Rights and Wronging

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# Rights and Wronging

* Assumption: People have certain rights.
* Main Question: When does intruding upon a right *wrong the rightholder* (i.e., is wrongful)?
* A right is *intruded upon* when its conditions are not satisfied.
* An intrusion may be *non-autonomous*, and hence neither permissible nor impermissible (nor wrongful or rightful).
* If autonomous, an intrusion is either *rightful* (no infringement; e.g., because of valid consent) or *wrongful* (infringement).
* Rightful intrusion is *impermissible* if and only if it violates someone else’s rights or violates an impersonal constraint.
* Wrongful intrusion is *permissible* if and only if there is an overriding justification (e.g., saves millions).
* Violation = Impermissible infringement = infringement without overriding justification.

# When does an autonomous intrusion infringe rights?

* Choice-protecting rights: Rights protect the choices of autonomous agents.
* They are infringed when and only when autonomously intruded upon *without the valid consent* of the rightholder.
* Valid = autonomous, suitably informed, suitably free
* Problem: This recognizes no rights for young children and demented adults.
* Interest-protecting rights: Rights protect the interests of sentient beings.
* Direct interest-protecting rights: They are infringed when and only when autonomously intruded upon *against the best interests* of the rightholder.
* Problem: Inadequate protection of wills of autonomous agents.
* I will propose a hybrid choice-prioritizing account (revising an earlier account).

# Authorization for Rights

* Definition: An autonomous intrusion infringes a right if and only if it is *not authorized* by (or on behalf of) the rightholder.
* For choice-protecting rights, authorization requires valid consent.
* For direct interest-protecting rights, authorization requires not being against the right-holder’s best interests.
* Before developing a hybrid account, let me specify my preferred account of (1) interests, and (2) being against someone’s best interests.

# Interests

* Interests include everything one has reason to value. They typically include:
* more than a concern one’s own wellbeing (e.g., a parents’ interests include the wellbeing of their children).
* for autonomous agents, an interest in (1) being in control of ones’ life (and not merely in what happens to one) and (2) being recognized and respected as an autonomous agent.
* Interests are based on the objective facts, and not on what the agent believes or reasonably should believe given her evidence.
* If indeterminism holds, they are based on objective probabilities of the various possible consequences of the action (where, if determinism is true, all probabilities are 0 or 1).

# Against One’s Best Interests

* Definition: An agent’s intrusion is *against the rightholder’s best interests* when and only when, for the rightholder’s interests, the intrusion has an expected (i.e., probability-weighted) value that is:
* (1) less than the expected value, if the agent acts permissibly and *does not intrude* upon the rights of the rightholder, *or*
* (2) such that some alternative intrusive action by the agent (a) is no worse for the agent (in terms of expected value of his interests), (b) is permissible, and (c) has a higher expected value for the rightholder.

# Choice-Prioritizing Rights: Consent and Dissent

* Standard choice-protecting rights require valid consent for authorization.
* It doesn’t matter whether there was dissent or merely silence.
* I believe that the difference matters.
* Consent: Public expression of endorsement by one’s will.
* Dissent: Public expression of opposition by one’s will.
* My goal (oversimplified): To articulate and partially defend an account of rights that appeals to valid consent and dissent when either exists, and best interests when there is neither consent nor dissent.
* We shall start with a weak principle and then strengthen it.

# Choice-Prioritizing Rights, Version 1

* Version 1: If it is currently “reasonably possible” to communicate with the rightholder about current valid consent to an intrusion, then the intrusion is authorized by the rightholder if and only if she has given unrevoked valid consent.
* Communication about consent is “reasonably possible” when it is empirically possible to request and receive consent (1) in a permissible manner, and (2) with costs to sender and rightholder that are “sufficiently small” (here left vague).
* Example: A blood transfusion is not authorized when the patient is conscious, autonomous, suitably informed, suitably free, and not asked for consent when this is costless.
* This agrees with standard choice-protecting rights, but is silent when current valid consent is not reasonably obtainable.
* The rest of our discussion addresses that case.

# Hypothetical Consent/Dissent

* I believe that, for authorization, a certain kind of hypothetical *consent/dissent*, if present, can be relevant and is *lexically prior* to interest considerations.
* Example: An unconscious Jehovah’s Witness who has not consented/dissented and would dissent to blood transfusion, even though in her best interest.
* I claim that a blood transfusion wrongs the patient in this case.
* This gives a stronger role to the will over interests.

# Hypothetical Consent/Dissent: Some Stipulations

* (1) The consent/dissent is to the *specific intrusion* by the agent against the rightholder in the actual circumstances (not to an action type).
* (2) The hypothetical consent/dissent is based on the rightholder’s disposition to consent/dissent, relative to her stable beliefs, values, and disposition to revise beliefs and value in light of evidence, *when she was last autonomous*.
* If the individual was never autonomous, then there is neither hypothetical consent nor hypothetical dissent.
* The hypothetical response is based on her stable beliefs and values when last autonomous, even if mistaken.
* (3) Third, the only idealizations involved are something like the following: (1) The rightholder is informed of (but need not accept) the beliefs of the intruding agent (and those with whom he coordinates for the intrusion) about the extent to which the intrusion is in her best interests, as well as their beliefs that support this belief, (2) the conditions for reflection and revision are adequate (or perhaps ideal) , and (3) she has unlimited time to reflect upon the information and whether to give consent/dissent.
* (4) The rightholder need not accept the new information considered.

# Hypothetical Consent vs. Interests

* A person’s interests (as I use the term) are determined by the *facts* and everything she *has reason to value*.
* Hypothetical consent/dissent (as understood here), like actual consent, is based on the individual’s *beliefs* and her *values* (which, due to ignorance or irrationality, need not be identical with what she has reason to value).
* Hypothetical consent/dissent better reflects the person’s will than her interests do.
* Hence, I make them lexically prior for authorization, when they exist.
* There may be neither hypothetical consent nor hypothetical dissent--even for a currently autonomous rightholder.

# Choice-Prioritizing Rights, Version 2

* (1) [as before] If it is currently reasonably possible to communicate with the rightholder about current valid consent to an intrusion, then the intrusion is authorized by the rightholder if and only if she has given unrevoked valid consent.
* (2) If it is *not currently reasonably possible* to communicate with the rightholder about current valid consent/dissent to an intrusion, *and the rightholder has given neither valid consent, nor valid dissent*, to the intrusion, then the intrusion is authorized if and only if (a) she hypothetically consents, or (b) she does not hypothetically dissent and the intrusion is not against her best interests.
* Hypothetical consent/dissent are determinative in the absence of valid consent/dissent and of reasonable possibility therefor.
* This is silent when there is a conflict between past valid consent/dissent and hypothetical consent/dissent.

# The Role of Interests in Version 2

* Suppose that there is no past valid consent/dissent and no hypothetical consent/dissent. Do interests determine authorization? Yes!
* Example 1: Young child who is not yet autonomous.
* Example 2: An unconscious autonomous agent who has not given valid consent or dissent to a blood transfusion.
* Suppose that, when last autonomous she might have consented and might have dissented (or might have done neither).
* Nonetheless, a blood transfusion is in her best interest (given the facts).
* I claim that in this case her interests authorize the transfusion.

# Can past valid consent/dissent be overridden?

* Suppose that the rightholder has given valid consent, or valid dissent, to the intrusion, but the agent has *new evidence* about the impact of intrusion, and it is not reasonably possible to elicit a reassessment by the rightholder.
* Can the past response be overridden by appeal to *interests*?
* No. Example: Unconscious Jehovah’s Witness who has dissented from transfusion, even though it’s in her best interest.
* Can the past response be overridden by appeal to hypothetical dissent/consent?
* Yes. Example: Unconscious secular person who has dissented from transfusion, because of fear of AIDS, but would consent in light of new information (for her) about blood testing.

# Choice-Prioritizing Rights, Final Version

* (1) [unchanged] If it is currently reasonably possible to communicate with the rightholder about current valid consent to an intrusion, then the intrusion is authorized by the rightholder if and only if she has given unrevoked valid consent.
* (2) If it is not currently reasonably possible to communicate with the rightholder about current valid consent/dissent to an intrusion, then the intrusion is authorized if and only if
* (a) she hypothetically consents (even if she validly dissented in the past), or
* (b) she does not hypothetically dissent, has not given unrevoked valid dissent, and the intrusion is not against her best interests.
* For beings that were never autonomous, the appeals to actual and hypothetical consent/dissent are irrelevant, and their interests are the only factor for authorization.

# Partial Defense: Hypothetical Consent/Dissent

* I assume that both choice-protection and interest-protection are relevant and that some kind of choice-protection is lexically prior to interest-protection (but feel free to challenge this).
* Is hypothetical consent/dissent ever relevant?
* Not if it is reasonably possible to communicate with autonomous rightholder.
* If not reasonably possible, hypothetical consent/dissent can fill in where actual valid consent/dissent is silent. It represents the will.
* This is in rough accordance with standard contemporary medical practice for informed consent and surrogate decision-making:
* Advance directives (past valid consent/dissent) are determinative when they exist.
* If they do not exist, and there is no reasonable opportunity to request and obtain current directives, then the substituted judgment standard (hypothetical consent/dissent) is determinative.
* Can hypothetical consent/dissent ever *override* actual valid dissent/consent?
* Not if communication is reasonably possible.
* If communication is not reasonably possible, and the agent has crucial information not had by the rightholder, then, I claim, hypothetical consent/dissent *better represent the autonomous will* of the rightholder than the less well informed actual valid consent/dissent, or absence thereof.
* This is *not* part of standard practice for informed consent and surrogate decision-making: Actual consent/dissent is deemed determinative.
* I agree that, as a practical matter, we should judge actual consent/dissent to be overridden by hypothetical dissent/consent only when we have very strong evidence for the hypothetical consent/dissent.

# Partial Defense: Interests

* In the absence of a reasonable possibility for communicating about current valid consent, and in the absence of hypothetical consent and hypothetical dissent, why aren’t interests *prior* to valid consent/dissent for authorization? After all:
* Given that there may be new information available that the rightholder takes to be relevant, actual prior consent/dissent may be based on inadequate information.
* Interests, by contrast, are based on the facts, and thus may seem relevant here.
* The crucial point, however, is that, given that there is neither hypothetical consent nor hypothetical dissent, any new information is insufficient *from the rightholder’s perspective* to override prior valid dissent/consent.
* Thus, there is no relevant sense in which rightholder would deem the original consent/dissent mistaken (even if it was).
* Second challenge: Some may reject to any appeal to interests, even when there is no reasonable opportunity to communicate about consent, no valid consent or dissent, and no hypothetical consent or dissent.
* Interests, I believe, however, that rights *protect the person* of the rightholder, and that includes *both her will and her interests*. So, where the will is silent (neither consent nor dissent, actual or hypothetical), it seems highly plausible that interests are determinative of authorization.
* This is in accord with standard practice for informed consent and surrogate decision-making: where there are no advance directives, and no basis for the substituted judgment standard, one appeals to the best interest standard.

# Partial Defense: Threshold for Autonomy

* Choice-prioritizing authorization conditions are choice-protecting/prioritizing (via actual or hypothetical consent/dissent) for autonomous agents, but are purely interest-protecting for non-autonomous beings.
* Objection: For such theories, (1) for autonomous agents, the will, when not silent, determines whether there is authorization for an intrusion, *no matter how great* the interest-benefit of the intrusion, whereas for an individual who is *slightly below* the threshold for autonomy, her interests determine whether there is authorization for an intrusion, even when they are *only trivially affected*.
* This seems strange and implausible.
* Reply: This problem can be solved by holding that, for levels of autonomy below the threshold required for full choice protection, the more autonomy that is present, the greater the role for the will.
* For example, for a given degree of autonomy, there may be a maximal setback to interests, relative to what is best for interests, over which the will has the authority.
* Infinite above the threshold (or perhaps only for perfect autonomy) and finite below.
* For example, the wills of young children typically may have authority over the color of their socks but not over whether to cross a busy street.
* The End: Let’s discuss!