[9] John Stuart Mill, *Utilitarianism* in *The Collected Works of John Stuart Mill*, 33 vols., ed. J. Robson (Toronto: University of Toronto Press, 1965–91), vol. X.

An act is unjust just in case it is wrong and violates someone's rights (*CW* X 249–50). Someone has a right just in case she has a claim that society ought to protect by force of law or public opinion.

> When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it. If we desire to prove that anything does not belong to him by right, we think this is done as soon as it is admitted that society ought not to take measures for securing it to him, but should leave it to chance, or to his own exertions. [CW X 250]

In conceiving of rights as claims that society ought to protect and enforce, I assume that Mill uses <ought> in the verdictive or all-things-considered sense. If someone has a right to something, it would be wrong for society not to protect and enforce that claim.

Notice that these relationships among duty, justice, and rights do not yet introduce any utilitarian elements. But Mill does think that whether sanctions ought to be applied to an action—and hence whether it is wrong—and whether society ought to enforce an individual's claim—and hence whether she has a right—both depend upon the utility or expediency of doing so (*CW* X 250). He does not say precisely what standard of expediency he has in mind. To fix ideas, let us assume that something counts as wrong just in case it is optimal to sanction that conduct in some way and that someone has a right to something just in case it is optimal for the state or society to enforce that claim.

Whether Mill's attempt to provide a utilitarian foundation for rights is successful is an interesting and complex issue, beyond the scope of this essay.[10] For present purposes, I am interested in the part of his analysis of rights that is not specifically utilitarian—his claim that rights are claims of individuals to liberties, opportunities, or resources that society ought to enforce. This link between rights and enforceability is an ecumenical claim that might appeal to non-utilitarians, as well as utilitarians. It's a substantive,

[10] I discuss the adequacy of Mill's various resources for providing a utilitarian foundation for rights in David O. Brink, *Mill's Progressive Principles* (Oxford: Clarendon Press, 2013), esp. ch. 9 and "Mill on Justice and Rights" in *The Blackwell Companion to John Stuart Mill*, ed. C. Macleod and D. Miller (Oxford: Blackwell, 2016).

rather than trivial, claim, because one might want to recognize rights that ought not to be enforced in some circumstances. But it's nonetheless a common claim about rights. This link between rights and enforceability reflects a resultant conception of rights. Rights are just those claims that society ought to enforce all-things-considered.

The way in which an adjudicative perspective presupposes the resultant conception of rights is also reflected in Dworkin's conception of the role of judges and other legal interpreters in ascertaining the rights of litigants, especially in hard cases.[11] Hard cases are potentially controversial cases in which litigants advance competing claims about who is entitled to what sort of treatment from whom. Dworkin's *rights thesis* is that in most cases, even in hard cases, one litigant is entitled to a decision in her favor as a matter of pre-existing right. The rights thesis tells us to identify the rights of litigants with the best or most justified resolution of their competing claims. Thus, the rights thesis also links rights and enforceability. In this way, the rights thesis assumes the resultant conception of rights, treating rights as settled by the conclusions of adjudication about which moral claims the legal system should enforce.

Dworkin is writing about legal rights and the theory of adjudication. But he is not a legal positivist. He conceives of legal rights as claims that society ought to enforce as a matter of political morality. But, without wading into contested issues in general jurisprudence about the relation between law and morality, we can easily enough adapt Dworkin's rights thesis from a legal perspective to a moral and political perspective. For we can think of moral and political disputes arising from the conflict of contributory moral and political factors, and we can identify the rights or entitlements of parties to those disputes as those that are part of the best resolution of those conflicts. On this view, rights are consequential on the correct balancing and adjudication of competing moral and political claims. These rights will be verdictive. Whether they are also enforceable depends on whether every all-things-considered moral or political duty is enforceable.

The resultant conception of rights may be reflected in other claims about rights, as well. The resultant conception fits Joseph Raz's claims about rights, in particular, his assumption that rights are duties that are grounded in the interests of individuals and defeat contrary moral claims and his conception of rights as claims that have pre-emptive force in normative reasoning

[11] Dworkin, *Taking Rights Seriously*, ch. 4, esp. pp. 81, 87.

and debate.[12] If rights pre-empt all other normative reasons, then they are resultant.[13]

John Oberdiek adopts something very much like Dworkin's rights thesis, offering a striking statement of the resultant conception of rights.

> The central role of rights in normative argument is *conclusory*; people argue *toward* rights, not *from* them.... The way that one proceeds in moral argument, therefore, is to marshal normative reasons of various kinds that purportedly establish that some right exists. One does not start with rights.[14]

Here, Oberdiek not only accepts the resultant conception but also rejects the contributory conception.

4. Moderate Deontology and Contributory Rights

Resultant rights are final and indefeasible. Contributory rights are not. Contributory rights are part of the toolkit of moderate deontology. To understand moderate deontology, we need to understand the contrast between agent-neutral and agent-relative reasons. An *agent-neutral* reason is one that can be specified without any essential reference to the agent who has it, and, as a result, all else being equal, every agent has the same agent-neutral reasons. By contrast, *agent-relative* reasons do make essential reference to the agent who has them, as a result of which different agents have different agent-relative reasons. A reason to promote happiness generally or minimize harm is an agent-neutral reason, whereas a reason to promote my own happiness or minimize my own pain is an agent-relative reason. It is common to recognize agent-relative *constraints* on the agent doing harm to others, even if this is necessary to minimize total harm, and to recognize agent-relative *options* to perform suboptimal actions, out of special concern for the agent's own interests or the interests of others who stand to him in special relationships, such as his loved ones and friends.

[12] See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), ch. 7, esp. pp. 181–6.

[13] It's less clear if Raz is committed to a resultant conception of rights if rights pre-empt some, but not all, other normative reasons.

[14] John Oberdiek, *Imposing Risk: A Normative Framework* (Oxford: Clarendon Press, 2017), p. 115.

A sensible agent-relative morality employs constraints and options that are *moderate*, rather than absolute.[15] Constraints are absolute if it is always wrong to treat others in certain ways (e.g. violating their rights), no matter how much good could be achieved or harm avoided by doing so. By contrast, constraints are moderate if there is some sufficient amount of good to be produced or harm to be avoided that would make it permissible to violate the constraint. A moderate constraint could explain why it would be wrong for a surgeon to kill one patient to save two without implying that one innocent could never be killed to save very large numbers of innocents. Likewise, options are absolute if they permit the agent to prefer her own good or that of a loved one to the good of others, no matter how great the cost to others. By contrast, options are moderate if there is some amount of good that could be achieved, or harm prevented, that would defeat the agent-relative option. A moderate option could explain why I am permitted not to sacrifice significant goods in my life for the sake of marginally greater goods to strangers without implying that I could refuse to save the lives of many when I could do so at little or no cost to myself.

Some understand moderate agent-relative morality in terms of thresholds of opportunity costs, below which constraints and options must be respected and above which they should not. But thresholds are normatively arbitrary. Besides the difficulty of specifying a Goldilocks threshold, thresholds perversely attach enormous significance to small differences just below and above the threshold and no significance to large differences below or above the threshold. Though there could be some precise point at which constraints and options give way to the increasing agent-neutral opportunity costs of respecting them, there is no reason to expect that there is some precise point on the consequentialist scale where constraints and options lapse, any more than there must be some precise point at which accumulating grains of sand constitute a heap. It could be indeterminate at what point moderate constraints and options lapse or are overridden.[16] *Moderate* deontology does not imply *threshold* deontology.

[15] For discussions of moderate agent-relative morality, see, e.g., Thomas Nagel, "War and Massacre" reprinted in Thomas Nagel, *Mortal Questions* (New York: Cambridge University Press, 1979); Michael Moore, *Placing Blame* (Oxford: Clarendon Press, 1997), pp. 721–5; Shelly Kagan, *Normative Ethics* (Boulder: Ridgeview Press, 1998), p. 79; and Larry Alexander, "Deontology at the Threshold" *San Diego Law Review* 37 (2000): 893–912.

[16] For present purposes, we can remain agnostic about whether moderate deontology can be given a utilitarian foundation, as Mill thought.

It is common to treat rights as agent-relative constraints on the pursuit of the good. But a moderate deontology treats constraints as presumptively decisive *pro tanto* moral factors that are nonetheless defeasible when the moral opportunity costs of respecting them are sufficiently high.[17] This requires the contributory conception of rights, which understands them as potentially defeasible, rather than the resultant conception of rights, which treats them as final and indefeasible.[18] We could identify rights only with the outcomes of moderate deontology, but this would be a revisionary modification of the common view that rights are moderate constraints.

5. Conflicts Among Contributory Rights

If we recognize conflicts of rights, we are treating them as contributory, rather than resultant, rights. It's common to recognize the possibility of conflicts of rights. For instance, rights to religious liberty or freedom of association can conflict with anti-discrimination norms and the rights to equality that those norms protect. A right to a fair trial might conflict with a right to privacy, when a defendant's right to the participation of material witnesses requires them to disclose personal information about themselves. Of course, when rights conflict, they can't all be respected. Perhaps some conflicts of rights have no non-arbitrary resolution. But let's assume, if only for simplicity, that in most cases, even hard cases that are controversial, there is a unique non-arbitrary resolution of the conflict in which one right should prevail in those circumstances over the other right. Both rights are important *pro tanto* contributory factors, but one factor will be outweighed and defeated by the other factor. Of course, after the fact, we can represent the prevailing factor as the resultant right. But the prevailed factor cannot be a resultant right. And we shouldn't assume that the prevailing factor in these circumstances prevails in all other circumstances. So it's appropriate to treat

[17] Nozick mentions, without endorsing, this moderate interpretation of rights as side-constraints. See Nozick, *Anarchy, State, and Utopia*, p. 30n.

[18] Judith Thomson distinguishes between infringements of rights that fail to respect those rights and violations of those rights that impermissibly infringe those rights. She then characterizes absolutism about rights as the thesis that all infringements of rights are violations of them. She rejects absolutism, concluding that rights can be infringed without being violated. See Judith Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), p. 122. My view of contributory rights is like her view in some respects, though I would eschew her distinction between infringements and violations and simply say that contributory rights may sometimes be permissibly violated. Absolutism is plausible, I think, but only about resultant rights.

the rights that pose the conflict requiring resolution as both contributory and potentially defeasible.

A resultant conception of rights treats them as absolute and compossible, whereas a contributory conception does not. If freedom of association claims are limited by anti-discrimination claims, then there can be no resultant right to freedom of association per se. A resultant right to freedom of association would have to be qualified. Indeed, it would have to be qualified by all the conditions in which freedom of association would be limited. The same is true about a right to equal treatment that prohibited unjustified discrimination and, indeed, about all rights. But then our actual rights, on the resultant conception, are highly circumscribed in ways that most of us may not understand. The resultant conception avoids conflicts of rights by making the content of rights potentially *esoteric*. By contrast, the contributory conception can recognize familiar claims about the content of rights but will treat rights as potentially conflicting. Insofar as we recognize conflicts of rights, this is evidence that we are thinking of them in a contributory fashion.

It is sometimes true that when rights conflict and we respect the right that is in the circumstances weightier, permissibly infringing the less weighty right, we leave a moral *residue* or *remainder* that may call for some form of moral *repair*. This may not be true in all cases of rights that are permissibly infringed, but it is true in some such cases. For instance, justifications, such as self-defense or necessity, involve circumstances where rights may be permissibly infringed.[19] In some cases, the permissible violation of a right leaves a moral residue that calls for repair. One such case is a necessity or lesser evils justification for infringing property rights.[20] Suppose that we are hunting in a remote area and you accidentally incur a self-inflicted gunshot wound and that I reasonably believe that the only way to get you timely medical attention is to call Emergency Medical Services using the phone in the only cabin within miles. The cabin is unoccupied. My trespass, though otherwise unlawful, is justified in order to avoid the greater evil of loss of life. Indeed, we might represent the situation as a conflict between property rights and the right to life. Though I permissibly infringe the cabin owner's property rights, you and I owe an explanation and apology and

[19] For discussion, see David O. Brink, *Fair Opportunity and Responsibility* (Oxford: Clarendon Press, 2021), ch. 8.

[20] Joel Feinberg discusses a similar case in "Voluntary Euthanasia and the Inalienable Right to Life" *Philosophy & Public Affairs* 7 (1978): 93–123.

compensation, if we damaged her property. It is a virtue of the contributory conception that we can explain why there is normative residue and a duty of repair.[21] The residue and duty of repair are *consequential* on the breach of the contributory right. A right is breached on the contributory conception but not on the resultant conception that recognizes the way in which the content of a property right is limited by necessity.[22]

Conflicts of rights and their resolution bring out a difference in the *content* of contributory and resultant rights. The content of contributory rights that produce conflicts of rights are often easily summarized—for instance, freedom of speech, religious conviction and practice, association, privacy, due process, equal treatment, just compensation, and fair opportunity. Because these rights are familiar rights on lists of basic rights and are easily stated in general terms, we might call them *large print* rights. But it is clear that large print rights can conflict and won't always prevail. This is why we must think of the rights that generate conflicts of rights as contributory rights that are potentially defeasible. We can adopt a resultant conception of rights that identifies rights with the correct resolution of a conflict among contributory rights. But, strictly speaking, the content of the resultant right will be distinct from the content of the contributory rights. This is because the contributory right that wins some conflicts is likely to lose other conflicts. At least, this will be true as long as no contributory right wins all contests with other rights. But then the right that wins a particular conflict must be a qualified or *fine print* right. The larger the number of conflicts that a given contributory right loses to other rights, the more qualifications and fine print must be built into the resultant right. Plausible resultant rights will be esoteric and contain too much fine print to be easily summarized or to be of much use in political debate or education. For this reason, political debate and education will rely on contributory rights that are understood to be important and presumptively decisive moral factors that are nonetheless potentially defeasible.

Here, it's worth noting that resultancy will be a *matter of degree* and be *relative to context*. For a given claim to win one normative contest, it may

[21] This virtue of the contributory conception of rights is a special case of the virtue of the Rossian analysis of moral conflict. See David O. Brink, "Moral Conflict and Its Structure" *Philosophical Review* 103 (1994): 215–47.

[22] The inability to offer this explanation of residue and repair seems to be an unwelcome feature of the resultant conception's denial of conflicts of rights. For discussion, within a resultant conception, see Russ Shafer-Landau, "Specifying Absolute Rights" *Arizona Law Review* 37 (1995): 209–26. Whereas the contributory explanation of residue is straightforward, I don't see a satisfactory resultant explanation of residue.

have to be qualified, introducing some fine print. This qualified right might be a resultant right *relative to that contest*. But that same right might lose in other contests, giving way to other moral considerations, either other rights or sufficiently great moral opportunity costs. But then the right that was resultant relative to the first contest will not be fully resultant, because, unless further modified, with additional fine print, it won't win the second contest. The specification of a right is *more fully* resultant the more normative contests it wins. But a right will only be *fully* resultant or resultant *simpliciter* if it wins all contests. Fully resultant rights are likely to contain a great many qualifications and much fine print and, as a result, be esoteric.

Contributory rights can be understood to generate *hedged* generalizations about resultant rights. Other things being equal, contributory rights are resultant rights.[23] For instance, other things being equal, freedom of speech should be honored. But other things are not equal if the moral opportunity costs of respecting those contributory rights are sufficiently great or if those contributory rights compete with other rights that, in the circumstances, are morally more important. Indeed, when one contributory right conflicts with another one that is in the circumstances weightier, that entails that the moral opportunity costs of respecting the defeated contributory right are too great. If so, the same defeasibility that applies to rights on a moderate deontology applies to rights in cases of conflicts of rights. We express this defeasibility in the hedged relation between contributory and resultant rights. Contributory rights can be large print rights but only if they are hedged. Indeed, if the qualifications necessary for specifying all the conditions under which contributory rights defeat other claims in normative debate are complex enough and defy codification, then even fine print rights will need to be hedged.[24]

[23] Hedged generalizations are common outside of ethics. Water boils at 100 degrees Celsius, but only other things being equal. This is true only of samples of water that are pure, that contain normal levels of dissolved air, and at normal levels of atmospheric pressure. For instance, water will boil at a lower temperature in Denver than in San Diego. If hedged generalizations are not going to be vacuous, we need to be able to say something independently plausible about which conditions are interfering and defeating and why. These claims can't just be post hoc ways of preserving the truth of the hedged generalization. For helpful discussion, see Paul Pietroski and Georges Rey, "When Other Things Aren't Equal: Saving Ceteris Paribus Laws from Vacuity" *British Journal for the Philosophy of Science* 46 (1995): 81–110.

[24] These issues about whether rights are large print or fine print and whether they must be hedged are connected to debates between generalism and particularism in ethics. My own view, for which I cannot argue here, is a form of generalism that combines contributory, fine print, and hedged generalizations. Normative principles can be thought of as statements of *pro tanto* or contributory normative factors (e.g. good-making or right-making features) that make an *invariant contribution* to the overall normative valence of the act or situation in which they occur. Contributory principles have *enabling conditions* that must be met if that factor is to make its

6. Constitutional Rights as Contributory Rights

Familiar conceptions of constitutional rights must treat them as contributory rights. I will focus on the case of constitutional rights in the United States, the case with which I am most familiar. The United States Constitution recognizes individual rights that constrain legislative action primarily in the Bill of Rights (the first nine amendments) and in the Due Process and Equal Protection clauses of the Fourteenth Amendment. These constitutional rights should be understood as contributory rights that establish a strong *pro tanto* but defeasible reason to treat legislation infringing those rights as constitutionally impermissible. Explaining this verdict requires providing context for these constitutional claims.

The United States is a constitutionally limited democracy in which constitutionally protected individual rights constrain legislative interference with those rights. It is the institutional role of the judiciary to interpret and enforce these constitutional rights by exercising judicial review and declaring invalid legislation that impermissibly infringes those rights. The Bill of Rights recognizes various individual rights affording protection against *federal* interference. On their own, these rights provide no protection against *state and local* interference. So, for instance, the First Amendment itself provides no protection against interference with expressive liberties by state or local authorities. What makes the First Amendment applicable to state and local government is the doctrine of *Selective Incorporation*, which incorporates fundamental rights ingredient in the idea of the rule of law in the Bill of Rights into the Due Process guarantee of the Fourteenth Amendment. The Bill of Rights recognizes individual rights against federal action; the Due Process clause of the Fourteenth Amendment recognizes individual rights against state and local government. Selective Incorporation refers to the gradual, piecemeal, and selective process by which the most fundamental interests and liberties recognized

invariant contribution (e.g. only free and voluntary promises are *pro tanto* binding). In principle, enabling conditions could be folded into the specification of the normative principle, resulting in a *fine print* principle. If enabling conditions cannot be finitely or conveniently specified, then even contributory principles must be formulated in a way that is *hedged*, containing an "other things being equal" clause. Many normative situations involve multiple normative factors, and an overall normative verdict depends on which factors are most important or prevail. Because normative principles state only contributory factors, their contribution to the normative valence of an act or situation is subject to *interference* and possible *defeat* from other normative factors in the situation. If potential interference and defeat from other factors cannot be finitely or conveniently specified, then normative principles, understood as claims about overall normative valence, must always be *hedged*, containing an "other things being equal" clause.

in the Bill of Rights have been treated as part of the Due Process guarantee in the Fourteenth Amendment. Selective Incorporation is part of so-called *Substantive Due Process*.

In effect, Substantive Due Process recognizes individual rights to fundamental interests, liberties, and opportunities, treating these rights as imposing constraints on democratic legislation that require special judicial scrutiny. This claim about the concept of Substantive Due Process has been reasonably constant. But the *content* of Substantive Due Process—in particular, which rights are recognized as fundamental—has evolved over time. The Lochner era, epitomized by *Lochner v. New York* (1905), accorded heightened protection to economic interests and freedom of contract.[25] The New Deal conceived of economic interests and liberties as conditioned by considerations of equality and fair opportunity and so treated liberty of contract as non-fundamental.[26] For the most part, modern Substantive Due Process accepts the New Deal reinterpretation of economic rights but privileges selected personal and political liberties. It embraces Selective Incorporation of fundamental provisions enumerated in the Bill of Rights, including rights to freedom of expression and religion, rights against unreasonable searches and seizures, rights to due process and fair trials, rights to just compensation for property appropriated by the state, and rights against cruel and unusual punishment.[27]

Due Process rights require that legislation affecting them survive a heightened standard of review. The distinction between different standards of review was implicit in *Lochner*. Whereas a Court majority rejected New York legislative restrictions on the working hours of bakery employees, employing a very demanding standard of review, the dissent voted to uphold the labor regulations, employing a more deferential standard of review. But the differentiation between these two standards of review was only explicitly formulated later in Equal Protection, rather than Due Process, analysis.[28]

[25] *Lochner v. New York*, 198 U.S. 45 (1905).

[26] New Deal Substantive Due Process jurisprudence is reflected in a series of cases, including *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); and *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

[27] See, e.g., *Palko v. Connecticut*, 302 U.S. 319 (1937).

[28] In *United States v. Carolene Products Company*, 304 U.S. 144 (1938) the Court acknowledged a general presumption in favor of the constitutionality of democratically enacted legislation, but acknowledged three situations that would call for more careful scrutiny of legislation: (1) when the legislation seems on its face to violate specific guarantees in the Bill of Rights or the Fourteenth Amendment, (2) when legislation compromises democratic processes, and (3) when legislation discriminates against "discrete and insular minorities."

For instance, in *Korematsu v. U.S.* (1944),[29] which was an equal protection case concerning the internment of Japanese Americans during WWII, the Court determined that racial classifications were "suspect" and so triggered "rigid scrutiny" of legislation, requiring a showing of "pressing public necessity." Regrettably, a Court majority determined that the internment program met this stricter scrutiny.

Since *Korematsu*, the Court has evolved a basically two-tier system of review, including more and less deferential standards of review. The more deferential standard of review is known as *rational basis review*.

Rational Basis Review: Legislation is constitutionally permissible if it pursues a *legitimate* governmental interest in a *reasonable* manner.

A legitimate governmental interest is one that is not constitutionally proscribed, and a reasonable manner of securing or promoting that interest is one that might plausibly be thought to advance that objective. Though it is possible for legislation to violate rational basis of review, this standard of review sets a comparatively low threshold of scrutiny. This comparatively deferential standard of review can be contrasted with *strict scrutiny*.

Strict Scrutiny: Legislation is constitutionally permissible if and only if it pursues a *compelling* state interest in the *least restrictive* manner possible.

To survive strict scrutiny, legislation must be pursuant to an extremely important, and not merely legitimate, interest. Moreover, it must do so in the least restrictive manner possible, that is, in a way that does least violence to the individual interest or liberty in question, compatibly with securing the compelling interest. Though legislation does not automatically fail strict scrutiny, as the *Korematsu* case demonstrates, it does set a much higher threshold for legislation to pass. Strict scrutiny is a comparatively demanding and less deferential standard of review.[30]

[29] *Korematsu v. United States*, 323 U.S. 214 (1944).

[30] Gerald Gunther famously described strict scrutiny as "strict in theory, fatal in fact." See Gerald Gunther, "Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for a New Equal Protection" *Harvard Law Review* 86 (1972): 1–48. However, this assessment is not accurate. An empirical study of federal cases found that a full 30 per cent of cases decided by appeal to strict scrutiny satisfied that standard. See Adam Winkler, "Fatal In Theory and Strict In Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts" *Vanderbilt Law Review* 59 (2006): 793–871.

With some exceptions, this two-tier system of review now frames the interpretation of the Bill of Rights and both Due Process and Equal Protection analysis.[31] That means that the recognition of constitutional rights is committed to this pattern of analysis. In particular, constitutional rights are individual claims to fundamental interests, liberties, and opportunities that constrain democratic action, at both federal and state levels, by requiring legislation affecting these rights to survive strict scrutiny.

This conception of constitutional rights fits the contributory model. Constitutional rights are not absolute and don't settle the question of the permissibility of legislation infringing those rights. Rather, constitutional rights create a defeasible presumption that legislation infringing those rights is impermissible, but that presumption is rebuttable if the legislation passes strict scrutiny—that is, if it pursues a compelling state interest in the least restrictive manner. Though strict scrutiny is a legal doctrine that emerged gradually from diverse contingencies and pressures of constitutional history, it is a remarkably good fit with a conception of constitutional rights as important but defeasible constraints on the pursuit of collective goods. Like moderate deontology and a conflict of rights, the constitutional perspective presupposes the contributory conception of rights as presumptively decisive but defeasible inputs into normative debate and the adjudication of claims.

Though I have focused on constitutional rights as they have developed in the United States, I believe that this analysis of constitutional rights is reasonably robust within a comparative perspective.[32]

7. New Contributory Rights

The rights that often figure in moral, political, and legal debate are typically contributory rights—familiar large print rights that can conflict with each

[31] The Court's treatment of commercial speech, under First Amendment jurisprudence, and gender classifications, under Equal Protection jurisprudence, are exceptions to this rule, insofar as the Court subjects restrictions on commercial speech and regulations distributing social benefits and burdens by gender to an *intermediate* standard of review that conditions the constitutionality of legislation infringing protected interests on the underlying governmental interest and the fit between legislative ends and means both being *substantial*.

[32] For instance, the rights recognized in the Canadian Charter of Rights and Freedoms (1982) are treated as defeasible claims under the "reasonable limits" test in §1, as analyzed under the *Oakes* test developed in *R v. Oakes* (1986), 1 SCR 103. Similarly, private law rights in Japan have been recognized to be defeasible since the important case of *Japan v. Shimizu*, Imp. Ct., 3 March 1919, 25 Minroku 356. The case is translated and analyzed in C.D.A. Evans and J. Mark Ramseyer, "Japan v. Shimizu: Negligence and Abuse of Rights in Early 20th Century Japan" *Rechtsprechung, Case Law* 51 (2021): 313–28.

other and that provide presumptively decisive but nonetheless defeasible factors in normative debate. In cases of conflicts of rights, not every right can be honored, revealing the defeasible nature of contributory rights. But in some cases it may be true that *no* previously recognized right fully illuminates and resolves the conflict. New conflicts and further reflection on previous conflicts may lead us to recognize *new* rights, not contained in our existing juridical toolkit. In this way, new rights can emerge from recognition of the limitations of previously recognized rights.

The evolution of constitutional rights provides some examples. Modern Substantive Due Process came to see the need to recognize fundamental non-enumerated rights, such as rights of association and privacy. Though the First Amendment defends a right to peaceful political assembly, it does not explicitly mention a general right of personal association. Nonetheless, in a series of cases the Supreme Court has recognized a right of association as *implicit* in First Amendment rights to expressive liberties and political assembly. Initially, association was limited to official public organizations with a political mission, such as the NAACP, but eventually the Court came to recognize associational interests and rights in private associations, such as the Jaycees and the Boy Scouts.[33] Similarly, the Court came to see the need to recognize a right of *privacy* that was implied by individual liberties against governmental interference explicitly recognized in the Bill of Rights. Privacy was interpreted as a kind of personal autonomy and led to recognition of more particular rights, including a circumscribed right to get an abortion free from governmental interference, a right to same-sex consensual intimacy, and a right to same-sex marriage.[34]

[33] The evolution, sometimes uneven, of freedom of association can be seen in, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Ass'n v. New York City*, 487 U.S. 1 (1988); *Hurley v. Irish-American Gay Group*, 514 U.S. 334 (1995); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *Masterpiece Cakeshop, Ltd, Et Al. v. Colorado Civil Rights Commission, Et Al.*, 584 U.S. ___ (2018).

[34] The evolution of a constitutional right to privacy can be seen in, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Obergefell v. Hodges*, 576 U.S. 644 (2015). Of course, the recent decision in *Dobbs v. Jackson Women's Health Organization*, 19–1392, 597 U.S. __ (2022) overturns both Roe and Casey, abandoning fifty years of settled interpretation of constitutional privacy rights in cases involving abortion. This is not the place to discuss the Dobbs ruling, which I regard as unsound, or its larger implications for constitutional jurisprudence.

But these new constitutional rights are themselves contributory rights. This follows from the fact that like all Due Process and Equal Protection rights they are presumptively decisive but defeasible when legislation restricting them satisfies strict scrutiny. So, for example, a strong case can be made that the associational rights of members of quasi-public associations can and should be restricted when those associations violate anti-discrimination norms and so infringe the rights to equal opportunity of those excluded from the quasi-public association. For instance, the Court was willing to uphold anti-discrimination laws that limit freedom of association by recognizing the legitimacy of anti-discrimination laws in *Heart of Atlanta Motel, Inc. v. United States* (1964). The Heart of Atlanta Motel refused to rent rooms to Black people in violation of Title II of the Civil Rights Act of 1964, which prohibited discrimination "on the basis of race, color, religion, or national origin" in public accommodation pursuant to Congressional authority to regulate interstate commerce. The Court held that the motel owner's rights of freedom of association were limited by anti-discrimination norms and the associated rights of Black Americans.

In this way, recognition of the inadequacy of existing conceptions of contributory rights can lead to the recognition of new rights, which themselves should be understood as contributory rights. When these newly recognized rights help illuminate and resolve normative conflicts, they are part of juridical progress, helping us better map the landscape of contributory rights.

8. The Explanatory Role of Contributory Rights

As we have seen, contributory rights serve as important presumptively decisive but potentially defeasible inputs to normative debate about people's entitlements, whereas resultant rights represent the correct resolution of those debates and, hence, an indefeasible statement of people's entitlements. Because resultant rights figure as *conclusions* of normative debate, it must be contributory rights that play the familiar dialectical role of *premises* in these debates.

We often appeal to people's rights as a reason or justification for permitting them to do something, for protecting their liberties or opportunities, or for requiring others to treat them in particular ways. In other words, we appeal to individual rights in support of conclusions about people's entitlements. In these contexts, we must be understanding rights as contributory,

rather than resultant rights. We can't appeal to resultant rights as a reason for a conclusion about people's entitlements, because that is just another way of stating the conclusion, not an independent premise in an argument for this conclusion. We couldn't expect interlocutors looking for a defense of an assignment of entitlements to accept an appeal to resultant rights as evidence for this verdict. But contributory rights can play this dialectical role. To appeal to contributory rights in support of claims about resultant rights is not circular reasoning, because contributory rights are potentially defeasible and don't entail resultant rights. Moreover, since contributory rights will be large print rights, they will often be familiar and common ground among interlocutors.

These characteristics of contributory rights lend themselves to their dialectical role in normative debate. Their defeasibility gives them enough separation from resultant rights to avoid circularity in the justification of people's entitlements. Though defeasible, contributory rights are positively relevant to the determination of resultant rights. After all, the resultant rights in a situation are just those contributory rights that have not been defeated by other contributory rights or the opportunity costs of respecting them. Because contributory rights are important presumptively decisive moral factors, they provide good, but defeasible, evidence for the assignment of resultant rights. Appeal to contributory rights should carry the day in normative debate unless it can be shown that their moral opportunity costs are too great or that they conflict with even weightier rights.

9. Concluding Remarks

Rights are important factors in normative debate. On familiar views, rights are side-constraints on the pursuit of the good and trumps on appeal to majority preference or collective good. But these familiar claims paper over the distinction between contributory and resultant rights. That distinction is crucial, but often overlooked or misunderstood. Both kinds of rights are legitimate and, indeed, important.

Resultant rights are indefeasible. They are what we aim at in normative debate and various kinds of adjudicative contexts. Because resultant rights are the outcome of balancing various kinds of conflicting normative factors, resultant rights will typically be highly qualified factors that can only be fully specified with a lot of fine print. For example, the full specification of a resultant right to freedom of speech will have to state all the conditions

under which free speech can be permissibly restricted. This might include restrictions on incendiary speech that presents a clear and present danger; restrictions on low-value speech (e.g. libel and fighting words); time, manner, and place restrictions on speech; restrictions on speech to protect captive audiences; restrictions on speech to prevent workplace harassment; and restrictions on hate speech. This is only some of the fine print that might be necessary to specify the contours of a resultant right of free speech. Indeed, the exact content of a resultant right to free speech may be very hard to state and is potentially esoteric.

However, many familiar claims about rights and their dialectical significance presuppose that rights are contributory and potentially defeasible, rather than resultant and indefeasible. First, rights are part of moderate agent-relative morality. But moderate deontology implies that rights are defeasible when the moral opportunity costs of respecting them are great enough. Second, the possibility of conflicts among large print rights also implies that even if rights are normally decisive, they are nonetheless defeasible moral factors. Indefeasible rights will have to be fine print and won't play the same role as defeasible rights in normative reasoning and debate. Third, constitutional rights of the sort involved in the Bill of Rights and Due Process and Equal Protection analysis demand strict scrutiny of legislation infringing these rights. Though strict scrutiny establishes a presumption of protection, that presumption can be rebutted if the state has a compelling interest that it pursues in the least restrictive manner. This makes constitutional rights contributory rights—important and presumptively decisive constraints that are nonetheless defeasible. Fourth, only contributory rights can provide a non-circular justification for conclusions about people's enforceable entitlements. Contributory rights provide independent but defeasible evidence for verdicts about those entitlements.

Contributory rights can be large print, and they are potentially defeasible. Of course, the fine print resultant right could figure as an input into moral and political debate. If so, it could function as a contributory right and would not be defeated. But contributory rights are not in general indefeasible. As we have seen, many presumptively decisive contributory factors are defeasible, and most large print contributory factors are defeasible. The fine print necessary for most resultant rights is usually identified only as the result of moral, political, and legal debate and adjudication. So although a fine print factor could in principle be an input to debate and adjudication, and would then be indefeasible, most contributory rights are large print and potentially defeasible. This means that even if fine print contributory rights

could also be resultant rights, the content of contributory rights and resultant rights will generally diverge. It also means that there will be many more contributory rights than resultant rights, because many contributory rights are not only defeasible but will be defeated in the course of normative debate and adjudication.

On the one hand, attention to these familiar claims about rights and their significance presupposes the potentially defeasible character of rights. This testifies to the importance and centrality of the contributory conception of rights. On the other hand, both conceptions of rights have legitimate and, indeed, complementary functions. A determination of resultant rights is the ultimate aim of much normative debate in moral, political, and legal contexts. But it's the interaction and proper weighting of contributory rights and other morally relevant factors that produce this determination. We make best sense of the interpretation of rights as side-constraints or trumps by understanding them as contributory rights that state important *pro tanto* and presumptively decisive moral factors that are nonetheless defeasible. Only by recognizing and weighting these contributory rights can we arrive at a proper appreciation of our resultant rights.

The result of this analysis is a kind of pluralism about what rights are that recognizes both contributory and resultant rights. Failure to distinguish these two kinds of rights can produce confusion. For instance, it is problematic to claim that rights are absolute or inviolable but also to recognize conflicts of rights and rights that may be overridden. This would either be inconsistent or, perhaps more charitably, involve a tacit switch between resultant and contributory conceptions of rights.

To be clear, I am not arguing that there is something incoherent about rights monism or that one couldn't be a consistent resultant monist. One can maintain resultant monism if one is prepared to deny enough common and familiar discourse about rights as mistaken or misleading. A resultant monist must deny that moderate deontological constraints are rights, that rights can conflict, that infringements of constitutional rights are permissible if they satisfy strict scrutiny, and that large print rights play an explanatory role in determining people's entitlements. This requires a sort of skepticism or error theory about contributory rights. They are not genuine rights, but only *sources* of rights.[35] But this is unnecessarily revisionary. We can respect and explain ordinary and theoretical claims about rights and their role in

[35] Insofar as resultant monism is skeptical about ordinary claims about rights, treating contributory rights as mere sources of rights, it is like rule-skepticism about the law that treats

normative argument by accepting pluralism and recognizing both contributory and resultant rights. On this view, contributory rights turn out to be explanatorily primary insofar as resultant rights are explained by the interaction of contributory rights and other *pro tanto* moral factors. Contributory rights can be explanatorily primary in this way, even if normative analysis is only complete when it establishes resultant rights.[36]

constitutional provisions and statutes, not as laws, but as sources of law that is ultimately determined by the final judgments of courts. See John Chipman Gray, *The Nature and Sources of Law*, 2d ed. (New York: Macmillan, 1921). For discussion, see H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), ch. 7 and David O. Brink, "Legal Interpretation, Objectivity, and Morality" in *Objectivity in Law and Morals*, ed. B. Leiter (New York: Cambridge University Press, 2001).

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