

Rights, legal and moral:  
You say either, she says neither – let's call  
the whole thing off<sup>\*</sup>

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**I**

In her *Realm of Rights*, Judith Thomson makes the following remark:

Many people say, “Well, we have legal rights on the one hand and moral rights on the other”, and many of those people wish to be understood as saying that what they are calling “legal rights” and what they are calling “moral rights” are two discrete territories within the realm of rights. It is *that* idea that won't do. (Thomson 1990, 73)

Thomson calls this dichotomy between legal and moral rights the Two-Species thesis. Her condemnation of it is somewhat provocative. The legal–moral dichotomy is a very popular one. When my undergraduate students read this passage they are typically bewildered or frustrated. What could possibly be wrong with such a natural idea?

It should be noted, of course, that Thomson nowhere says that the Two-Species thesis is literally false. She merely suggests that it is “less helpful” than it is usually thought. Nonetheless, this is a reasonably strong claim, and given it has potential implications for method in philosophy of law and moral philosophy, it surely requires careful justification.

Thomson's argument may be reconstructed as follows:

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1. Suppose that legal and moral rights are two necessarily non-overlapping species of rights.
2. Therefore, there are no rights that are both legal and moral.
3. I have a right not to be assaulted.<sup>1</sup>
4. This right is legal, because it is assigned to me by the legal system in which I live.
5. This right is also moral, because morality assigns it to me.
6. Therefore there is an instance of a right which is both legal and moral, and therefore the initial assumption is false.

This argument, however, is surely most doubtful at the second last step. The advocates of the Two-Species thesis could surely agree that Thomson has a right not to be murdered which is legal. So too could they agree that Thomson has a right not to be murdered which is moral. What they dispute is Thomson's assumption that these rights are identical, not merely in content, but identical simpliciter. Why not adopt the Two-Species thesis *with possible overlap* between legal and moral rights?

Thomson could have argued against the Two-Species thesis in a different fashion, however. I suggest that her eschewal of the Two-Species thesis, even with overlap, is most plausible in light of other commitments, more or less evident in the rest of Thomson's work. These commitments, however, are controversial, and thus the debate over the appropriateness of the Two-Species thesis is in effect a mere side-show to a more important substantive dispute.

## 2

Thomson's rejection of the Two-Species thesis makes more sense in light of two particular commitments revealed elsewhere in *The Realm of Rights*.

1. Thomson's original example is the right not to be murdered. As Anthony Ellis (1994) has pointed out, however, this is a very poor example for Thomson's purposes. There are good reasons to doubt that criminal prohibitions in any way assign rights to individuals. In civil law, the situation is different, and it is far more plausible that torts, for instance, correspond to legally "assigned" rights. Henceforth, I shall use examples – such as assault and negligence – which may be found in civil law.

First, Thomson believes that law can give rise to novel obligations – meant simply as factors that impinge on what we ought to do. For instance, she suggests that property rights can arise only under a legal regime which invests individuals with the power to acquire property (337–8). She also suggests that the right not to be exposed to risky behaviour of certain sorts arises only in a legal system (247). Moreover, she thinks these legally created obligations are to be weighed up along with other non-legal factors in determining what one ought to do. The legally created obligations might be called moral, because they have force with respect to the ultimate question of what one ought to do. On the other hand, they are non-moral in the sense that they are created by a contingent legal process. Their source is law, not morality.

This apparently puts her at odds with arguments of those such as M. B. E. Smith who have argued that if law ever gives rise to obligations of obedience, it is not in virtue of being law, but in virtue of its independent moral appeal.<sup>2</sup> Without saying that wicked legal systems give rise to obligations, Thomson wishes to allow that laws which fail to imitate moral imperatives may nonetheless give rise to constraints on behaviour with the very same force as constraints that are moral in origin.<sup>3</sup> This is of course controversial, but suppose we grant Thomson this assumption.

Secondly, Thomson holds that rights are not independent entities whose existence necessitates duties or obligations. She *identifies* rights with a particular type of constraint on behaviour (77–8). Thus, whether something is a right is independent of its origin.

Therefore if law gives rise in some cases to novel constraints with the same structure as rights that are of moral origin, then these novel constraints are rights simpliciter. Insofar as one of these rights constrains behaviour, it is uninteresting to Thomson to ask whether its source is in morality or law.

Rendering the question uninteresting, however, does not make the question go away. Provided by “legal” and “moral”, we mean to make a point about origin, not about constraining force, Thomson has no objection to make to talk of moral and legal rights. And thus far, we have not yet seen why Thomson’s other commitments lead her to reject the Two-Species with overlap thesis.

Consider, though, what it would mean to say, with respect to the right not to be harmed by the negligence of others, that there are *two* rights in play here. That would require that there be two distinct constraints upon our behaviour,

2. Smith 1973. Also see Simmons 1979.

3. See, in particular, her discussion of “The Limits thesis” (1990, 273–4).

different in origin, yet that they both have the same content.

At first glance, this might seem right, because one might think that law and morality constrain in very different ways. For instance, one might think that being constrained by law amounts to being liable to institutionalised penalties if one acts contrary to the constraint. Being constrained by morality might involve no such liability to be penalised, or at the very least, not penalties with the peculiar institutional character associated with law.

For Thomson (75), however, and for all but the most extreme of positivists, the ability of law to guide action is not simply in virtue of the threat of sanctions. Rather, law can, in at least some cases, be reason-giving in a fashion that is quite different from the prudential reason of avoiding penalty.

There appears, therefore, to be no other way for law to guide action, except to constrain behaviour in the same way that moral rights constrain behaviour. At the very least, Thomson seems not to envisage any other way for a law to constrain behaviour, and thus naturally concludes that legal and moral rights are essentially similar in the way they constrain behaviour.

One might object to this that the constraints imposed upon us by law and morality, while similar in structure, are not identical in what actions they constrain. For instance, the law of negligence in most jurisdictions does not hold failure to rescue another to be a breach of the duty of care (e.g. *Osterlind v. Hill* 160 N.E. 301 (1928)). However, in some jurisdictions this has recently been changed by statute, such that failure to rescue can give rise to criminal prosecution, civil liability, or both. Thus in cases where one can be found negligent for failure to rescue, the law may be said to assign to individuals a right to be rescued, in at least some circumstances. One might think, however, that the moral right not to be negligently harmed is less demanding than this. Perhaps, morally speaking, the traditional common law conception gets it right: where no special relationship exists between the parties there is no duty to rescue.<sup>4</sup>

Supposing it to be true, then, that while the legal right not to be negligently harmed sometimes constrains others to perform rescues, the moral right to be harmed does not, would this show that there are two constraints of different content, and thus there are indeed two distinct rights?

Not immediately. For consider this possible retort by Thomson: “Consider the types of action where law and morality appear to impose different con-

4. If one does not like the example, because one is convinced that there is indeed a moral right to be rescued, then one can simply consider the converse situation, where the law is *less* demanding than morality, in a legal system where there is no legal duty to rescue.

straints. Call any such possible rescue, not required by morality, but required by law, an instance of doing alpha. Are we constrained to do alpha? If you say yes, then you are suggesting that the law has constrained us more than we were already constrained by morality. In which case I say there is one constraint – and it is the single sum of the legal and moral prescriptions regarding negligent harm: it has the larger extension. If you say no, then you are suggesting that the conflict between law and morality is, in this instance, so grave that the law does not bind us. It therefore *does not give rise to a constraint* that we do alpha. In which case the requirement of doing alpha is not part of the constraint we call the right not to be negligently harmed.”

There is something appealingly neat about this reply, but both its disjuncts appear to beg the question against the overlap thesis. For instance, there is nothing logically defective about the claim that, if the first disjunct is true, we are constrained by law to do alpha-type rescues, while we are constrained by law *and* morality to do other actions as part of our duty of care.

If the second disjunct is true, then the Two-Species theorist could endorse a legal duty to do alpha, but concede that this constraint can be overridden. Thomson herself is at pains to recognise that rights are not absolute constraints, but may conflict and be overridden by other considerations (chs 3–4).

In the absence of any further argument then, I see no reason why we must reject the claim that constraints may overlap in extension without thereby being identified, or without thereby subsuming the smaller into the larger.

### 3

It should be evident, then, that Thomson’s equation of rights with constraints is central to her eschewal of the legal–moral Two-Species thesis. This identity claim is not the only plank on which her position stands, however. What is also necessary is a view about the identity conditions for constraints. At least sometimes, overlapping constraints ought to be identified. One can see that this has the attractive consequence of discouraging a sort of double-counting fallacy. “I am constrained not to alpha once, by law, and a second time, by morality. Therefore I *really* ought not to alpha”. This argument is, surely, specious, and to the extent that Thomson’s view inhibits such arguments, it is to be welcomed.

On the other hand, there remain reasons to withhold a final judgment. In particular, there is reason to doubt Thomson’s lynchpin premiss: the claim that

law can give rise to novel constraints of essentially similar obligating force as moral constraints. Perhaps the debate over the Two-Species thesis, then, will be best settled by closer attention to related issues of this sort.

## References

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