

# The trouble with moral rights

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Today, it is common to hear talk of all kinds of “rights” which people allegedly “have”, even when no valid law says that they do. Human rights are an obvious case in point, at least where they are not invoked as quasi-legal rights (pertaining to a nascent international law). But also in more homely contexts, rights loom large. According to many, there is the right not to be lied to, the right to be treated fairly, and even, perhaps, the right to get a thank you note when you have chipped in towards a birthday present for your co-worker. These are all *moral* rights.

In this paper, I want to argue that moral rights discourse is surprisingly muddled. Not only is it rife with ambiguity. Right-claims imply ought-claims, and in moral contexts, it is often not clear which one out of a number of possible ought-claims a particular right-claim implies (section 1). Worse yet, there is the problem that the most popular reconstructions of moral right-claims come at a substantial philosophical cost. In particular, there is no uncontroversial way of substantiating the idea that moral rights are “trumps” like their legal cousins (section 2). If we want to avoid associating moral rights-discourse with controversial philosophical theses, we must interpret moral right-claims as simple all-things-considered ought-claims. But if we do that, it seems best, in light of the ambiguities inherent in moral rights talk, to stick to the traditional language of *oughts* when we wish to make ethical claims, and to leave the vocabulary of rights to legal contexts (section 3).

## 1. Some quite different uses of moral right-claims

As is well known, there are different types of moral right-claim. In particular, different moral right-claims are meant to imply different ought-claims. In this regard, there are at least three different types.<sup>1</sup> Firstly, there are *passive* rights-claims. Take “Mary has a right to be treated nicely” as an example. This claim turns out to imply that someone ought to treat Mary nicely. The addressee of this ought-claim can vary: sometimes, it is everyone; sometimes it is a subgroup of everyone. Apart from the openness of the addressee of the implied ought-claim, this type is relatively harmless.

But there are also *active* right claims, and they come in at least two sub-types: a simple and a complex one. As an example of a simple active right claim, take “Mary has a right to complain to the chef”. This claim can be analysed as implying that Mary *may* complain to the chef, which – relying only on the vocabulary of oughts – means that it is *not* the case that Mary *ought not* to complain to the chef.

This claim is often confused with the complex kind of right claim. In fact, it may be that you have already wanted to read the aforementioned right-claim as a complex one. But let me give a slightly clearer example: “I realise that buying the *Bild-Zeitung* is stupid and harmful, but Mary surely has a *right to do it*.” The second (part of this) claim, I contend, is best analysed as implying only that it would be wrong to *prevent* Mary from buying the *Bild-Zeitung*. Note that this is compatible with the claim that one *ought not* to buy the *Bild-Zeitung*. For this reason, complex active right claims give a sense in which there is a right to do wrong. We can also say that we have rights to some actions (in the complex sense) to which we have no right (in the simple sense).

Here, we have a first serious danger of ambiguity. A second one comes into view when we consider that frequently, an active moral right-claim to some action can be read as a claim to the effect that there ought (morally) to be a legal right to the action. (Perhaps this is a special case of the complex

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1 The following analysis is very loosely based on Wesley Hohfeld's seminal work on the analysis of rights.

reading, where the addressee of the implicit prohibition of preventive action is the state.) Together, these ambiguities constitute a constant danger of misunderstanding. To get a sense of the problem, imagine a scenario in which a father claims that he has a moral right to favour his sons over his daughters, and suppose that an interlocutor challenges this claim. Does the challenger imply that preventing the unequal treatment would be acceptable, perhaps even called-for? Or does she restrict herself to registering her disapproval of the incriminated conduct? And the father's own claim: is it about the acceptability of unequal treatment, or is it merely about the wrongness of preventive interference in case he decides to favour his sons over his daughters? Or is it rather a claim to the effect that current law is objectionable because it does not allow him the range of discriminatory conduct he envisions?

I do not want to overstate the case that ambiguity lurks in moral rights talk: careful speakers can do much to make explicit what they are committed to and what questions they leave open. But the fact that even philosophers needed a few years to solve the puzzle around the “right to do wrong”<sup>2</sup> and the fact that debates over moral rights often go on forever suggest that the room for ambiguity is not just a curious and purely academic side note, but a problem built into rights discourse.

## 2. Reservations about rights as trumps

However, there is also a more serious problem. When we make a right-claim in a particular situation, we tend to think that we do something *more* than just talk about what people ought to do in the situation at hand (and in ethically equivalent situations). The intuition is that a right-claim is distinguished from ordinary ought-claims by something akin to a modal force. If I have a *right* to some kind of treatment, there is a sense in which being treated in a different way is wrong, *necessarily*, or *irrespective of what (else) is true of me, my actions or the situation*. This intuition, I want to contend, is best given up – unless we are prepared to tie moral rights-discourse to very controversial philosophical theses. Let me elaborate on this claim.

The usual way to substantiate the claim that moral right-claims have a quasi-modal force is to say that they *trump* other kinds of moral claims. In the background to this reconstruction, there is the thought that individual considerations about a situation issue in individual pro-tanto ought claims which then interact with one another to yield all-things-considered ought judgements. The thesis, now, that right-claims are trumps is nothing else than the denial of the non-monotonicity of the interaction of individual (considerations and their attendant) pro-tanto oughts, at least for some areas of deliberation.

Non-monotonicity means that every practical inference from an ethically relevant consideration to an overall ought-claim must be read as involving a *ceteris-paribus* clause without which the inference would be liable to defeat by an unforeseen disabling condition. The trouble with the current proposal about moral rights-discourse is that so far, no convincing evidence for areas of genuine monotonicity in moral reasoning has been presented. Every purported example of a moral principle without a *ceteris-paribus* clause turns out to implausible, and the only monotonicity that has been uncontroversially established is trivial monotonicity: it is always wrong to murder, but that is just because murder is *defined* as wrongful killing (among other things).<sup>3</sup>

Many philosophers now recognise that tying rights discourse to the thesis that ethical discourse can be non-trivially monotonic is too shaky to rest one's case on it. James Griffin, for example, accepts that understanding rights as trumps in the sketched sense makes right claims come out false.<sup>4</sup> But most friends of moral rights, including Griffin, want to hold on to some weaker variant of the “trumping” idea.<sup>5</sup>

2 See Waldron (1993). The idea that some right claims are claims denying the acceptability of preventing an action is Waldron's solution to the problem of the “right to do wrong”.

3 For more on the non-monotonicity of everyday moral reasoning, see Kiesselbach (2010).

4 See Griffin (2008).

5 Note that this cannot be done by simply giving an abstract characterisation of the range of scenarios within which

It could be said, and sometimes it is said, that rights are just very important considerations. However, as easily as this reply comes across some philosophers' lips, it forces us to attend to a yet more fundamental problem: it is not clear how moral rights can be "considerations" at all. To see the problem, consider what makes the idea of a right as an individual reason-giving consideration sensible in legal contexts. When we say "we ought to release Peter because unless he is charged, he has a (legal) right to being released after 48 hours in custody", we say, in effect, that we ought – all things considered – to release Peter because we ought – legally – to do so: we derive an overall ought from a legal ought. Can something like this be going on in moral rights discourse, too? Might it be that moral rights give us restricted, pro-tanto oughts, which then enter into overall oughts?

There are plenty of ethically relevant considerations which go into our overall judgements. The fact that Peter is hungry, or the fact that Laura has failed to tidy her room, are examples. However, these considerations seem radically different from the consideration of having a moral right. Having a moral right is already morally laden in a way that being hungry, or having failed to tidy one's room is not. While it is logically possible to portray having a right as analogous with these kinds of considerations, this move seems like an attempt to justify a way of talking by way of another way of talking which is even more in need of justification. If we wish to speak in this way, we are operating, it seems, with an ontology which is far more complex than necessary. Here, then, we have another example of how moral rights discourse turns out to require commitment to controversial philosophical theses.

### **3. Moral right-claims as simple all-things-considered ought-claims**

However, perhaps we need not go down that road. Interestingly, when speakers are invited to say what they *really* want to convey with their moral rights claims, most of them converge on nothing else than overall ought-claims, namely the ought-claims sketched in the first section. Perhaps it is not so implausible, after all, that when considered soberly, rights attributions turn out to be just assignments of duties to carry out, omit, or (in the case of complex active right-claims) prevent actions.

If that is true, however, then – in light of the space for misunderstandings – would it not be best to stick to the traditional vocabulary of *oughts* in the first place, and leave rights talk to legal matters?

Note that none of the problems of moral rights talk mentioned in this paper afflicts legal rights talk. Not only is there no problem with the ideas that legal rights are individual reason-giving considerations or that they trump other considerations. There is also no ambiguity of the kind sketched in the first section. It seems that the trouble with rights have appeared when rights talk was extended to cover non-legal matters: when rights talk was extended from legal (or quasi-legal) matters to non-legal matters, some of its grammatical features – rights as trumps, and more generally: rights as individual considerations – lost their sense.

Instead of searching for new ways of justifying these features in moral contexts, we can go back to the traditional vocabulary of oughts when making ethical pronouncements. What we lose is the sense of "trumping". What we gain is a decrease of ambiguity – and, perhaps, a more realistic view of moral deliberation.

Waldron, "Is There A Right To Do Wrong?", *Ethics* 92, 1981

Kiesselbach, "Zwischen Partikularismus und Generalismus: Ethische Probleme als Grammatische Spannungen", in *AZPhil* 35.2, 2010

James Griffin, *On Human Rights*, OUP 2008

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the ought claims implied by right claims are guaranteed to come out true. This would -- again -- amount to a denial of non-monotonicity. But how else could the idea be cashed out?