

The slide features a white background with several thick, parallel red diagonal lines. Two lines are positioned in the upper right quadrant, and two are in the lower left quadrant. A thick red horizontal line spans the width of the slide, intersecting the diagonal lines.

Lecture 2

Justification and Conflicts of Rights

Marinella Capriati

Matthias Brinkmann

RIGHTS

Marinella Capriati
Matthias Brinkmann

GENERAL PART

26. 4. Nature of Rights

3. 5. Justification and Conflicts of Rights

SPECIAL PART

10. 5. Group Rights

17. 5. Property Rights

Overview

I. JUSTIFICATION OF RIGHTS

- (1) Status
- (2) Instrumental
- (3) Contractualist

II. CONFLICTS OF RIGHTS

- (1) Introduction
- (2) No-Conflict View
- (3) Conflict View



Justification of Rights
Status Justifications

Status Theories

- Status Theories focus on respecting a certain normative quality, status, that persons are held to have
- **Direct justification**
 - (1) Individuals have a form of moral status
 - (2) We are required not treat beings with moral status in certain ways
 - (3) Thus, individuals have rights corresponding to their moral status

Central Features

- Mostly Kant-inspired; central are often notions such as dignity/inviolability/respect
- Deontic approach: focus on rightness and wrongness of actions
- Direct justification: the nature of the right-holder directly justifies the right
- Traditionally makes rights very strong

Utilitarianism of Rights?

- You have a choice between
 - violating one person's right R, or
 - letting it happen that five other person's R is violated (without yourself violating R).
- Rights provide us with **agent-relative reasons**:
 - rights are about what **you** should (not) do
 - thus, you should not violate R
- Rights provide us with **agent-neutral reasons**:
 - rights are about what **should (not) be done**
 - thus, you shouldn't let it happen that five person's rights are violated
- Status theories generally oppose a utilitarianism of rights

Status Justification: problems

- Difficulty in explaining the ground of rights
- Too simplistic and thin about the content of rights; fails to do justice to the reality of moral and legal reasoning
- Too forceful an account of the strength of correlative duties



Justification of Rights

Instrumental Justifications

Instrumentalism: Central Features

- Consequentialist approach: focus on consequences
- Rights are rules, the general observance of which will lead to an optimal distribution of interests
- **Indirect justification**
 - (1) A state of affairs S – in particular, a distribution of benefits across people, D – is the most desirable
 - (2) Assigning rights to individuals is the best means to achieve, or approximate, S
 - (3) Thus, individuals have the rights assigned to them under this scheme

Different Teleologies

What counts as a desirable states of affairs could be many things:

- **Mode of distribution:** Utilitarianism / Egalitarianism / Prioritarianism
- **Distribuendum:** well-being / resources / primary goods / capabilities / perfection
- **Impersonal values:** desert / fairness

General Problems

(There will be specific problems corresponding to which teleology you choose.)

- The existence of rights becomes contingent, and subject to empirical claims
- A rule-following problem
 - rights can probably be at most prima facie
- Inclines towards a utilitarianism of rights
- Content problem (for some views)
 - which rights are assigned to individuals will often not track our considered intuitions

Mixed Positions

- Consider the following distribuenda:
 - inviolability (Kamm, Nagel)
 - dignity
 - control over one's own normative situation
 - respect
- This will make some instrumental views close to status views
- One difference: in instrumentalism, these are values we bring about, not a status we respect



Justification of Rights

Contractualist Justifications

Contractualism: Central Features

Rights define principles that would be chosen by properly situated and motivated agents agreeing to the basic terms of their relations.

Indirect justification:

- (1) It is wrong to treat individuals in ways that they could reasonably reject
- (2) Individuals could reasonably reject any system of social cooperation in which they are not assigned rights
- (3) Individuals have the rights assigned to them under this system

Kinds of Contractualism

The exact kind of contractualism will vary:

- **Rawls**: principles chosen in the original position
- **Scanlon**: principles that no one could reasonably reject
- **Gauthier**: principles chosen by rational bargainers

Contractualist Justification: problems

- The redundancy objection: the contractual metaphor is not actually doing any work
- Too indeterminate about the content of rights
- Can it make sense of animal rights?



Conflicts of Rights

Introduction

A Simple Example

You find yourself in the following position: You are on a hiking trip. Peter is in strong pain, which will be relieved by some drug. There is no other way to relieve the pain, and you would need three days of hiking to get Peter medication through other means. However, the drug belongs to Joe, which he has given to you for delivery. Joe is not present at the moment, and you have no way of contacting him. You know, however, that Joe has an easy re-supply of the drug, and that he doesn't currently need it.

- Do Peter's and Joe's rights conflict?
- Can rights in general conflict?
- If they can conflict, how do we solve conflicts?

Framing the problem

- A valuable distinction:
 - A right is **infringed** = a duty correlative to that right is not fulfilled
 - A right is **violated** = a right is infringed, and that infringement is morally wrong
- Not rights as such conflict, but **their duties**
 - if all rights were liberties, we wouldn't have a problem

Two Conflicting Intuitions

- First, an intuition about the **strength of rights**: rights have absolute, “overriding” strength. I ought to fulfill the duties corresponding to rights.
- Second, an intuition about the **scope (or shape) of rights**: in this case an others, rights “overlap”: they command us to do incompatible things.
- To resolve the problem, we have to weaken either the strength of rights, or reduce the scope of rights

Two Solutions

No-Conflict View

- weaken the scope of rights
- rights are not overlapping
- all infringements of rights are violations of rights

Conflict View

- weaken the strength of rights
- rights are overlapping, but the duties they impose are weaker
- there are some infringements of rights which are not violations

Two Plausible Alignments

- **Interest Theory** naturally aligns with **Conflict View**
If the Interest Theory is true, then rights protect important interests; but important interest can conflict, so it is difficult to see how rights would not conflict (Waldron, 1989)
- **Will Theory** naturally aligns with **No-Conflict View**
If the Will Theory is true, then right-holders have powers over correlative duties. This defines a set of discrete domains; so it is easier to see how rights could not conflict (Steiner, 2005)



Conflicts of Rights
No-Conflict View

Specificationism

- Your **right not to be killed** is in fact
 - others have a duty not to kill you,
 - EXCEPT if killing you would save at least five other, innocent people,
 - EXCEPT if you are a member of a group of five, and killing you and the others would save at least 25 other, innocent people,
 - EXCEPT if you intentionally threaten someone else's life, and killing you is the only way to save that other person's life,
 - EXCEPT ...
- Advantages
 - rights can be absolute
 - appealingly simple

Problems with Specificationism

- How can we know such rights?

Reply: statements such as “you ought not to lie” are full of implicit exceptions, and we have no problems knowing/understanding such statements either

- Rights lose explanatory force

Reply: this is a substantive matter; specificationism does not itself give explanatory unity to a question.

- Cannot explain “moral residue”

moral residue: the regret, restitution, apologies etc. that are due after infringing a right

Reply: the “grounds of rights” conflict, and this allows us to account for moral residue



Conflicts of Rights

Conflict View

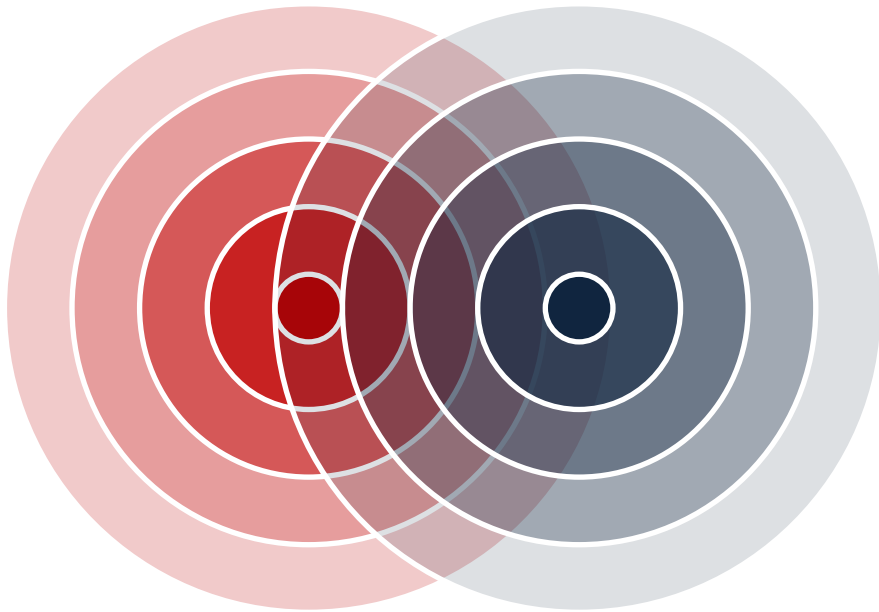
Conflict View

- Thesis
 - Rights have universal applicability but are liable to being overridden in certain circumstances
- Advantages
 - Generality of rights
 - Account for sense of conflict
 - Account for “moral residue”
- Disadvantages
 - Weakens rights
 - Messy; gives us few answers
 - Rights lose some of their explanatory force

Waldron's Waves of Duties



Explaining Conflicts



- Rights have a **complex internal structure**
- The conflicting nature of rights is **often over-stated**: usually only a subset of the duties conflicts
- Speaking of the **absolute lexical priority** of one right over others (or non-right considerations) is implausible
- Rights as trumps might be **too strong** as well
- It's messy!

Summary



Summary

- Status justifications of rights gives us a direct argument for strong rights, but the theory suffers generally from great indeterminacy
- Instrumental justifications of rights can rely on various teleologies; on some of these, rights might be too flimsy
- Contractualist justifications might be an interesting middle way
- To avoid a dilemma about the conflicts of rights, we must either weaken the strength of rights (Conflict View), or their scope (No-Conflict View)
 - Specificationism, the main kind of No-Conflict View, suffers from grave problems
 - There is little consensus among Conflict Views; the take-home message is probably that we should accept a messy picture of the moral universe

Literature: Justification of Rights

Status

- Kamm, Frances. *Intricate Ethics*. New York: Oxford University Press, 2007. Chapter 7, “Moral Status”.
- Nagel, Thomas. “Personal Rights and Public Space.” *Philosophy and Public Affairs* 24, no. 2 (1995): 83–107.

Instrumentalists

- Pettit, Philip. “The Consequentialist Can Recognise Rights.” *The Philosophical Quarterly* 38, no. 150 (1988): 42–55.
- Scanlon, T. M. “Rights, Goals, and Fairness.” In *The Difficulty of Tolerance*. Cambridge University Press, 2003.

Literature: Conflicts of Rights

- Feinberg, Joel. “Voluntary Euthanasia and the Inalienable Right to Life.” *Philosophy & Public Affairs* 7, no. 2 (1978): 93–123.
- Kamm, F. M. “Conflicts of Rights:” *Legal Theory* 7, no. 3 (2001): 239–255.
- Shafer-Landau, Russ. “Specifying Absolute Rights.” *Arizona Law Review* 37 (1995): 209–225.
- Thomson, Judith Jarvis. “Rights and Compensation.” *Noûs* 14, no. 1 (1980): 3–15.
- Waldron, Jeremy. “Rights in Conflict.” *Ethics* 99, no. 3 (1989): 503–519.

Backup Slides

A case

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 in 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.

Feinberg 1978

Strength of Rights

- **Rights as Side-Constraints** (Nozick): if you have a right-correlative duty not to ϕ , under no circumstances ought you to ϕ
- **Rights as Trumps** (Dworkin): if you have a right-correlative duty (not) to ϕ , then all non-rights related considerations about whether you ought to ϕ become irrelevant
- **Rights as Prima Facie Reasons**: rights are “rules of thumbs“. If others have a claim against me that I (not) ϕ , that normally gives me a strong reason (not) to ϕ .