

Spongy and Rigid Side Constraints
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Note for Philosophy 13
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Let's suppose we believe in human rights, and to keep matters simple, let's suppose that the human rights we believe in are negative rights not to be harmed by others in certain ways (breach of promise, fraud, theft, destruction of property, violence against an innocent nonthreatening person, extortion, and so on). Corresponding to each of these rights are duties that others have toward the right-holder, duties not to harm in certain ways.

Rights might be interpreted as goals to be promoted, side constraints on eligible candidates for action, or some mixture of the two. Let's suppose we interpret rights as side constraints.

On the side constraint view, the moral rights of other people are constraints that limit what it is morally acceptable for you to do. When deciding what to do, subtract from the set of possible actions you might choose, all of the possible actions that would violate anybody's moral right. Those actions you must not do. You may select any of the remaining non-rights-violating possible actions available to you.

The issue arises, is it always possible in any situation one might face to choose some action that would not violate anyone's moral rights? For example, it might be the case that either you break your promise to return right now to its rightful owner Smith the loaded gun you borrowed from him or you become an accessory to a murder, given that if you give Smith the loaded gun right now he will certainly use it to murder Jones. In this situation one must either violate Smith's moral right or Jones's moral right, one might think. But perhaps it is wrong to make a promise without an escape clause for this sort of situation, so if you never do wrong, you never face a situation in which you must violate someone's right whatever you do. Still, someone might wonder how it can be guaranteed, that one will never confront a situation through no fault of one's own in which whatever one does, one will violate someone's rights. At any rate there is an issue here: Are rights properly conceived necessarily co-possible (all can be fulfilled)?

A further issue now arises: Are moral rights construed as side constraints absolutely binding or exceptionless? A moral right is exceptionless if there are no circumstances in which it could be morally acceptable to violate it. A moral right that binds without exception holds unconditionally: there is no condition that must be satisfied if the right is to hold. Elizabeth Anscombe in her essay "War and Murder" does not appear to regard moral rights not to be killed in certain ways as holding unconditionally, because she holds that the requirement to respect the right in question holds only on the condition that the requirement is commanded by God. If God alters His commands, the requirement is suspended, according to Anscombe. But Anscombe does hold that there are moral requirements that hold whatever the consequences. Call a right that must be fulfilled whatever the consequences a rigid right.

Rights as side constraints might instead be regarded as nonrigid. Call these "spongy side constraints."

Robert Nozick raises the issue, in a footnote in his essay reprinted in the Darwall reader. He writes, "The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I largely hope to avoid." So suppose we look at the issue Nozick prefers to avoid, what then?

Moral rights vary in importance. I have a right that you not torture and kill me just for fun, and also a right that you not steal the extra button attached to the bottom of my shirt. The latter right is less important than the former one.

So, one might hold that more important moral rights trump less important moral rights. The agent whose aim is to respect moral rights should give priority to respecting the most important of the rights at stake, when rights are in conflict, and one cannot respect all the rights that apply to one's decision problem. If rights are co-possible, such conflict situations will never arise.

One might hold that for some or all moral rights, they may be overridden if the consequences of fulfilling their terms are sufficiently bad. If side constraints are overrideable in this way, they are spongy; if not, they are rigidly nonspongy.

Here is one possible way to think about the degree of sponginess of a particular right. Suppose I have a right against you that you not kick my knee. We can compare the harm (or loss of benefit) that will befall the rightholder if the right is not respected to the harm (or loss of benefit) that will befall nonrightholders if the right is respected. Here we should think in terms of net loss to nonrightholders: If twenty will each gain the equivalent of a dollar if my right not to be kicked is respected and thirty will each lose the equivalent of a dollar, the net harm to nonrightholders is the equivalent of ten dollars. We then consider the ratio of the net harm to nonrightholders if the right is respected to the harm to the rightholder if the right is not respected (let's confine our attention to the cases in which these harms are all positive in sign). The larger this ratio must be, to warrant failing to respect a right, the more stringent or less spongy the right is. If it is acceptable to kick me in the knee causing me three units of pain in order to prevent ten units of pain from befalling other people, but not acceptable if the ratio is less favorable, then the threshold of acceptable failure to respect the right is 10/3. We might say that on this view, infringing a right (acting in a way that brings it about that the right is not fulfilled) can be morally acceptable. If all violations of a right are by definition wrong, then on this view, not all infringements of rights are violations.

One might hold (a) no moral rights are spongy, (b) some but not all moral rights are spongy, or (c) all moral rights are spongy. One might also hold some rights are spongy but with a rigid core. For example, one might hold it can be morally OK to kill an innocent nonthreatening person, but only if one thereby saves the life of at least one innocent nonthreatening person or in some other way gains a large enough benefit for a single nonrightholder to justify infringing the right. This view denies *Aggregation*. Aggregation is the position that in principle, very small losses that would be suffered by a great many people can add up to justify overriding any right whatsoever. According to aggregation, if fulfilling Arneson's right that he not be tortured and killed would bring it about that each of a very large number of people would fail to get some trivial benefit such as a single lick of ice cream, it may be acceptable to bring it about that Arneson's big right is not fulfilled in order to secure the very many tiny benefits.

Notice that rejection or acceptance of aggregation is independent of the consequentialism versus nonconsequentialism issue. A consequentialist could *reject* aggregation, and hold for example that violation of your right to basic free speech is always wrong no matter how many trivial benefits could be gained by denying your right. A nonconsequentialist could *accept* aggregation, and hold that we ought not always to bring about the best outcome that could be reached, because sometimes we are under agent-relative duties to respect people's rights, but that any person's right could be overridden if the consequences of not infringing the right were in the aggregate large enough.

Why might anyone accept aggregation? Its implications sound horrible. The defender of aggregation says that even though a torture murder is morally worse than a simple murder without torture, there is some number of simple murders that is morally worse than a single torture murder. And there is some number of serious mutilations (eg cutting off a single innocent person's leg) that is morally worse than *that* number of simple murders that was worse than a single torture murder. And so on down the line. So there is some number (humungous, no doubt) of failures of persons to gain a lick of ice cream that is morally worse than a single torture murder, however morally bad we hold that wrong act to be. (I borrow this argument from Alistair Norcross, not a course author.)