DO WE NEED RIGHTS IN BIOETHICS DISCOURSE?

Short title: Rights in bioethics discourse

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Abstract

Moral rights feature prominently, and are relied on substantially, in debates in bioethics. Conceptually, however, duties can perform the logical work of rights, but not vice versa, and reference to rights is therefore inessential. Normatively, rights, like duties, depend upon more basic moral values or principles, and attempts to establish the logical priority of rights over duties, or the reverse, are misguided. In practical decision-making, however, an analysis in terms of duties is more fruitful than one based on rights. A right may function as a proxy term for a consequentialist rule, or for a deontological constraint, but does not thereby enrich these concepts. Rights may also help in a purely expressive sense, and may assist an initial focusing on a moral conflict. However, their role in bioethics discourse is more one of convenience than of necessity. Moreover, unless rights are firmly founded on fundamental moral values, their use encourages rhetoric rather than argument.

Keywords: rights; duties; consequentialism; bioethics

I. INTRODUCTION

Debate in bioethics frequently occurs in terms of rights: e.g. the right of the fetus to life (Shaffer, 1994), the mother's right to control her reproduction (Kennedy, 1990), the patient's right to refuse treatment (Agich, 1993), the seriously ill patient's right to die (Johnson, 2001), or the citizen's right to health care (Daniels, 2015). With growing activism on the part of various interests and constituencies, demands are increasingly heard for moral rights for and within health care (Halpern, 2004).

However, do such rights play an indispensable, or at least a useful, role in moral argument in bioethics? This question lies on two levels. First, there is the issue of whether rights are *conceptually* adequate. Does talking in terms of rights make sense in relation to an understanding of other normative concepts, or is it redundant or, worse, confusing? The second issue is whether rights are *normatively* acceptable – even if we can logically speak in terms of rights, is it helpful to moral decision making in an applied area such as health care to do so? Almond (1994, 512) argues that "[i]f it makes sense – important sense – to talk about duties and obligations, about good and bad, right and wrong, then it also makes sense to talk about rights." This paper examines this claim. In conceptual terms, I will show that whilst rights are coherent as a deontic concept, they are superfluous to an account framed in terms of duties, particularly as duties may exist where rights do not. In normative terms, I will argue that the appropriate role of rights in discussion of applied problems in bioethics is limited. Specifically, I suggest that attempts to establish rights as fundamental and duties as derivative (or, indeed, vice versa) are misguided, and that moral conflicts are more effectively, and more precisely, analysed in terms of duties rather than rights. Although there can be a role for rights in both deontological and consequentialist frameworks, this role is more expressive than analytical.

II. WHAT IS A RIGHT?

There has lately been a proliferation of rights discourse in various areas of life (Wellman, 1999). Baker (2001, 249) goes so far as to claim that "[r]ights discourse is already the accepted language of international ethics." In many arguments framed in terms of rights, however, it is rare to find any clear definition of just what a right is. Instead, it is often used as if it were a self-validating concept that demands immediate acquiescence. Alternatively, appeal may be made to another, presumably

more fundamental right, as a justification for the right at issue, without any defence of the original right, *qua* right. Although it is often clear, in substantive terms, what is being demanded when a right is invoked, it is rarely clear on what philosophical basis it is given the status of a right.

It does not help that the vocabulary surrounding rights is confusing and not always consistent. However, following Gewirth (1982), we can speak of the *subject* of a right as the person who possesses the right, and can identify the *object* of the right as that in respect of which the subject holds a particular right. The *respondent* of a right is a person on whom it operates; this is principally the bearer of a correlative duty. The *ground* of a right is the justificatory basis of a right (i.e. that in virtue of which an individual holds a right).

Some writers regard a right as a form of claim (Feinberg, 1969; Powell, 1977).[1] A right is indeed something that can be claimed, but this is not to say that a right *is* a claim; one can have a right to things that one has not claimed. One might even have a right to something of which one is unaware, and which one would accordingly be incapable of claiming. Nor is the *ability* to claim a prerequisite for a right, for not only are those who have temporarily lost the ability to make claims (e.g. those who are comatose) usually deemed to have retained their rights, but those who have yet to acquire this ability (e.g. neonates) are not necessarily denied rights (Andersson, 2014).[2] A right is perhaps a *potential* claim; hence the claim is something one has rather than something one makes (Golding, 1968). Importantly, however, this does not mean that any justified claim is a right. It will be argued in due course that only claims of a certain weight may qualify as rights. Equally, we will see that something may justifiably be claimed of a person on grounds other than those of a right.

Raphael (1967) proposes a broad twofold classification of rights. First, there is a right of *action*, which is a right to do something. A right of *recipience*, in contrast, is a right to receive something.[3] By extension, a right of recipience is a right to be treated in a certain way, e.g. to be treated equitably, with respect, and without discrimination. Raphael goes on to claim that to have a right of action is to have an additional right of recipience to freedom from interference. On Raphael's formulation, if one has a right of action, others should not interfere with one's exercise of that right. Equally, if one has a right of recipience, one has some sort of justified claim on – and certain others should take steps to provide – whatever goods, services or treatments are the object of this right.

The Relationship between Rights and Duties

Talk of rights commonly leads to talk of duties (or obligations).[4] However, there is a difference in those to whom these concepts can be applied. We can understand what it might mean for animals to have rights (even if we dispute that they do in fact have them), but not what it might mean for them to have duties. A neonate, similarly, can meaningfully be said to be the subject of certain rights, but can scarcely be seen as having duties. A person who is comatose is, for the duration of the coma, free of duties, but has not necessarily lost his or her rights (Andersson, 2014). So, the bearer of a duty must be in actual possession of moral agency, whereas in the case of a right-bearer, such agency can be suspended or only potential.

How does the distinction between rights of action and rights of recipience relate to the relationship between rights and duties? Considering first rights of action, it appears that if one has such a right, this equates to an *absence* of duty on one's own part, whereas if one has a right of recipience, this equates with the *presence* of a duty on the part of whoever is the respondent to the right. However, taking the first of these ideas, there is more to having a right than not being otherwise obligated. To say that I have a right to do something is surely saying more than that I am under no duty not to do it; my right to do something suggests in addition that I have some positive justification or entitlement (of sufficient moral importance) to do it. There would seem therefore to be a certain threshold at which a right comes into play; rights should protect or promote non-trivial interests or choices of clear moral importance. Thus, it may make sense to talk of a right to dress as one wishes (C. Wellman, 1995), as this choice may be intimately bound up with a morally significant sense of personal identity, but it is less clear that there is a right to "wear mismatched socks" (Steiner, 2006), or to wear green nail varnish rather than blue, or to "walk on one's hands" (Raz, 1984), or to whistle as one walks, or to take a drink at the bar rather than seated at a table, as little of moral significance would seem to hang on such choices. In these instances, it is not that the rights are present but are in some sense inert below such a threshold, but that the low moral significance of the case does not justify us in invoking a right in the first instance.

So, a moral right to do something means that one has no duty *not* to do that thing, such that, as Flatham (1976, 71) puts it, individuals have "discretion in deciding whether to exercise their rights in a particular situation."[5] It does not follow from this that having no duty to refrain from something

confers a right to do it. It is the case, though, that if one has a duty not to do something, one has no right to do it – the prohibition implied by such a duty removes the sense of moral justification necessary for a right. Does it follow from what it means to have a right that one is under no obligation to do what one has a right to do, or to receive what one has a right to receive? Presumably so. On the basis of disclosing privileged information, a patient gains a right to confidentiality, but can choose to waive this right; in Hohfeld's (1919) terms, the individual has a 'power' with respect to such a right. To regard a right as imposing an obligation on the subject of the right would make rights unwaivable in a way that is counterintuitive.[6] A right therefore excludes a duty either to do (or receive) or not to do (or receive) whatever is the object of that right.

Turning to others' duties, does having a right of action imply that others have – as Raphael (1967) argues – a correlative duty of non-interference? It seems hard to make sense of the idea that a person would have a right of action without others thereby being under some duty, at least *prima facie*, not to interfere in the exercise of that right. So, in terms of public health, if we say that a person has a right to engage in activities likely to harm his or her health – such as smoking, drinking, or mountaineering – this implies that others should not prevent him or her from engaging in these activities.

Does a right of recipience imply a duty in others in a way similar to that proposed for a right of action? Lyons (1970) argues that in the case of certain relations between individuals – such as promises, or cases of wrongful injury that call for reparation – there is a form of mutual entailment, whereby fully specifying the right fully specifies the correlative duty, and *vice versa*. If we take the idea of a right to health care, it can be argued that unless we are able to specify those who have the associated duty to provide such care, a right to be provided with health care cannot be realized and is therefore meaningless, and, by the same token, a duty to provide health care is meaningless unless some stipulation is made as to who the proper recipients of such care should be.[7] Thus, to define the nature of a right of recipience is to define the nature and the bearer(s) of the related duty.

A right, therefore, gives rise to certain duties in others. If it is a right of action, others are required not to interfere, and if it is a right of recipience, others are required to provide whatever it is that someone has a right to receive.[8] However, while we can derive duties from rights, it is not so clear that we can derive rights from duties in the same way. Some duties that are based on a specific moral

event or transaction clearly imply a right; for example, the duty incurred by promising, or the duty of reparation brought about by wronging somebody. However, White (1981, 60) argues that "there can be a duty to do *something*… which is not a duty to *someone* and, therefore, gives rise to no right in any one." Feinberg (1966) cites cases of such duties; for example, certain duties of obedience that are owed to an impersonal authority such as the law, but not to any specific individual or group of individuals. In such cases, Feinberg (1966, 142) argues, "it is especially difficult to find an assignable person who can claim another's [obedience] as his due."[9] Similarly, if we have discretion as to who should be the beneficiary of a duty (as in the case of imperfect duties), no rights are created. So, if it is felt that physicians practising on a fee-for-service basis have a duty to provide *pro bono publico* service, this means that they should treat in this way some unspecified financially disadvantaged people, on some unspecified occasions; no rights are created in any particular person by virtue of this duty. Or, it might be argued that one should donate blood or body parts after one's death for the benefit of others who may themselves otherwise die (Howard, 2006; Snelling, 2014), but this does not translate into a right on the part of any such individual to such a donation. If we fail to assist a person in this way, we have failed to perform our duty, but we have not necessarily failed to respect that person's rights. Being a potential beneficiary of such duties does not, therefore, automatically confer a right.[10] Thus, whereas some duties automatically give rise to correlative rights, others do not; we should not therefore assume that where we can identify no rights, there are no duties.[11]

It is noteworthy that some attempts to derive rights from duties confuse the underlying deontic logic:

> Instead of stating as a moral rule that the healthcare professional has a duty to get consent before surgery, one might say much the same thing by claiming that the candidate for surgery has a right to consent to the surgery. (Fry et al., 2011, 24)

The right whose existence is claimed here is presented as if it were a right of action (to *give* one's consent), to which the correlative duty would be one of non-interference. However, the relevant duty here on the part of the surgeon is one of positive action, and the associated right would be one of recipience – specifically, to have one's consent sought. The move from duty to right here is at the cost of ambiguity as to the moral demands of the case.

The implications of this section of the paper for the role of rights discourse are as follows. It would seem that both rights of action and rights of recipience can be re-expressed as duties. Not all duties, however, can be translated into rights, as some duties do not entail rights in others. To this extent, rights appear to be a dispensable part of the moral vocabulary, whereas duties appear to be essential.[12] Talk of rights might therefore just be a convenient means of describing the presence or absence of particular duties (positive or negative) on the part of the subject and the respondent of a right.

At a purely conceptual level, therefore, it is hard to find a distinctive role for rights in bioethics discourse. The logical work that is done by rights can equally be done by duties, and duties may exist where rights do not. Although they are conceptually coherent, in terms of deontic logic rights seem to be superfluous, and it might therefore be suggested that we should simply abandon the vocabulary of rights in favour of that of duties. However, this conclusion could be resisted if it can be shown that rights play a useful role at a normative level – as Braybrooke (1972) notes, logical superfluity does not imply practical superfluity. The next part of this paper will ask whether talking in terms of rights assists the more practical business of addressing substantive moral conflicts.

III. THE MORAL ROLE AND FORCE OF RIGHTS

Discussion of the appropriate normative role of rights, and the extent to which they play a distinctive role in practical moral deliberation, will be structured in terms of four issues – first, in relation to their *prima facie* status; second, in terms of conflicts either within rights or between rights and duties; third, in the context of their moral grounds or justification; and last, with regard to the appropriate application of the term 'right'.

Rights as *Prima Facie*

Rights are sometimes described as absolute, or indefeasible – often in relation to such issues as torture (Twiss, 2007), abortion (Di Nucci, 2014), or the refusal of treatment (Husted & Husted, 2008). In some cases, this may arise from a confusion of two separate claims. It may well be the case that, as regards a particular right-holder, a right is "the strongest of all moral claims that all men can assert" (Wasserstrom, 1964, 632), but this does not mean that it is the strongest moral claim in play

(just as the highest bid that I am able to make in an auction room will not necessarily win the item). On other occasions, there is no such confusion – rights are explicitly put forward as absolute.

There are two reasons for thinking that this position is incorrect. First, unless they are specified so narrowly as never to overlap,[13] many rights are potentially incompatible with each other and will sooner or later come into conflict, and if we regard rights as absolute, there will be no obvious means of resolving such a conflict. In a critique of "rights-talk," Midgley (1991, 105) comments:

> Debates that have been handled in this way are thus notorious for producing sterile and unshiftable controversial blocks. Over abortion, the absolute right to life of the foetus confronts blankly the woman's absolute right over her own body. Over euthanasia, the absolute right to life confronts the right to control one's own destiny, or the right not to be forced to suffer.

If, however, rights are seen as *prima facie*, or *pro tanto* (Frederick, 2014), we can appeal to the various principles that ground individual rights – respect for autonomy, non-maleficence, or whatever – as a means of prioritizing one right over another in a specific situation. Overriding a right does not mean that its moral force is ignored, merely that the greater moral force of another right is recognized. Hence, Thomson (1986) distinguishes between infringement and violation of a right: when a right is justifiably overridden, it is infringed, but if it is unjustifiably overridden it is violated. She gives the example of a child whose life depends upon receiving a certain drug. The only available supply of this drug belongs to you, and you are not available to be consulted. If your house is broken into and the drug is taken and given to the child without your consent, certain of your rights have been overridden – but because a child's life was at stake, the actions performed were morally justified, and whilst some of your rights were infringed, none was violated.[14]

The second difficulty with an absolute view of rights is that it overlooks a distinction between two moral senses of the word 'right'. Clearly, doing what one has a *legal* right to do may not be *morally* correct, but further, doing what one has a *moral* right to do is not necessarily to do the right thing morally. Although it was argued earlier that having a right implies the absence of any obligation to refrain, there is a higher-order sense in which it may not be right to *exercise* one's rights. Doing what we have a right to do may require us to break a promise, or, by virtue of the effect it has on others, may mean that we violate a duty stemming from such principles as beneficence or non-maleficence, and in some such cases the moral value embodied in exercising the right may be

insufficient to warrant the breaking of the promise or the violation of the duty. One's duty, all things considered, may be to forbear from exercising a right, even though that right is *prima facie* morally justified (i.e. something, in terms of earlier discussion, that one is *prima facie* not obligated to refrain from).[15] So, although one may have a moral right to certain health care resources, it may not be right to insist upon receiving them if one's own health problems are minor and others are in critical need of those resources. Similarly, if health care is severely restricted, one should perhaps forgo one's right to engage in behaviour that may put one's health at risk. Or, a patient suffering from neurological impairment may have the right to refuse certain elements of a rehabilitation program, but if this causes a substantially increased burden of care to fall on his or her family, this may not be the right thing to do.

Moreover, to say that a person 'had no right to do' something is not to say that he or she was wrong to do it. If it is agreed that a person does not have a right to demand information about a family member's medical history, this means that the moral appropriateness of this action cannot be justified in terms of rights. It does not mean that the action cannot be justified on other grounds, but merely that one *prima facie* source of moral justification has been foreclosed. Accordingly, if the two senses of 'right' – as a noun and as an adjective – are not clearly distinguished, the moral force of rights may be misinterpreted. In particular, it may wrongly be assumed that if one identifies a *right*, whatever that right demands of one is, by definition, the *right thing to do*, with the effect that rights are taken to be absolute rather than *prima facie*.[16]

This *prima facie* characteristic of rights places them on an equivalent footing to duties in moral deliberation (Ross, 1930), as opposed to their having some superordinate status as trumps. Rights, just like duties, are subject to higher-order evaluation of what it is right to do, in terms of more basic moral values or principles. Nonetheless, some would argue that rights are somehow logically prior to duties. Sumner (2013, 358) argues – referring to Hohfeldian concepts such as liberties and powers, and immunities – that rights are fundamental and irreducible to duties because they "contain elements which are not duties, and not definable in terms of duties." McCloskey (1976, 104), meanwhile, argues that "talk about rights is often the logically primary talk" and that although "rights are justified by reference to goods and obligations… when we ascribe or claim a right, the primary, key thing is often the right; something is lost in the discussion if we refer only to the good

or the duty which is the basis of the right." From a rather different angle, Raz (1986, 171), arguing that rights ground duties, notes that "there is no closed list of duties which correspond to the right," and new duties may rise in respect of a particular right as time or circumstances change – suggesting thereby that rights are fundamental and duties derivative. Feinberg, meanwhile, also posits a logical entailment from rights to duties and bases the priority of rights on the notion that there is a unidirectional relationship between the right and the duty. The duty depends upon the prior existence of the right:

> If Nip has a claim-right against Tuck, it is because of this fact that Tuck has a duty to Nip. It is only because something from Tuck is *due* Nip (directional element) that there is something Tuck *must do* (modal element). This is a relation, moreover, in which Tuck is bound and Nip is free. Nip not only *has* a right, but he can choose whether or not to exercise it, whether to claim it, whether to register complaints upon its infringement, even whether to release Tuck from his duty (Feinberg, 1969, 250; original emphasis).

Similarly, Gewirth (1986, 333) claims that rights "are prior to duties in the order of justifying purpose or final causality, in that respondents have correlative duties *because* subjects have certain rights."

Taking these ideas in turn, Sumner's (2013) claim seems to rest on the idea that liberties, powers and immunities are exclusively components of a right. However, it seems more plausible that powers and the like are things that can be *predicated* of rights, rather than things that rights *contain*, and can equally well be expressed in terms of duties. For example, the power that enables *A* to waive a right held against *B* is simply an ability to annul *B*'s duty to the extent that such a duty relates exclusively to *A*. Similarly, the immunity that *A* possesses in respect of his or her right against *B* is simply the demand that *A* can make on *B* regarding the duty (e.g. of non-interference) that is correlative with this right.

Arguments such as those of McCloskey (1976) and Raz (1986) only take hold if duties that are correlative with a right are seen as necessarily being mediated by the right. A more plausible and more parsimonious view is that both the right and the duty arise directly and simultaneously from the moral value or principle that grounds them, without the one being mediated by the other. For example, considerations of respect for autonomy ground a patient's right to make a choice regarding

medical treatment, and they similarly form the basis of the physician's duty to obtain consent (and perhaps, as Raz argues, other similar duties), but there seems no reason to think that the entailment of this duty must be via the correlative right.

Feinberg's (1969) claim is seemingly stronger, as he seems to posit a causal relationship between Nip's right and Tuck's duty – only if Nip has the right does Tuck have a duty – and highlights Nip's ability to 'control' Tuck's duty. Again, however, there is a danger of mistaking correlation for causation – one can legitimately regard both the right and the duty as being 'caused' by whatever more fundamental value grounds them. Moreover, if we are to rely on a causal nexus, we could argue equally plausibly – but no more fruitfully – that Nip's right might have arisen from some prior action or commitment (e.g. a promise) on Tuck's part, automatically generating a duty in Tuck that only secondarily conferred a right on Nip. So, depending on which we regard somewhat arbitrarily as the antecedent, we can reverse the direction of causation between right and duty. Correspondingly, in terms of one party's control over the other, if Nip has the power to release Tuck from this duty, so too might Tuck deny Nip the right by failing to perform the action or make the commitment on which the right is based. Finally, Gewirth's (1986) causal argument relies on equating rights with benefits and duties with burdens, such that burdens are for the sake of benefits, and not vice versa. Now whilst one might regard a right as much the same as a benefit, it is less clear that a duty is a burden – rather, it is *like* (or perhaps *feels like*) a burden. Gewirth's reasoning is therefore at core analogical, and alternative analogies – for example, casting a duty as something given and a right as something received – might be adduced to suggest a relationship in the opposite direction. Moreover, it can again be objected that both the right and the duty are simultaneously 'caused' by their shared moral grounding, rather than by one another.

Claims as to the directional dependence of duties on rights, or indeed vice versa, are hard to sustain, but even if these claims could be established, it does not follow that rights should have pre-eminence in our practical moral deliberations in the way McCloskey (1976) implies.

Conflicts of Rights and Duties

As already noted, one right may come into conflict with another:

> a woman (including a pregnant woman) has a right to autonomy, of which the right to privacy and to be free from unwanted bodily interference is one important aspect… a fetus has rights… [and] these rights must include the right of the fetus to be free from that which may destroy or damage its potential for being born whole. (Kennedy, 1990, 172–173)[17]

Similarly, Gabard and Martin (2003) describe a case in which a husband comes to a clinic in search of his wife, whom he has injured in a domestic dispute. The staff member is hesitant about revealing the woman's presence to the husband. They portray the underlying conflict in terms of the wife's right not to be assaulted and the husband's right to be told the truth. When two rights conflict with each other in this way, Gabard and Martin (2003, 26) suggest that the problem is solved in the following manner:

> The dilemma consists of the clash of these rights, and the question is which right has priority in the situation. The dilemma is properly resolved by exercising good judgment in weighing these conflicting rights.

For the clinician, however, the most immediate question is: what is he or she to *do* in this situation? Determining the appropriate course of action is most directly an issue of duties, rather than of rights. It would seem quite possible for a decision to be reached in this situation without necessary reference to rights, but it is hard to see how it could be reached without reference to duties, in the broad sense of what one is morally required to do (or refrain from doing). Ultimately, something has to be done, or not done, and the action-guiding property of duties facilitates this decision more directly than an appeal to rights.

Therefore, in situations where two rights conflict with each other, and in those where a right conflicts with a duty, at the level of practical action the essential conflict is not between two rights or between a right and duty, but between two (*prima facie*) duties. Thus, returning to the first example cited, the right of the fetus to life equates to a duty on others, including the mother, to protect it from harm, and conversely, the mother's right over her body equates to a duty on others not to interfere with decisions she may make affecting reproduction. The conflict exists most immediately in terms of

these correlative duties – reflecting Waldron's (1989, 506) argument that "[w]hen we say that rights conflict, what we really mean is that duties they imply are not compossible."[18] By assessing the relative stringency of these duties,[19] the weightier duty can be identified and action taken accordingly; in Ross's (1930) terms, one of the conflicting *prima facie* duties thereby becomes a duty proper.

Accordingly, as regards moral action in a particular situation, the moral nexus between individuals is directly formulated by duties, and only indirectly by rights (where they exist). Although rights may help to provide a moral understanding of certain relationships between individuals, and may encourage an ethical conflict to be expressed in terms of both the person who has needs and interests and the person who has responsibilities, the moral conflicts that arise within such relationships are ultimately resolved, and thus most appropriately framed and analysed, in terms of duties.

Grounding Rights in Basic Moral Values

A right is not self-validating, but needs to be grounded in and justified by some more general moral notion. Thus, Harris (1985, xvi) argues that a right should feature as the conclusion of a moral argument, not as one of its premises. It is therefore misleading of Wasserstrom (1964, 630; original emphasis) to argue:

> [I]f a person has a right to something, he can properly cite that right as the *justification* for having acted in accordance with or in the exercise of that right.

Such a claim only makes sense if the right in question has already been demonstrated to be grounded in some fundamental moral value or broader moral principle, such as justice (Rawls, 1972) or respect for autonomy (Richards, 1981), or a Kantian notion of human dignity (Rothhaar, 2010);[20] the simple fact of its being called a right is insufficient. Baker (2001, 250) similarly appears to mistake the direction of justification when he talks of "principles as mechanisms for protecting human rights," as does van Tonder (2011, 150) when arguing that "human rights form the basis for the determination of moral values." We do not invoke principles to justify a predetermined right; rather we justify rights by reference to principles whose moral value we already acknowledge. So, the basis for a right could be that it protects an individual's autonomy, or that it preserves his or her essential human dignity, or that it maintains the just distribution of benefits within a society. In each case, appeal is made to a more general moral value or principle. Accordingly, in respect of van Tonder's (2011)

claim, we use moral values to determine rights, not vice versa.[21]

Basing rights in consequentialist value

More contentious is the idea that there might be a consequentialist justification for rights. Although Bentham (1843) was famously hostile to the idea of rights, other utilitarians (Mill, 1891; Hare, 1981; Pettit, 1998) have sought to accommodate the notion of rights within their theories. However, most accounts of rights regard them as being resistant to (Dworkin, 1978; Lyons, 1984; Donnelly, 1985; Sprigge, 1988) – or even excluding (Jones, 1994) – utilitarian calculations; Dworkin's (1978) view of rights as "trumps" is a famous example of this point. Hence, Brown et al. (1992, 21) argue that "when we talk of individuals having rights we mean that their interests or preferences may not be overridden even to achieve great value."

A consequentialist theory, such as utilitarianism, emphasizes benefits that accrue at an aggregate level, whereas a rights-based theory is concerned with the moral entitlements of specific individuals (Mackie, 1984). Consequentialism cannot, therefore, fully accommodate rights, if what we understand by the idea that somebody has a right is that purely consequentialist considerations should not be allowed to outweigh it. The possibility remains, however, that rights might be assigned the same function as rules in a rule-utilitarian framework.[22] That is, we might allow rights because, although the exercise of such rights may constrain utility on specific occasions, the long-run effect is to maximize utility. So, if we accept that individuals in certain circumstances have a right to receive care for a particular illness – perhaps based on some prior commitment on the provider's part to provide such care – it might be reasonable to uphold that right, even if on a specific occasion somewhat greater benefit would accrue by diverting care to another person.[23] A system of care based on such an understanding might, overall, produce greater benefit than one in which the notion of rights had no special force.

The role accorded to rights in this restricted form of utilitarianism is nonetheless a limited one, as the criterion by which they are judged is still a consequentialist one, albeit at a higher level. The moral value of rights here is derivative from that of utility, not fundamental. Reference to 'rights' in this context is perhaps little more than a proxy for 'rules'. There is, therefore, a fundamental tension between the concept of a right and a consequentialist way of thinking. This, however, may suggest a

potentially useful role for speaking of rights. I earlier argued that rights come into operation at a certain level. We invoke rights when something of significant moral value is at stake – something that we would not wish to sacrifice without compelling reasons. Accordingly, if we wish to signal a deontological constraint upon attempts to maximize utility – to mark certain actions as wrong in themselves, despite their consequential benefit (Nozick, 1974; Nagel, 1986) – an effective way of doing so may be to refer to rights. Whereas reference to other notions – such as duties, obligations, harms, benefits – can be subsumed within a consequentialist formula (some perhaps more readily than others), the lack of fit between rights and consequentialism may provide a role for referring to rights in practical normative argument. They serve to indicate something of sufficient moral value that it is resistant to consequentialist considerations.[24] Importantly, this does not constitute *immunity* to such considerations; rights remain defeasible, albeit with a high threshold for being overridden.

However, using rights in this way gives them more of an expressive than a substantive role; they may serve to highlight a deontological constraint, but they do not augment or modify our understanding of what such a constraint is. Signalling a constraint on the pursuit of utility does not involve a *necessary* recourse to rights. Hence, rights may simply serve as convenient shorthand for deontological constraints just as, in the context of consequentialism, they may do for rules. In neither case are rights indispensable.

Misapplying the Term 'Right'

A final issue that bears upon the use of rights in bioethics concerns the ambiguous application of the term 'right' to actions (or non-actions) that are more plausibly seen as duties. For example:

> Physicians should... have the right to refuse to violate their professional ethics or personal morality. (Lo, 2013, 112)

> Nurses... have the right to practice their profession; that is, to work in compliance with professional ideals and rules... [and] have the right to refuse to provide care if they believe they do not have sufficient knowledge or skills to give good care. (Kangasniemi et al., 2010, 632)

> Does a nurse have a right to ensure that a patient is fully informed when the giving of such information

is a flagrant violation of a physician's orders? (Bell, 1982, 1)

Given that, as argued earlier, a right to do something implies a lack of duty to do it, framing the above issues in terms of rights seems inappropriate. It suggests that practitioners are, *prima facie*, morally justified in either violating or not violating their professional ethics or professional ideals and rules, or either providing or not providing care that lies beyond their competence, and so forth. In each of these cases, however, the focus is on things that the practitioner is surely obligated either to do or not to do. Thus, if it is felt that ensuring that patients are fully informed is morally significant, doing so is presumably a (*prima facie*) duty rather than a right.[25] It may be tempting to use the term 'right' here in order to emphasize that others are obligated not to interfere with clinicians' discharge of their duty. However, the underlying moral logic is distorted in the process, as the notion of discretion suggested by the reference to rights is inappropriate and presumably unintended. The obligation not to hinder others in the discharge of their duties can be adequately expressed simply by reference to the moral weight of these duties; such interference is impermissible unless its moral value outweighs that of the duty it obstructs.

IV. CONCLUSION

Viewed in terms of its deontic properties, a moral right is a type of (potential) claim, justifiable in terms of some more basic moral value or principle, which requires a morally appropriate response (doing or forbearing) from one or more other parties. Not all moral claims on others generate rights, however; some such claims refer directly to others' moral duty, without invoking moral rights. If we focus predominantly on rights, and identify duties only where we have already identified rights, we may thereby fail to recognize those duties that do not have corresponding rights. Equally, if we conflate 'having a right' with 'what it is right to do', our reasoning is likely at best to be confused, and at worst to commit the fallacy of equivocation. Rights seem therefore to be at best redundant in deontic terms, and at worst to be a potential source of confusion, particularly in view of the imprecise or ambiguous ways in which they are sometimes invoked.

Moreover, even if clearly stated, a right that is posited without prior argument or justification does not have a meaningful function in decision making. If, for example, it is asked "Does a respiratory team need to unconditionally respect the right of their lung cancer patients to smoke" (Trede &

Croker, 2016, 127), we must first be told the basis on which such a right is invoked before we can begin to respond to the question. Furthermore, rights should be assigned only to those moral claims or choices that reach an appropriate threshold of moral significance – the temptation to label any moral claim as a right risks a proliferation that "devalues rights by eroding their argumentative power" (Sumner, 1987, 15).

At the level of practical moral reasoning, however, there are ways in which we might wish to refer to rights. Within a consequentialist framework, we might prefer to use the language of rights in preference to that of rules, though this would be a change purely in terms of exposition and would not alter the nature of consequentialist reasoning. Perhaps more fruitful is the function of rights within a deontological approach to decision making, where they may signal a constraint on a consequentialist pursuit of impersonal utility more immediately and emphatically than many other moral terms. Again, however, this would be more a change in form than in substance, and a unique function for rights is still lacking.

As noted earlier, McCloskey (1976) considers that "something is lost" if we exclude rights from our discussion, and Wasserstrom (1964, 636) claims that a system of morality without rights

> would be a morally impoverished one. It would prevent persons from asserting those kinds of claims, it would preclude persons from having those types of expectations, and it would prohibit persons from making those kinds of judgments which a system rights makes possible.

Whilst avoiding reference to rights might make our *expression* of moral claims or judgments somehow less convincing, it is hard to see how their absence would prevent us from *constructing* those claims or judgments – again, their role is more one of form than of substance.

Nonetheless, one should perhaps not dismiss outright the expressive function of rights. Providing that their *prima facie* nature is not overlooked, rights may alert us to the fact that issues of particularly high moral import are at stake. They may also shift attention to the individual, particularly when that individual is vulnerable or wronged (Almond, 1994), and highlight the notion of an individual's moral entitlement (Doyal, 2001). There may also be occasions, particularly when first reflecting on a problem, when it is useful to take advantage of a greater generality of rights than of duties (Stoljar, 1984). We may have a clear conviction that something is morally owed to an individual or a group of

people, in terms of certain moral values or principles, but at this stage not be able to specify what actions others should perform (or not perform) in relation to this entitlement. In such a situation, it may be easier, in the first instance, to speak in terms of rights than of duties, but nonetheless we would ultimately want to know what the relevant duties are.

In these ways, rights may contribute to how we may effectively *express* moral conflicts, but it is not clear that in so doing they make a contribution to our normative *understanding* of such conflicts beyond that provided by notions of duty, obligation, and the right (or wrong) thing to do. Moreover, we should be wary of this expressive function of rights sliding unnoticed to a purely rhetorical use of rights discourse in which the underlying moral reasoning is lost or ignored. The rhetorical power of rights-talk that some regard as a merit (Knowles, 2001) lends itself to exaggeration or misuse, and such rhetoric may easily take the place of reasoned argument on moral problems – in Glendon's (1991, 14) words, promoting "mere assertion over reason-giving."

I conclude that a detailed analysis of moral decision making in bioethics is more fruitfully conducted in terms of duties; these are more comprehensive in their coverage, and their action-guiding nature supports moral decision-making in a more direct, and often less ambiguous, way than rights. Although the "exhortative" function of a right (Macklin, 1976, 32) may indicate that some sort of action is required, in determining specifically what that action should be we need to focus on the respondent to such a right, and the duties that it gives rise to in him or her.

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NOTES

[1] Hohfeld (1919) uses the term 'claim', in a technical sense, to denote a particular type of right. However, my concern here is with the ordinary, non-technical sense in which Feinberg and Powell use the term.

[2] Moreover, some would grant rights to animals, who are neither actual nor potential claimants (Regan, 1983) – though this position assumes an interest-based rather than a more restrictive will- or choice-based theory of

rights. For accounts of these two theories of rights, see Kramer et al. (1998).

[3] By analogy with positive and negative duties, rights of action and rights of recipience are sometimes referred to, respectively, as negative and positive rights (Jones, 1994). However, Rainbolt (2014) notes that these terms are used inconsistently in discussions of rights.

[4] The term 'duty' tends to be used in a positional sense and 'obligation' in a transactional sense (Mish'alani, 1969; White, 1981). However, these terms will be regarded as synonymous in the present discussion.

[5] This is broadly a Hobbesian interpretation; see Curran (2007).

[6] See Steiner (2006) for a rejection of the notion of inalienable rights – those that can neither be dismissed by others nor be waived by the subject of the right, and Feinberg (1980) for a discussion of 'mandatory rights. For a contrary view – at least in respect of certain rights such as the right to life and the right to personal liberty – see Meyers (1985). Whilst waivable rights clearly support a will-based theory of rights, they are nonetheless compatible with an interest-based theory provided that the right-holder is able to surrender or subordinate his or her interests.

[7] A more generous interpretation would be to follow Feinberg (1969) and refer to rights with no identifiable respondent as 'manifesto rights'; an aspirational sense of rights that are to be wished for. However, as Feinberg points out, these are 'possibilities of rights' rather than actual rights (p. 255). They fail to be actual rights not in the sense of being unacknowledged or disregarded, or because others fail to act in response to them – which would not deprive them of this status – but because they are simply inoperable without an identified respondent.

[8] Stoljar (1984, 40) is therefore correct to argue that "rights cannot operate without a correlative, for what would the right now be – a right to or a right against – if it did not entail a responsive duty by another individual?"

[9] Whilst no individual can claim obedience to the law as a right, certain persons, such as police officers, do of course have the legal right to take certain action in the event of an infringement of the law (see also note 25).

[10] Against this position, Magnell (2011, 7) argues that "[i]f there is no right to charity and no one has a right to charity, then the poor have no more right to charity than the rich" – but this seems simply to beg the question; it does not demonstrate that the greater need of the poor for charity generates a right. He proceeds to argue that an imperfect duty gives rise to a *conditioned* right: this is *A*'s right to receive what is required by *B*'s imperfect duty if it is not received by others to whom it is due. It is not clear, however, that a conditioned right is a necessary or helpful elaboration of an imperfect duty, given that it appears to be defined fully in terms of such a duty.

[11] Nor should we accept the view that provided that we have not violated a person's rights we have not wronged him or her: "where there is no right to life, then – all else being equal – there is no moral case to be made against abortion as such" (Carrier, 1975, 381). One can fail in one's duties to others on grounds other than overriding their rights. See also Thomson (1973).

[12] It might be objected that this focus on duties does not capture the sense of moral entitlement associated with a right. However, the issue at this juncture is the deontic logic of rights, and it seems that this sense of entitlement on the part of the subject of a right can be expressed in terms of the duties of the respondent(s) to this right – and even if this is not the case, there is other terminology than that of rights in which it can be expressed (e.g. 'morally justified'). There may be normative reasons for wishing to express this entitlement in the language of rights, but these are separate from a conceptual or logical analysis.

[13] This specificationist view builds into the definition of a right the circumstances in which it does not apply, as a series of 'unless' clauses, thereby avoiding conflict with other rights (Shafer-Landau, 1995; C. H. Wellman, 1995). Specificationism sees rights as delimited but absolute, whereas a *prima facie* account sees them as universal but provisional. The specificationist account of rights seems unsatisfactory for at least three reasons. First, although individual 'unless' conditions may readily be described, the full complement of such conditions would be extremely difficult to specify. Secondly, and relatedly, on the specificationist view, determining whether a right exists requires foreknowledge of the agreed exceptions to the right in question. On epistemic grounds, this seems unrealistic, and it is more straightforward to appeal to the moral considerations directly presented by the situation at hand. Third, in the event of conflict, specificationism seems to make the *existence* of one right dependent upon the right with which it conflicts – if the latter right satisfies an 'unless' clause, the former right is not a right after all. This seems a rather unwieldy approach, and weighing conflicting *prima facie* rights in terms of their strength constitutes a more intuitive and parsimonious account. Additionally, as Rainbolt (2006, 165–166) argues convincingly, the specificationist account is much less applicable to moral rights than to non-moral (e.g. legal) rights.

[14] However, just as in Ross's (1930) account of overridden *prima face* duties, a right that is infringed is not thereby annulled. Accordingly, some degree of compunction, recompense, or at least some explanation to the subject of the overridden right may be required (Melden, 1972; McCloskey, 1976). Frederick (2014) contends that the specificationist account of rights has difficulty accounting for this sense of recompense.

[15] In this connection, White (1981, 98) draws a distinction between doing something rightfully and doing it rightly.

[16] In addition to conceptual difficulties in regarding rights as absolute, such a view may encourage an excessively rhetorical and unreflective use of rights; see Glendon (1991, ch 2).

[17] I ignore here the debate as to whether fetuses can have rights.

[18] C. Wellman (1995) and Kamm (2001) contest Waldron's formulation, arguing that there are some conflicts involving rights that cannot be re-expressed as conflicts of duties. Even if this view is correct, my argument would still apply to those rights conflicts that can be framed in terms of duties.

[19] It is not crucial for the present argument whether such stringency is determined with recourse to general deontological principles, by appeal to some form of moral rule, or through a more particularistic analysis of morally relevant aspects of the particular situation (Dancy, 1983).

[20] There appears sometimes to be a curious dissociation of the notion of a right from more fundamental moral principles. Allmark (2004), for example, refers to a category of "rights advocacy," under which a practitioner would ensure that "a patient was aware that he or she could refuse treatment, that they were properly informed about treatment and, if they did refuse, that such a refusal was respected" (p. 137). He then talks in very similar terms of a category of "autonomy advocacy," under which the practitioner "as means to the patient's autonomy... [would] give a patient adequate information in order to make decisions" (p.138). A more parsimonious account would be to elide these two categories and include respect for autonomy among the grounds of the rights for which the practitioners might advocate.

[21] On occasions the reasoning is not only in the wrong direction but also somewhat circular: "A person's right to autonomy is that moral property whereby he has the right to be dealt with according to his uniqueness" (Husted and Husted, 2008, 144).

[22] Or another indirect form of consequentialism, such as is proposed in Sumner's (1987) consequentialist analysis of rights.

[23] Although not writing from a specifically consequentialist perspective, Raz (1984) expresses a similar idea when he argues that rights allow us to deal with practical moral questions without having to refer to ultimate values on each such occasion.

[24] As well as acting as deontological constraints on the demands of impersonal utility, rights may similarly constitute deontological *options*, giving the subject of the right "*permission* not to maximize the good" (McNaughton and Rawling, 2014, 39).

[25] It may make sense to refer to a non-moral right in the above instances. Practitioners may, for example, have a legal or professional right to refrain from actions that are contrary to their personal morality or to decline to undertake care beyond their competence – but the present concern is with their putative *moral* rights.

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