

A defence of rights as side-constraints against the irrationality and saveability objections

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Abstract

Rights as side-constraints is a position that upholds individuals' rights as inviolable, so as to reflect the importance of the human person. In this essay, I defend rights as side constraints against two pressing challenges: (1) that rights as side-constraints is irrational because it does not lead to a maximisation of rights upheld, and (2) that rights as side-constraints upholds inviolability of a given person but diminishes the saveability of the same person, even though both reflect the importance of the person's moral status. Specifically, I argue in the case of (1) that maximisation of rights upheld does not actually uphold rights, and that "irrationality" may actually reflect the strength of deontic constraints, and in the case of (2) that inviolability is a stronger measure of a person's importance than saveability.

Introduction

Rights as side-constraints is a position that upholds individuals' rights as inviolable, so as to reflect the importance of the human person. There are two main challenges to rights as side-constraints. These are: (1) that rights as side-constraints is irrational because it does not lead to a maximisation of rights upheld, and (2) that rights as side-constraints upholds inviolability of a given person but diminishes the saveability of the same person, even though both reflect the importance of the person's moral status. In this essay, I defend rights as side constraints against these two pressing challenges. Specifically, I argue in the case of (1) that maximisation of rights upheld does not actually uphold rights, and that "irrationality" may actually reflect the strength of deontic constraints, and in the case of (2) that inviolability is a stronger measure of a person's importance than saveability. In this essay, I will first explain rights as side constraints, then consider challenges (1) and (2) in turn. For (1), I specifically explore a system of utilitarianism of rights as a foil to rights as side-constraints. For (2), I consider Kagan's (1991) argument that both inviolability and saveability are indicators of an individual's importance.

I. Rights as Side-Constraints

In *Anarchy, State and Utopia*, Robert Nozick (1974) outlines his argument that certain rights function as side-constraints, in that possessing such a right constrains actions that others may take that violate this right. Such rights may include as the right to life or the right not to be harmed. Nozick believes that conceiving of rights as side-constraints upholds respect for the inviolability of the human person. Specifically, this inviolability stems from the Kantian principle that individuals should be treated as ends in themselves, rather than means to ends. This means that individuals should not be treated as ways in which to bring about a particular goal, but instead appreciated and respected as end goals in themselves. As Velleman (1999) suggests, to be valued as an end in oneself is to be "that with a view to which one is moved to act". In this sense, accepting rights as side-constraints will lead to the imposition of constraints on the actions that agents may take that harm or kill others, insofar as such an action treats the victim as a means because the action is motivated without the view of the victim in mind. Thus, it is clear that rights as side-constraints upholds a very strict standard for the inviolability of

the human person, as it forbids actions that do not treat the potential victim as an end in themselves.

Consequently, those who uphold rights as side-constraints believe that these deontic constraints exist regardless of possible outcomes. In practice, a proponent of rights as side-constraints would argue that there is no situation where it would be morally permissible to harm an individual in order to spare others from harm, as doing so would violate the one individual's inviolable right not to be harmed. Consider this *Bridge* variant on the infamous trolley case: there is a trolley careening down the tracks and will hit and kill 5 maintenance workers who cannot be moved in any way. You are standing on a bridge over the tracks next to a very large man, who if pushed in front of the trolley, will stop the trolley in its tracks and save the five workers. While many reasons have been raised by philosophers for not pushing the large man, a proponent of rights as side-constraints would argue that it would be morally impermissible to push the man over the bridge to save the five, since this would violate his inviolable right not to be harmed. In sacrificing the man to save the five, the man is used as a means rather than seen as an end in himself, and any agent that chooses to push him is clearly not moved to act with his view in mind¹. In one sentence, rights as side-constraints imposes deontic constraints on certain actions in order to protect the moral status of important and inviolable individuals.

II. Irrationality Objection

The first challenge against rights as side-constraints is that it is irrational, because it is a system of rights that does not lead to the maximisation of rights upheld. To make this comparison, consider a system of utilitarianism of rights. A utilitarian of rights would argue that since upholding rights is morally good, we should maximise the outcome of number of rights upheld.

¹ It must be noted that a subscriber of right as side-constraints would be opposed to pushing the man in this case, but would not be opposed to turning the trolley into the side-track in the original *Trolley* case. In the original case where the choice is between the five workers and another worker on a side track, accepting rights as side-constraints would still allow one to redirect the trolley to kill the one worker instead of the five. This is because the one worker is not used as a means to save the five, and as such, while her right to life was violated, her status as an end in herself and not a means was not violated. In this case, upholding five rights to life versus one right to life is still preferable, insofar as the moral status of the one as an end in herself was not violated.

To draw upon the *Bridge* case again, a subscriber of utilitarianism of rights would advocate sparing the five by sacrificing the one, since, she argues, this course of action upholds five rights against harm, while forgoing one, leading to a net 4 rights against harm upheld. In comparison, a proponent of rights as side-constraints would advocate an outcome where only one right against harm is upheld, while five are forgone, leading to a net -4 rights upheld. This seems to be a compelling challenge against rights as side-constraints: it is a moral position that claims to prioritise rights as an important moral good, yet in practice does not advocate for outcomes that maximise upholding such rights. In other words, it seems that when faced with difficult choices, those who subscribe to rights as side-constraints do not make decisions that reflect the goodness of protecting the inviolability of the human person.

Frances Kamm (Voorhoeve, 2009) defends rights as side-constraints by arguing that any system that aims to maximise rights upheld erodes the inviolability and integrity of the supposed “rights” upheld. According to Kamm, moral decisions that choose to sacrifice individuals implicitly signal that any individual’s (and not just the individual that was sacrificed) right to not be harmed or right to life can be violated in circumstances where it would lead to a net positive outcome of rights upheld. In other words, a moral system that sacrifices the rights of a minority to uphold the rights of a majority in order to lead to a net positive outcome of rights upheld diminishes the inviolability of the human person, by transiting from a universally inviolable right to a right that can be violated given specific circumstances. Kamm’s defense seems compelling: if utilitarianism of rights systems do not uphold the same universally inviolable right that rights as side-constraints systems do, but rather a less powerful right that can be violated in specific circumstances, then it is not clear that they uphold the priority of rights more strongly than rights as side-constraints systems do. In allowing for the persons to be harmed in certain circumstances, utilitarianism of rights systems do not uphold the universal inviolability of the human person. As Kamm (ibid) puts it, “If it were permissible to kill the one to save the others, then *no* one...would have the status of the highly inviolable being.” With this being the case, the irrationality challenge seems considerably weakened as moral decisions made in a rights as side-constraints framework actually do maximise number of *inviolable* rights upheld.

Furthermore, I argue that the perceived “irrationality” of rights as side-constraints actually strengthens the argument for them. As shown above, rights as side-constraints, while perceived to be irrational, are in fact rational as they actually maximise the number of inviolable rights

upheld. This difference stems from a difference between deontological and utilitarian perspectives. However, the fact that rights as side-constraints seem irrational to a utilitarian (of rights) seems to support the claim that rights as side-constraints do indeed uphold the inviolability of the human person. This is because choosing to uphold a person's inviolable right not to be harmed even when it leads to adverse consequences would strongly signal the importance of this inviolable right. If it was easy to uphold a person's inviolable right or if the decision to uphold a person's inviolable right can be justified by mere cost-benefit analysis, then it would not be very special to do so. Rather, the fact that it *seems* irrational to do so, that one is required to do so in spite of all adverse consequences, is reflective of the special inviolability of the human person. In this case, the perceived "irrationality" of rights as side-constraints actually points to the fact that rights as side-constraints do uphold the lofty goal of protecting the high moral status of the human person.

Thus, I believe that because maximisation of rights does not actually uphold rights, and that the perceived irrationality of rights as side-constraints signals its strong protection of the inviolable status of the human person, the challenge that rights as side-constraints is irrational has little force.

III. Saveability Objection

The second challenge against rights as side-constraints that I will consider is that it upholds inviolability of an individual but appears to diminish saveability of an individual. According to Kagan (1991), both are indicators of a person's importance. As earlier explained, inviolability can indicate an individual's importance by enforcing their status as ends in themselves, and not merely means to the end of the best outcome for the group of individuals. In other words, if others must constrain their actions in order not to harm me, that is indicative of the importance of my moral status over theirs. Conversely, it appears that saveability might also be an indicator of an individual's high moral status. By saveability, Kagan refers to the idea that individuals have a duty to sacrifice themselves to save another person. If others have an obligation to sacrifice themselves to save me, then surely that is also indicative of the importance my moral status carries over theirs. Here, Kagan points out that rights as side-constraints upholds inviolability but diminishes saveability: if we are not permitted to sacrifice one individual to save five individuals in order to uphold the inviolability of the one individual,

then those five individuals can be considered to have a lower saveability than if we were allowed to sacrifice the one to save them. If the underlying intention of rights as side-constraints is to uphold the importance of each individual's moral status, then it is not clear why in cases where they are mutually exclusive, inviolability is upheld while saveability is diminished.

I disagree with Kagan. I contend that while saveability and inviolability might both tell us something about an individual's importance, inviolability has precedence over saveability because the constraint against causing harm is stronger than the obligation to save. Consider the following cases *River* and *Chase*. In *River*, Alice is trapped in the sluice gate of a river, and will drown if she is not saved. Betty can jump in to save her, but will lose her right arm in the sluice gate in the process. In *Chase*, Betty is running away from an attacker who intends to chop off her right arm. In her way stands Alice, and Betty can either trample over Alice and kill her, or be caught by the attacker and lose her arm (Frowe, 2020). In both cases, we see that Betty is faced with the exact same trade-off of her right arm and Alice's life. Yet, most people's intuitions would lead them to believe that in *River*, Betty may choose not to save Alice, but in *Chase*, she cannot kill Alice. In this case, we see that the constraint against causing harm is stronger than the obligation to save. When faced with similar outcomes, the constraint against harm makes it morally impermissible for Betty to kill Alice, but the obligation to save does not uphold an equally strong duty for Betty to save Alice. One reason why this might be the case is because in cases of harming, one is making the victim worse off, while in cases of saving, one is improving the victim's situation. I believe that making someone worse off is morally worse than not improving their situation because in the former, the harm originates from the actor, while in the latter the harm is external to the actor. As such, the actor has a stronger responsibility to rectify the harm in the former (by not harming) than to rectify the harm in the latter (by saving). Therefore, the constraint against causing harm is stronger than the obligation to save. Extrapolating this to inviolability and saveability, we may believe that inviolability is stronger than saveability because inviolability constrains individuals' actions against harming others, while saveability upholds obligations individuals have to save others. Since the constraint against harm is stronger than the obligation to save, inviolability has precedence over saveability.

I believe there are two possible challenges to my argument that the constraint against harm is stronger than the obligation to save. Firstly, not all cases of saving involve externally originated harms. In my argument, I state that that the constraint against harm is stronger than the

obligation to save because we have a stronger responsibility to prevent harms inflicted on others by ourselves than we do to save others from harms originating from other sources. A challenge for my argument then is to raise cases where harms do indeed originate from the actor. Consider the *Scheduling* case: you are a manager at a railway maintenance firm. Due to a scheduling error on your part, five maintenance workers are currently working on the tracks while a trolley is careening towards them. You are standing on a footbridge over the tracks and can push a large man to stop the trolley, killing him but saving the five workers who were put in harm's way because of your mistake. In this case, we see that there is a tension between the constraint against harming the large man, and the duty to save the workers who are facing the possibility of harm only because of the actor's actions. Yet even in this case, there seems to be a very strong intuition that we should not use the one man's life to save the workers. This can be explained by a distinction between harms that originate intentionally and harms that originate accidentally. Pushing the large man is an intentional harm while the scheduling error is an accidental harm. There is a stronger constraint against causing intentional harms than accidental ones because the harm originates in an informed manner and through the exercise of one's own agency. In this case, the constraint against causing intentional harm is stronger than the combined obligations to save and to rectify an accidental harm. The relevant constraint against harm when considering cases where saveability and inviolability conflict is the constraint against *intentional* harm. Thus, we see that even when the duty to save is given additional weight from the duty to rectify one's wrongs, it is insufficient to trump over the relevant constraint against intentionally harming the large man. Clearly, even in such a limit case, the constraint against harm is stronger than the obligation to save.

The second challenge to my argument is that the duty to save is stronger than I am making it out to be. One could argue that in the *River* case, one does actually have a very strong obligation to save someone who might otherwise drown in the river, as the cost of losing one's arm pales in comparison to the cost of someone else losing their life. Singer (1972) argues for a Principle of Sacrifice: that if we can prevent something morally bad from happening, without having to sacrifice something of comparable moral importance, then we ought to do so. Notice that in Singer's utilitarian principle the origin of the harms does not matter, only that they happen, and the extent to which they happen. If we buy into Singer's principle, then we would have to acknowledge that the duty to save is indeed very strong, and when comparing the original *River* and *Chase* cases, it is not clear that the duty to save is less strong than the constraint against

harm. For the sake of brevity, I will not challenge Singer's principle and will accept it to be true. Even then however, I argue that the relevant constraint against harm is still stronger than the duty to save. Singer's principle, while offering a forceful moral argument for the obligation to bear costs on oneself to save others, seems considerably weaker in cases where we make decisions for others. While we may be obligated to give up an arm for another's life, it is not the case that we are obligated to force someone else to give up their arm for another's life, in cases where no other alternatives to save the life is possible². Undeniably, we are able to exercise more agency over ourselves than over others. In other words, the constraint against harming ourselves is much lower than the constraint against harming others. While Singer's principle may give the obligation to save enough force to push it over the strength of the constraint against harming ourselves, it does not push hard enough for it to exceed the strength of the constraint against harming others. Thus, even when I acknowledge that the duty to save is stronger than I originally made it out to be, it is still not stronger than the constraint against harming others.

As such, I believe that even when faced with the above two challenges, my argument that the constraint against harm is stronger than the duty to save still holds. Since inviolability constrains individuals' actions against harming others, while saveability upholds obligations individuals have to save others, this gives us reason to believe that inviolability should indeed take precedence over saveability. Kagan's argument that it is not clear why rights as side-constraints prioritise inviolability as a measure of the importance of the human person over saveability seems then to have little force.

Conclusion

In conclusion, I considered two challenges to rights as side-constraints: (1) that it does not maximise "rights" upheld and (2) that it arbitrarily prioritises inviolability over saveability. I responded to (1) the irrationality objection by arguing that any system that aims to maximise "rights" is not actually maximising inviolable rights, and that the perceived irrationality of

² Imagine that in the *River* case, you cannot swim, but are standing next to a passer-by who can. You and the passer-by are the only individuals in the area.

rights as side-constraints actually reflects the importance of the human person. I responded to (2) the saveability objection by arguing that inviolability should actually be prioritised over saveability because the constraints against harm is stronger than the obligation to save.

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