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DOING, ALLOWING, AND DISABLING: SOME PRINCIPLES  
GOVERNING DEONTOLOGICAL RESTRICTIONS\*

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Most people accept that there are some things you may not do, even if the number of harms suffered or rights violated would be minimized if you did them. For example, most people believe that you are not allowed to shoot or torture one person even if that is the only way to save five others from being similarly mistreated. I will refer to the prohibitions against taking such actions, even if taken for the general welfare, as deontological restrictions.

The problems confronting a proponent of deontological restrictions are twofold. On the one hand, the case has been made that they are inherently paradoxical, that there is no reason not to violate them which does not weigh at least as strongly in favor of choosing to violate them on certain occasions. On the other hand, it has been difficult to come up with a plausible account of the intuitions on specific cases, which only sometimes hold that minority rights should prevent us from maximizing the welfare over all. Both problems have been pressed by consequentialists,<sup>1</sup> their thought being that if we cannot both account for the variation in our intuitions and do so in a way which is well grounded in basic moral concerns, then our commitment to deontological restrictions is irrational. They would have us accept that it should at least be permissible to do whatever is required to minimize the number of harms suffered or rights violated.

I will argue that the Doctrine of Doing and Allowing (DDA), making a fundamental distinction between doing something harmful and allowing an equivalent harm to take place, can both get us past the appearance of a paradox and help us account for our intuitions.<sup>2</sup> However, unlike traditional supporters of the DDA, I do not take the DDA to be, by itself and unqualified, sufficient to account for our intuitions. Instead I will

argue that if we are to account for our intuitions, we should augment the DDA with what I call the Disabler Principle (DP). This principle identifies a significant, and seemingly overlooked, class of exceptions to the DDA, cases in which you *are* free to harm some for the sake of others. We will touch on other principles as well, but the DDA and DP together will take us quite a long way.

There are two ways my project here is limited. The first is a limitation in the nature of the subject matter. I want to endorse the standard caveat that the deontological restrictions I am talking about need not be absolute. If it were a matter of killing one innocent person to prevent a whole city from being destroyed, then I'm not sure a decent defense of killing the one could not be mounted. The second is a limitation in the kinds of cases I will consider. To make things simpler, I will focus on cases in which *risk* of harming or allowing a harm is not at issue.<sup>3</sup> I believe that an analog of the DDA can generally be applied in cases in which others are put at risk, but a discussion of risk taking would involve us in unnecessary complexities, and I will not engage in it here.

The structure of the paper will be as follows: In section one I will explain how deontological restrictions can appear paradoxical. In section two I will argue that the DDA allows us to resolve the paradox. In section three I will argue that we have independent reason to accept the DDA thesis, that negative claims are significantly more weighty than competing positive claims, if we start with a familiar non-consequentialist ground for rights. In the fourth section I will argue that by appealing to the DDA alone we will be unable to account for the difference between cases in which deontological restrictions apply and cases in which they don't. In the fifth section I will explain how the DP helps fill the gap and why we should take it seriously. And in the sixth section I will discuss problem cases, illustrating how this framework can be adapted and made more precise, and I will end by briefly contrasting the DP with a structurally similar and more familiar Doctrine of the Double Effect (DDE).

## 1. THE PARADOX OF DEONTOLOGICAL RESTRICTIONS

The paradox of deontological restrictions is based on the thought that although it may make sense to let rights trump utilities, rights should not trump equivalent rights. Nozick sets up the paradox of deontological restrictions this way. Suppose there is some constraint against doing a particularly horrible kind of action, say killing innocent people. Call the constraint *C*. If killing innocents is so horrible that *C* should prohibit it, then it would seem that our goal should be to prevent *C* from being violated. Nozick then spells out the paradox this way, "How can a concern for the non-violation of *C* lead to the refusal to violate *C* even when this would prevent other more extensive violations of *C*?"<sup>4</sup>

In the face of this paradox, Nozick's defense of deontological restrictions is twofold. He says they "reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent."<sup>5</sup> He also says, "This root idea, namely, that there are different individuals with separate lives and so no one may be sacrificed for others, underlies [their] existence."<sup>6</sup>

However, as Scheffler shows, the paradox can still be formulated even taking both of Nozick's thoughts into account. Scheffler interprets the first part of Nozick's justification as calling for the assignment of a high negative value to treating people simply as a means, say by killing them. He then claims that, objectively speaking, it would be even worse if through inaction you allowed even more people to be likewise killed.<sup>7</sup>

Consider this case:

*Mad Man:* A mad man is holding five people hostage, threatening to kill them if some innocent stranger (say, a woman he once saw on TV) is not delivered to him dead. You are uniquely well situated to kill and deliver this person, thereby saving the five hostages.<sup>8</sup>

Clearly you would use the one person simply as a means of securing the welfare of the other five if you killed her to save them. But if you take treating her as a means in this way to have great disvalue, you should take the mad man's killing five because he wants to show that his threats

should be taken seriously to have at least as much disvalue. And then, if you have the choice between acting so that one of these cases of using people as a means results, it is not clear why you should take yourself to be required to avoid the one in favor of the other that has at least as much disvalue. In fact, if this reasoning is sound, it might seem that you should take yourself to have a moral reason, even if not a binding moral reason, to try to kill the woman in order to save the five.

The second part of Nozick's justification for deontological restrictions does not prevent this move from seeming reasonable; in fact, focusing on it can make Nozick's justification seem even less adequate. The problem is that simply emphasizing that all six potential victims are different individuals with separate lives leaves open the following response: If you are about to violate a deontological restriction by killing the one, you can say that you know that each individual has her own life to lead, yet you cannot find a reason to give one such different individual preference over the others. After all, the kind of situation we are dealing with is one in which the crucial fact seems to be that five will be killed if you do not kill some other person. You can kill the one while being fully aware that they are all different people – simply by treating them as if they all have equivalent claims not to be killed, not all of which can be satisfied.

## 2. SOLVING THE PARADOX WITH THE DDA

Do we have any reason not to consider all six to have equivalent competing claims? If we accept the DDA, then we do. What the DDA says is that we should treat negative claims (claims not to be harmed) as significantly more weighty than competing positive claims (claims to be given aid) concerning the same type of good.<sup>9</sup> The point of the DDA is to bring to the fore the way in which the fact that people are individual beings bears moral weight: they should not lose their rights to the goods they enjoy simply because others have independently come under threat of losing those same goods (not even if they are under threat of having identical rights violated). This point can be respected without the DDA holding true all of the time, but we can assume that it holds true except

under certain limiting conditions (a number of which will be discussed later, including the Disabler Principle).

How does the DDA help in practice? In application to *Mad Man* it distinguishes between the five and the one on the grounds that the five make claims on you that you save them, while the one makes a claim on you that you refrain from killing her. The claims of the five are clearly positive while the claim of the one is negative. Since the negative claim outweighs the positive ones, the implication of the DDA is that you should not kill the woman, not even to save the five.

One thing the DDA requires of us, if we are to see how it applies to cases like this, is that we refrain from talking about things like a right to life simpliciter. The deontological restriction against killing the woman remains paradoxical if we speak of her right to life being balanced against the rights to life of the five. For there is no reason to think that she has more right not to be killed than they, and since there are five of them it would seem to be best to kill her. Describing the situation that way, however, is to fall into a consequentialist trap. To describe it accurately we must see it as it addresses you, the agent. From your position the woman has a right not to be killed, but the five do not have a right to be saved. It is only from the mad man's position that the relevant fact is that the five have a right not to be killed. Of course, in both positions all parties have a right not to be killed. It is not as if you are entitled to kill the five simply because the mad man has already threatened to kill them.<sup>10</sup> But you should not take yourself to be facing a choice between killing one or killing five. Given that you have good intentions, your choice is between killing one and allowing five to die, and given their conflicting claims as addressed to you, the only rightful choice for you is to allow the five to die.

This point is not a point about the mad man having responsibility for the deaths of the five. If we changed the case to the old, familiar hospital case in which you are a doctor who can save five from dying of organ failure only by killing one and divvying up her organs, the intuition most of us share is that you still may not do it. This is so even though there is no one here we can blame for the deaths of the five (we can suppose that no one, neither the patients nor others, did anything negligent, reckless, or malicious to cause their condition). If you are

their doctor, the responsibility for their deaths falls, if anywhere, on you. But still you ought not to kill the one.

It might be objected that the hospital case does not involve a conflict between rights and rights; it only involves a conflict between rights and utilities. But I think this distinction, though useful for setting up the paradox of deontological restrictions, cannot really carry as much weight as some would pretend. Is it really that much worse for people to die by being murdered than from natural causes? Consider the following scenario. Suppose you are in a boat and you see one person holding someone under water in one direction, while someone else is simply going under water for the last time in another. You can save either but not both. I can't see any strong reason to go one way rather than the other. In fact, if I had to choose between saving, on the one hand, two people from drowning who can't swim and who fell in the water through no fault of their own, and on the other hand, one person who is being drowned by an aggressor, I think I would feel a strong moral pull to save the two.<sup>11</sup>

It might seem that if it is not more important to prevent rights violations than to prevent similar losses of utility without rights being violated, then we are in danger of losing an essential feature of rights, namely, as Dworkin has put it, that rights trump utilities.<sup>12</sup> But if it seems that way, that is only a sign of how far we've fallen into a consequentialist way of seeing things. The thought that rights trump utilities is a thought that is meant to operate within a rights framework, not a straightforwardly consequentialist framework. It is meant to indicate that one does not lose one's right to something simply because another can make better use of it. It does not mean that there is more utility in one's having a right protected than in one's holding onto a good when violation of a right is not at issue (as would be the case if you were drowning because of a freak accident). The bindingness of rights does not come from their carrying their own peculiar utility or value. Though their protection has value, and though what they protect has value, their bindingness is inherent in them as a distinct non-consequentialist form of moral obligation.

Still, it might seem that we have not resolved the paradox in the case of *Mad Man*, for even if negative claims are significantly more

weighty than positive claims, there are five negative claims in danger of going unrespected unless you violate one negative claim. But this worry reflects the confusion just addressed. It is a misunderstanding of the way rights work to think that negative claims are more important than positive claims, in the sense that respecting them has more value. Value, at least in this consequentialist sense, is the wrong notion to use. The situation has to be looked at in terms of the claims that are addressed *to you*. You and the mad man both have a duty to respect the negative claims of the five by not killing them. But you can't respect those claims *as they are presented to the mad man*, you can only respect those claims presented to you. You do that by not killing them. You are also, of course, presented with five positive claims for aid, but these claims are less weighty than the conflicting negative claim of the one. The one therefore has a right against you that you not kill her, even if by doing so you could save the five. And your duty is to respect the rights people have against you.

It will help clarify what I am saying if I say a bit more about how I am using the notion of a right. First, I should point out that I use the word "right" in an artificially narrow sense. I want to distinguish between rights that may not be violated, such as the right not to be killed of the woman in *Mad Man*, and prima facie rights which may be violated, such as the prima facie rights of the five to be saved by you. To make things clearer I will use the term "claim" as the general term, reserving the term "right" for those claims which may not be morally ignored.<sup>13</sup>

I take rights to exist whenever one party can stake claims which, when augmented by all supporting claims, are stronger than the competing claims of all other parties. Claims compete because they have one of two forms: to be allowed to do some X, or to prohibit others from doing (or to require others to do) some X. For example, in *Mad Man* the woman has a right not to be killed by you because her claim to prohibit you from killing her is stronger than your claim, even supported by the interests of the five, to be allowed to kill her. Insofar as we want to say she has a general right not to be killed, that is because as things stand there is no one whose claim to be allowed to kill her is stronger than her claim not to be killed.

Rights do not depend solely on the resolution of the competition between agents who stake claims to be free to act as they please and others who might be harmed by or allowed to suffer because of their actions. They also depend on the weight given to the claims for aid staked by those who would benefit from the actions or restrictions in question. If the collective claims of all those interested in your taking an action (yourself and other beneficiaries) are stronger than the competing claims to prohibit it, then you will have a right to take that action. And if the claims of beneficiaries of a potential action are stronger than the competing claims of those who might be harmed by it and your own claim to be free not to take it, then you not only have a right to take the action, you have a duty to take it.<sup>14</sup>

In the kinds of life and death cases we are concerned with, you will generally be prohibited from doing anything that would kill others, even if that action would also save at least as many – this much is entailed by the DDA and the thought that your independent claim to be entitled to kill is extremely weak. There will be cases in which the claims of those who would be killed lose some of their strength and come to be on a par with the claims of others to be given aid,<sup>15</sup> cases in which killing is at least acceptable even if not obligatory, but we will not discuss these until section four.

### 3. DEFENSE OF THE DDA

So far I have tried to show how the DDA, when properly understood in a rights framework which emphasizes their relational nature, allows us to understand why deontological restrictions in cases like *Mad Man* are not paradoxical. But I have not tried to argue that we should accept the DDA. What I propose to do in this section is to explain how a conception of rights grounded in the concept of autonomy supports the DDA.

What do I mean by a conception of rights grounded in autonomy? In essence, the thought is that rights constitute a structure in which individuals can claim unique authority to direct their own lives and to dispose of the goods they have fairly acquired in order to pursue their own ends. The thought here is that a system of rights should



coordinate the freedoms people enjoy and the obligations they must accept if they are to harmoniously coexist in society *while maintaining their fundamental authority to lead their lives as they choose*. On this line, people may be expected to take the ends of others and the group as a whole as among their ends, and they can certainly be expected to refrain from certain activities because of their effects on others. But people cannot be expected to lead their lives as servants to some consequentialist goal. Instead, they must be free to make their own lives by choosing amongst a wide range of permissible goals, both short term and long term, and permissible means of pursuing them.<sup>16</sup>

The reason this conception of rights supports the DDA thesis is that with authority to lead your own life comes the responsibility to take your own risks and reap your own rewards. Suppose two people invest \$1,000 in stocks. A year later, one has lost \$500, and the other has gained \$500. They may have invested with equally sound advice; their luck was simply different. Is it sensible to suggest that the one who gained \$500 give it to the other to make up for his bad luck? Of course not. They might have agreed to pool their resources and split any net profits in the beginning, but if they independently invested their money, one simply has more and the other less. It would make hash out of the idea of investing if those who profited had no more right to their profits than those who lost.<sup>17</sup> This is so even if what separates winners and losers is just luck.

It might be objected that although certain activities, such as playing lotteries and investing, only make sense if people have a right to claim what comes their way through good luck and have to suffer losses even if brought on only by bad luck, these activities are special cases. It might seem that we should treat being taken hostage by a mad man to be on a different order of seriousness and to deserve different treatment. But although I agree that being taken hostage and threatened with death is much worse than losing \$500, I think the cases are still deeply analogous. We all know there are risks out there, and if we are prudent and responsible, we take them seriously. There are certain places one should not go alone, there are certain foods one should not eat much of, and there are certain activities one should undertake with great caution. We each choose our own balance between taking risks to get what we want,

and avoiding risks to protect what we have. Still, as this is a matter of risk, one person who takes only certain risks may be seriously harmed, and another taking equivalent risks may find great rewards. And as each is leading her own life, the one who suffers must be treated as having a claim for help that falls well short of a right to recoup her losses at the expense of the one who did not suffer.<sup>18</sup> If her claim for aid were just as strong as the other's claim not to be harmed, the effect would be to pool their welfare as if they did not each have their own lives to lead. This lesson extends from loss of property, to loss of health, to loss of life in cases like *Mad Man*.<sup>19</sup> For people to have the authority to lead their own lives, the system of rights within which to make sense of that authority must, in the case of competing claims for a particular good, allow that claims to enjoy that good in peace, if legitimately acquired and maintained, are stronger than claims to acquire or restore that good, even if it is lacking through no fault of the person who lacks it.<sup>20</sup>

In understanding this point it is important not to confuse the protection granted by rights with a right to protection. Claims to enjoy your goods deserve respect at face value; claims to be protected in the enjoyment of your goods are not equivalent, they are claims for aid, claims to have what is lost or in danger restored or secured. These latter claims deserve some weight, for without security in the enjoyment of your rights, there is no point in having them. But claims to have your goods protected are positive, and therefore weaker than claims to enjoy your goods in peace, which are negative.

The issue of security raises the specter of a deep consequentialist objection. If the point of having rights is to provide a kind of security in carrying out your plans, as long as you do so in harmony with everyone else, why let the security be violated? Why not maximize it by minimizing the violations of comparable rights? The answer is that although rights provide a framework for carrying out plans, and that framework is only meaningful if reasonably secure, security is not a goal to be maximized at all costs. It can only rightfully be pursued while respecting the function of rights, which is to allow people to lead their own lives in harmony with others. Since leading their own lives is only possible if negative claims are generally stronger than positive, security cannot be maximized at the cost of sacrificing that relationship. At

bottom, there is no maximizable goal which defines rights. Rather they are defined by an idea, that of respectful autonomy. This idea implies that they have a general form and that this form must be maintained in the pursuit of any particular goals, even the goal of ensuring greater respect for rights in general.

Is this in conflict with maximizing rationality, that which says that it is always better to have more value than less? The answer, for two reasons, is no. First, the goal of minimizing rights violations is a worthy goal, but like many goals, it is only conditionally a good thing to pursue it. It is not better, morally speaking, to violate the right not to be killed of one to save five; no one who believes in rights (at least those rights based on autonomy) should judge it to be so. For even if the total number of rights violations goes down, it would have been better, morally speaking, for you to allow the five to die. Second, what it is better *for an agent to do* has to be judged, not from the perspective of someone counting rights violations or looking for utility maximization, but from the perspective of the agent confronted with conflicting claims. And anyone can see that you do better by allowing the five to die since that is the only way for you to *maximize* your respect for the competing claims of others.<sup>21</sup>

#### 4. LIMITATIONS OF THE DDA; WHEN KILLING IS PERMITTED

It seems that we have handled the paradox of deontological restrictions. Now we need to turn to the problem of accounting for the fact that our intuitions hold that sometimes we *are* allowed to harm some in order to help others. The most famous, and by now the most hackneyed, case in which this seems to be true is the following:

*Trolley:* You are the driver of a runaway trolley, which you can only steer from one track to another. Five people are working on one track which you are now set to go down; one is working on the other. Your choice of track will determine whether you kill one or five.<sup>22</sup>

Looking at *Trolley*, it may seem deceptively simple to account for the permissibility of killing the one. According to the DDA, although you

may not kill one to save five, you may kill one if the alternative is killing five. And this seems to be the alternative you face in *Trolley*.<sup>23</sup>

The inadequacy of this simple appeal to the DDA shows up if we introduce a simple variation on *Trolley*. If you are a bystander at a switch, rather than the conductor of the trolley, you would face the choice between killing one and allowing five to die. Yet most people who have the intuition that you may turn the trolley onto the one retain that intuition in the bystander variation.<sup>24</sup> Thus we are presented with a dilemma. We must either find a better way to account for our intuitions than by this simple appeal to the doing-allowing distinction, or we must question the soundness of our intuitions.<sup>25</sup>

In fact, things are even worse than they already appear for the thought that our intuitions can generally be handled by a simple appeal to the DDA. The DDA itself should not be applied in the simple way which corresponds to our distinction between killing and letting die. Consider this variation on *Trolley*: it is initially headed for the one instead of the five (it doesn't matter if you are the conductor or a bystander, but for the sake of concreteness, we can assume that you are the conductor).<sup>26</sup> It seems intuitively clear that you may not turn the trolley onto the five in this instance, even though you would be allowed to leave it pointing at the five in the original version of the case. If your choice were between *doing* one of two harmful things in the original conductor variation, then it should be the same in this variation. And if you are allowed to kill the five in the original variation, then it would seem that you should be allowed to kill the five in this variation. But you are not allowed to kill the five in this variation. Therefore, if we are to retain the belief that you are allowed to turn the trolley from the five to the one, it must be the case that even in the original conductor variation of *Trolley* your choice is between *doing* something harmful to the one and *allowing* five to suffer an equivalent harm.

To make good use of the DDA, then, we should take a strict view on the difference between doing and allowing. Strictly speaking, turning the trolley from its set course is a doing, and leaving it alone is an allowing. Even if you would be said to have killed the five if you did not turn the trolley (as you would if you were the conductor), that killing would not have the moral significance of a doing. It would be a killing

because you were in charge of the trolley which killed them. But paying attention to the choice you are confronted with at the moment you make it, whether you are the conductor or a bystander, if you do not turn the trolley then your causal role is really that of letting them die.<sup>27</sup> This strict view is pushed on us by the bystander variation and by the variation in the original direction of the trolley. The problem is that by interpreting the DDA this way, we see that we cannot rely on it alone if we want to give an account of our intuitions in cases like *Trolley*.<sup>28</sup>

##### 5. INTRODUCING THE DISABLER PRINCIPLE

I will assume, then, that if the DDA is to be used to explain cases like *Mad Man* its application needs to be restricted by another principle so that it will not be misapplied to cases like *Trolley*. Coming at this another way, in *Trolley* we don't want to be told that the one has a right not to be killed for the sake of the five. Therefore we need a principle to explain why the normal implication of the DDA does not hold in cases like this. To fit this bill, I propose the Disabler Principle. The DDA brings to the fore, as we said at the beginning of section two, the fact that individuals should not lose their rights to the goods they enjoy simply because others have independently come under threat of losing those same goods (not even if they are under threat of having identical rights violated). The DP qualifies the DDA by showing that people who are innocent of any wrongdoing, and who are not members of the group needing help, may nonetheless stake their claims in such a way as to get caught up in the welfare of those already facing a threat. Putting it in a slogan: while the DDA reflects the separateness of people, the DP shows when that separateness is overridden by causal connections.

My strategy here will be first to illustrate as well as possible the need for the DP, then to clarify the mechanics of the DP, and finally to show why it complements the DDA. I will start by introducing a new case, one with less history than *Trolley*, and one that more clearly requires that we appeal to the DP.

*Terrorist:* You are chief of the local police, and you get a note from a well known terrorist informing you that he intends to kill five people this evening. He also tells you that he has attached himself to a hostage in such a way that if he is killed the hostage will die as well. He indicates that he will release his hostage safely once he has killed his quota of five people, and since you know something of his psychological profile, you have good reason to believe that he is telling the truth. Your choice is to give orders to shoot the terrorist once he appears, and thereby kill the hostage with him; or to allow him to kill his five victims, trusting that he can be captured once he has killed five and released his hostage.

I believe you are morally entitled to proceed to kill the hostage in *Terrorist*, and I think that we must appeal to the DP to see why. In a nutshell, the DP holds that if by respecting the claims of some you would be morally disabled with regard to helping others, then the claims which would disable you are significantly weaker than the claims of fully uninvolved innocent parties. The hostage is such an aspiring disabler since her claim not to be killed would, if respected, prevent you from stopping the terrorist as you *otherwise* could and presumably would, namely by shooting him. She is not an actual disabler because she does not actually present you with claims strong enough to prevent you from doing what you would have done in her absence to stop the terrorist. But her claims are of the sort which, if strong enough, would morally disable you by making it morally impermissible for you to do what you otherwise would do to stop the terrorist. Thus her claims fall under the DP and she is a disabler. (We could always distinguish between aspiring disablers and actual disablers, but it will be simpler, and there should be no loss in clarity, if we use the term "disabler" to describe both.)

For the DP to make any sense, the distinction between someone not enabling you to help others and someone disabling you from helping others must be clearly marked. To help mark it we can contrast the role of the woman in *Mad Man* with the role of the woman in *Terrorist*. It may be tempting to think that the woman in the first case similarly

disables you from saving the five, but there is a deep dissimilarity in the two cases. Respecting the woman's claim in *Mad Man* would not prevent you from doing what you *otherwise* could do to save the five. Rather, were you to harm her in the course of saving them, you would use her as a means to saving the others. This is not a point about how you think about her in planning your action; it is a point about the causal role you would actually put her in. Her death would enable you, for the first time, to save the five. Being faced with an obligation not to violate her right not to be killed does not disable you from saving the five, not as respecting the same claim of the woman in *Terrorist* would. The right of the woman in *Mad Man* merely prevents her being within your reach from morally enabling you to save the five. But failing to enable is not the same thing as disabling what otherwise could be done.

In brief, what makes killing the woman in *Terrorist* acceptable is that there is no way to stop the terrorist without killing the woman, *and* the means you would take to stop the terrorist, shooting him, would be just as effective if the woman were not present.<sup>29</sup> Her presence as a being to be killed does not enable you to kill the terrorist and thereby save the five. The counterpart of this second feature is not present in *Mad Man*, for her death being within your causal reach does enable you to save the five.

The point here does not rest at bottom on a bald appeal to the Kantian thought that people should not be treated simply as a means.<sup>30</sup> For although that thought has strong intuitive appeal, the question remains: Why is it worse to treat someone simply as a means than to cause her equal harm as a side effect of other plans? My focus on the DDA and DP is meant to provide an answer to that question. My account holds that the special protection due those who would be used simply as a means for the welfare of others exists because people generally have stronger negative claims not to be harmed than positive claims to be given aid. This priority of negative claims is limited, however, because people can get in the way of the independent pursuit of the welfare of others and thereby cease to be uninvolved third parties. If that happens, their negative claims can come to be on a par with competing positive claims that they would otherwise easily trump.

The connection between getting in the way of help that would be given to others and not getting full protection from the DDA can be summed up as follows. The DDA is based on the idea that people take their own risks, reap their own rewards, and should not lose their rights to the goods they have legitimately acquired and maintained simply because others have independently fallen upon hard times. But disablers do not stake their claims independently of others who have fallen on hard times. For although a disabler does not put others under a threat by being a disabler, her claim not to be harmed may serve to disable someone else from saving them. The existence of her claim may serve to keep a threat upon others which otherwise would have been removed, and having such a role her claim ought not to be treated as if it occurs independently of the troubles the others face.

In *Terrorist* it seems that the hostage's claim is diminished to the point that it is more or less on a par with the positive claims of others to be saved from an equivalent harm.<sup>31</sup> Taking their competing claims to be more or less on a par, they go on a balance in which the numbers count, even though some of the claims are negative and some positive. Since the numbers count, it is permissible to shoot the terrorist even though it will kill his hostage.<sup>32</sup>

Something similar is going on in *Trolley*. I will focus on the original conductor variation, but the points will generalize to the other variations. If you decide to save the five by turning the trolley onto the one, you do not thereby use the one simply as a means to improve their welfare. You can turn the trolley onto the other track whether or not the one is there. Moreover, if he were not there, then you should not hesitate to turn the trolley onto the other track. Thus, since the presence of the one on the other track would give you reason not to do what you would do if he were absent, he is a disabler whose claim not to be killed competes on a par with the claims of the other five not to be killed. Since they outnumber him, you are at least permitted to turn the trolley onto him to save them.

Now it need not be the case that a disabler may be killed to save others. Disablers may have a right not to be harmed if they are protected by numbers. This is illustrated by a variation on *Terrorist* in which there are five hostages and the terrorist is only out to kill one person.



In that case it seems as if the hostages, though disablers, would have a (collective) right not to be killed.<sup>33</sup> And we have already observed in *Trolley* that it seems that you are not allowed to turn the trolley from one onto five. This is so even though the five disable you from doing what you otherwise could to save the one. There may also be other reasons, not based on numbers, why a disabler would retain a right not to be killed.<sup>34</sup> But in cases like *Terrorist* and *Trolley*, it seems that the best way to account for the intuition that one may be sacrificed for the sake of five is by appealing to the fact that the one is a disabler.

#### 6. PROBLEM CASES AND FURTHER REFINEMENTS

A. Before concluding that the DDA and DP together work well enough to handle our intuitions, we need to push them a bit with some problem cases. The first is one which brought Thomson to reject what is essentially the DP.<sup>35</sup> It is a variation on *Trolley* that goes as follows:

*Loop Trolley:* You are the driver of a runaway trolley, exactly like the one in the original trolley case, except the tracks ahead form a continuous loop. If there were five on one part of the track and no one on the other, the trolley would either kill them directly or swing around the track and kill them coming the back way. Likewise, if the five were not on one part of the track, the trolley would either kill the one directly or swing around the track and kill him coming the back way. But since there are five on one part of the track and one on the other, the trolley will kill only that group or person it hits first, the mass of those hit being sufficient to slow the trolley to a non-lethal speed by the time it gets to the other party. Your choice of track will determine whether you kill one or five.

It seems as intuitively clear that you may kill the one in this case as it does in the original *Trolley*. Yet this case cannot be handled by the DP,

which throws doubt on whether the DP is really the best way to explain the original *Trolley*.

Why can't *Loop Trolley* be explained by appealing to the DP? The answer is that the one is not a disabler. Start by assuming that you are already headed towards the five. In that event, the one's claim would not, if respected, prevent you from doing what you *otherwise* could do to save the five. You can't save the five without killing him. Therefore if you save them by turning the trolley onto him, you use him simply as a means to saving them. His presence enables you to save them.

Does this indicate that the DP is wrong? No, for the DP does not say that all non-disablers are protected; the DP says only that disablers as a class are less likely to benefit from the DDA than others whose claims are staked in a way that is more fully independent of the welfare of those under threat of harm. The DP is only one principled way to limit the application of the DDA; there are others.

One other obvious limitation of the DDA is that those who commit crimes do not have negative claims to enjoy their goods in peace that are as strong as they otherwise would be. And even if one is not a criminal, one may accidentally bear a threat to others, as a result of which one's claims not to be harmed will be weaker than if one poses no threat to others.<sup>36</sup> What I want to suggest here is that there is yet another kind of restriction on the DDA that comes into play with *Loop Trolley*.

I want to suggest that the one in *Loop Trolley* does not enjoy his life independently of the five the way the one in *Mad Man* does, and that this undermines the strength of his claim not to be killed. The one in *Loop Trolley* can only live if the five are killed. Their being hit by the trolley would save his life just as his being hit by the trolley would save theirs.

It might be objected that the same is true of the woman in *Mad Man* since the only way it will turn out that she lives, at the end of the day, is if the five die. But the causal connections are different. The death of the five does not save the woman in *Mad Man* from a threat that was already bearing down on her, not unless you take yourself to be bearing a threat towards her which can only be averted by the five dying. But to consider someone already threatened that way is to put the cart before the horse; your question is supposed to be whether to kill her or not, and

if you consider her already threatened by your putting the question to yourself, then you treat her as if she can only have positive claims to be saved, saved from you by you. Since this way of framing the problem would obviously undo the point of the distinction between positive and negative claims, we must take it that the woman in *Mad Man* is not already threatened, and that allowing the five to die does not cause her to continue to live.<sup>37</sup>

The point is, then, that in *Loop Trolley*, but not in *Mad Man*, it is literally because the five are affected in such a way that they die that the one is able to live. Consider this counterfactual. Suppose you could remove the five in both cases to safety, what would happen? In *Mad Man* the woman would go on living as before; in *Loop Trolley* the one would be run down by the trolley.<sup>38</sup>

What does it matter that the one would only live through the death of the five? It matters because his claim to enjoy life is not staked independently of their identical claims. Though there is an asymmetry in their positions, namely that the trolley, we are supposing, is headed towards the five, this asymmetry does not seem to matter. Their claims are so tied together by the fact that one party will live only because those in the other party die that there is no reason to treat the one's negative claim as substantially more weighty than the five's positive claims. Being more or less on a par, the numbers count and it would be permissible to turn the trolley from them onto him.

*B.* Our second problem is accounting for the asymmetry noted earlier in the variation on the starting direction of *Trolley*. We need to understand why it is that (in either the conductor by bystander variations) you would not be allowed to turn the trolley onto five if it starts out headed towards the one, but you would be allowed to leave it facing the five if it starts out headed that way. This asymmetry was central to our decision to interpret the DDA strictly, yet it may be perplexing given that the individual claims of disablers in *Trolley* are more or less on a par with the claims of those who need aid.

The solution to this puzzle has two parts. First, we can note that even if the claims of disablers are close enough to being on a par with the claims of those who need help for you to be justified in turning the

trolley from five to one, the claims of disablers still seem somewhat stronger. If it were a matter of turning the trolley from one onto another, I would think you would not be allowed to do so. It should be that much clearer then (and I think it is) that you are not allowed to turn the trolley from one onto five.

This part of the solution only takes us part of the way. It explains why you are not allowed to turn the trolley onto the five. But why are you allowed to let it remain headed towards the five? If the claims of five about to die outweigh one disabler, how can you have the right to do other than turn the trolley onto the one? Is it that the claims of the five outweigh the claim of the one, but by such a small margin that you are free to turn the trolley or not as you please? If so, how could we distinguish this case from the case of turning the trolley from one onto one. Presumably in that case the claim of the one disabler is not much stronger than the claim of the one who is already threatened. If his claim were much stronger then it would not be permissible to turn the trolley onto him even if he were outnumbered. Yet, on the assumption that these cases are similar in that one set of claims beats out the other by a small margin, we still have to explain the fact that you are not free to turn the trolley from one onto one, whereas you are free either to turn or not to turn the trolley from five onto one.

I think the crucial difference is that in the case of turning the trolley from one onto one the claims of others balance out so that you are confronted by a prohibition (not to turn the trolley onto the one), whereas in the case of turning the trolley from the five onto the one the claims of others balance out so that you would be, if it could be justified, confronted with a requirement (to turn the trolley onto the one). I claim that, generally speaking, you have a stronger claim not to be required to do something than you have not to be prohibited from doing something (i.e. your claim to be free will generally fare better if it is competing against claims to require you to do something than claims to prohibit you from doing something comparable). That is to say that requirements are harder to justify than prohibitions.

Why should we accept that requirements are harder to justify than prohibitions? The answer is that a prohibition removes only one option. All the other non-prohibited options are open to the person. For example,

prohibiting you from turning the trolley onto the five does not prohibit you from leaving the scene altogether to do something else, such as call your best friend to describe the situation. A requirement, on the other hand, does remove all the other options. If you are required to save the five, then you may not choose to sit still to think about flowers or death, nor may you go off to call your friend. You must pull the lever.

If the point of rights is to protect autonomy so that people can lead their own lives, then it should be a much more serious matter to require someone to do something than to prohibit someone from doing something. A requirement is a bigger infringement on a person's freedom. Therefore a person has a stronger claim not to be required to do something than she has not to be prohibited from doing something with equivalent consequences. So even if the claims of the five and the one were balanced more or less the same whether the trolley is set towards the five or the one, your claims would differ. The balance in either case is in favor of the five, but if your claim is to be free from the prohibition against turning the trolley onto them, your claim can be outweighed. That is, you can be prohibited from turning the trolley onto the five. But if your claim is to be free from the requirement that you turn the trolley onto the one, your claim is not outweighed, and you are free from that requirement. That is, you may turn the trolley onto the one for the sake of the five if you so choose, but you are not required to do so.<sup>39</sup>

C. In the interest of keeping the forest in view despite the appeal of the trees, I will not try to canvass the range of principles other than the DP which must be taken into account if we are fully to understand the operation of deontological restrictions. Suffice it to say that we cannot rule out the possibility that there will be cases structurally very similar to the ones we've examined in which the intuitions are different, and that what we need to do when we encounter such cases is look for factors which can be addressed by principles which can be grounded in either our basic commitment to rights grounded in autonomy, or in the specific commitments that go with a specific context.<sup>40</sup> Instead of discussing these now, I will introduce one more case which I think illustrates an important qualification on just who should count as a disabler.

**Rescue Ahead:** You are on a special train hurrying along to save five who are in imminent danger of death. Every second counts. Suddenly, you see someone trapped ahead on the track and notice that the conductor has left his post. Unless you pull the emergency brake cord and stop the train, the person on the track will be killed. If you stop the train, however, the rescue mission will be aborted and the five will die.<sup>41</sup>

Quinn, who developed this case out of one given by Foot, believes that you should not let the train continue. If he is right,<sup>42</sup> the question is, how do we distinguish the one in *Rescue Ahead* (who seems to be a disabler since you could save the five perfectly well if he were not in your way) from the disabler in *Trolley* (in either the conductor or bystander variations)?

I think that we can best find an explanation for *Rescue Ahead* by assimilating it to another case of Foot's.<sup>43</sup>

**Brain Serum:** You are a doctor and you have a patient, Bob, who needs a drug to stay alive. You also have five other patients whose lives can only be saved by use of a serum, one which can only be extracted from the brain of a person with Bob's condition. If you withhold the drug from Bob, he will die, and then you could use his brain to save the other five. You have no other way, short of killing someone, to get the serum to the five in time to save their lives.

This case is different from *Rescue Ahead* because Bob does not seem to be a disabler. If he were not present, there would be no way for you to save the five. So his claims, if respected, would not prevent you from being able to do what you could otherwise, in his absence, do to save the five. Nevertheless, the explanation for why you must not withhold the drug from Bob is, I believe, the same as the explanation for why you may not proceed in *Rescue Ahead*.

How do we explain why it seems that you must not withhold the drug from Bob? My answer is that Bob's claim on the drug is more

immediate than the five's claims for the brain serum. Their claim to receive the serum would give them a right to it *if Bob dies*, but they have no claim on his dying. Since their claims would only have effective pull if he dies, and Bob already has an effective claim on a drug which would prevent him from dying, the two groups are not in the same boat. You may think, at first, that you are stuck with a simple choice between letting one die or letting five die. But the choice is not that simple because Bob has an effective claim for your help, and the five only have conditional claims, the condition of which is not met. If you were to help the five and not Bob, you would be violating his rights, as he has the strongest of the competing claims (assuming that you are not free to help no one).

We can draw a general lesson out of *Brain Serum* to the effect that you are only free to respond to the needs of some if you have a right to use the necessary means. If someone else has a prior claim to those means which is stronger than your claim, even if your claim is augmented by the claims of others in need, then you may not use them.<sup>44</sup> This is the case in *Brain Serum*. The necessary means involve a product from Bob's brain which you can only extract from his brain after he is dead. But he has a rightful claim not to be allowed to die which morally denies you access to the means necessary to save the five.

Support for this general lesson can be found by returning to the argument we made in section three for the DDA. If a person has a claim on something, then he should not lose it simply because others have independently come into a state of need. Absent the five, Bob would have a right to the drug you have, and he should not lose it simply because others independently have come to need a serum which could only be produced if he dies.

The difficult question is, how is Bob different from the one in *Trolley*, who, absent the five, would have a right not to be hit by the trolley? Why doesn't Bob's claim on the drug interfere with what you could otherwise do to save the five as we said the claim of the one in *Trolley* would do if respected? We might be tempted to say that it doesn't interfere because, absent Bob, you have no way to save the five. But one of the problems of this explanation is that it will not allow us to transfer this account to *Rescue Ahead*. A better explanation is that what falls under "what you

could otherwise do" is what you can do given the means you have a right to use. If Bob's claim is on the means, then it does not interfere as the claim of a disabler would if respected. It is more like the claim of the woman in *Mad Man*, whose claim we can now recast as a similar claim to deny you her death as a means to saving the five, than it is like the claim of the one in *Trolley*, whose claim concerns only the effects of your action, not the means for taking it.

In fact, I believe we can now say something important about the protection we think people have not to be used simply as a means. We can broaden the explanation of that protection given in section five as follows: There are two conditions you must pass before you are free to do something. You must have a right to use the means you plan to use, and you must have a right to cause the effects you can (or ought to) foresee will result. The claims of people who are in a position to deny you use of some means to achieving your goal are paradigmatically protected by the DDA as long as they stake those claims independently of your finding yourself in need of those means. As a consequence, if you are using someone simply as a means *or if you are neglecting someone's prior rightful claim to what you would use as a means*, then you do not meet the first condition on being free to act in that way.

We can now be more precise about what a disabler is. A disabler is someone who had no rightful claim on the means you would use, and therefore can only prohibit you from acting in virtue of his claim to deny you the right to cause his harm as an effect of your action. The fundamental reason Bob is not a disabler, then, is not that you could not save the five if he were to disappear. The reason Bob is not a disabler is that you have no right to consider the serum you could extract from his brain something you have access to. Because he has a right to the drug (a right he would only fail to have if there were others who had at least as strong a claim on the drug), you don't have a right to use the means necessary to save the five. When you ask the question, "Is there anything I can by rights do to save the five?" the answer must come back, "No." Therefore there is nothing you could "otherwise" do to save the five which, by respecting Bob's claim, you would be disabled from doing.



A complication worth noting arises at this point, a complication concerning the distinction between positive and negative claims. Though Bob is staking a positive claim for the drug, relative to the claims of the other five, his claim is negative. Relative to their claims, it is the claim not to lose what he already had a right to simply because his losing it would enable you to save them. I believe this complication can be taken in stride. What we can say is that someone in Bob's position, someone who is not in a position to be literally used as a means, but who has a prior right to the means you would use, is a means claimer. A means claimer may no more be dispossessed of a good he was about to receive than someone may be dispossessed of a good he already has in order to help others who have independently fallen into a state of need.

With this conceptual equipment we can easily make sense of *Rescue Ahead*. In that case the five and the one all have positive claims for your help, but the means of saving the five includes getting to them, and that aspect of the means is what would kill the one. It is true that the case is set up so that if you do nothing you merely allow the one to die. But the same was true in *Brain Serum*. And in both cases the one has a claim with regard to the means you would use to help the others that is more immediate than the claims of the five for aid.

In *Rescue Ahead*, the one's status as a means claimer is not a point about temporal proximity. If you were rushing off to save five and saw one person in danger on another track you would be entitled to keep going even though his need is more temporally immediate. What makes it wrong to allow the one on your track to die is that his death is a consequence of your getting the means to save the others. The others have a claim on you that you save them if you have the means, but he has a claim on the means you are trying to develop, a claim that blocks your right to pursue those means. Contrast that with the one on the other track. The one has a claim to be aided, but as the means you would use to save the others is not what threatens him, he has a claim no more immediate than their claims. And since he is outnumbered by them, his claim can rightfully be ignored.

The distinction between *Rescue Ahead* and *Trolley* should now be fairly clear. In *Trolley* you have the means to save the five ready at hand. The claim of the one is a claim not to be killed as a side effect of turning

the trolley away from the five. It is not a claim that concerns your having the means to turn the trolley away from the five. In *Rescue Ahead*, on the other hand, the claim of the one does concern your getting the means to save the five. Thus in *Trolley* the claims of the five are confronted by and outweigh the claim of a disabler, whereas in *Rescue Ahead* the claims of the five are conditional upon and defeated by the claim of a means claimer.

D. Finally, before coming to a close, I want to clarify one more thing. Those who know something about the Doctrine of the Double Effect (DDE) may feel that I have merely put a new label on an old idea by introducing the DP. For the DDE, in its traditional interpretation, allows you to cause or allow to continue certain harms as long as you do not intend them but merely foresee them. In practice this is usually taken to mean that you may sometimes harm some or allow some to be harmed for the sake of others as long as you do not harm them or allow their harm as a means of helping the others. This seems to be essentially the shape the DP takes in practice. Is the DP, then, merely a version of the DDE?

I think there are three reasons for seeing the two principles as fully distinct. First, the DDE is not particularly concerned with positive versus negative claims, whereas the DP is. Those concerned with the DDE will find as much reason to oppose intentionally allowing a harm to befall some as intentionally causing a harm to befall some. My concern with the DP is focused on those with negative claims. It says that the negative claims of disablers may be on a par with the positive claims of others.

Second, the DDE is focused on the intentions of agents, and suffers all the problems that come with trying to pin down what those intentions are. The DP is focused on the claims of patients. Only those patients who lack normative authority over the means an agent would use to accomplish some beneficent end are disablers. The DP suffers from problems concerning who has normative authority over the means to an end, and what distinguishes affecting the means to an end from causing side-effects in the pursuit of an end. These problems may not be any easier to handle in the final analysis, but they are nonetheless different problems.

Finally, I think the DDE and the combination of the DDA and DP should be seen as complementary, rather than competing, principles. The DDA and DP are, I believe, necessary to lay out certain structural features of rights necessary for understanding deontological restrictions. These features simply are not implicit in the DDE.<sup>45</sup> But the DDE provides a framework for taking into account the importance of intentions which is not implicit in the DDA and DP. A full account of what we owe each other would find a way to properly integrate all three principles.

\* \* \*

With that I conclude my discussion of the DDA and the DP. The first reflects our commitment to a notion of rights based on the ideal of autonomy. Without it we are treated as if we have pooled our welfare, instead of being treated as if we each have our own lives to lead. The second explains how we can innocently enough get in the way and prevent others from being helped, thereby losing our status as fully independent beings. If our independent status is lost, then our negative claims not to be harmed can often justly be put on a par with the positive claims of the others to receive aid. Thus, the second principle complements the first principle, and the two together allow us to understand, to a large extent, when and why we face deontological restrictions against harming some for the sake of others.

#### NOTES

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<sup>1</sup> See Shelly Kagan's *The Limits of Morality* (Oxford: Clarendon Press, 1989) for a sustained attack, clearly grounded in a consequentialist moral perspective, on common sense morality and its use of deontological restrictions. Samuel Scheffler's *The Rejection of Consequentialism* (Oxford: Clarendon Press, 1982), despite its name, also moves in the same spirit.

<sup>2</sup> The DDA was first put forward in recent times by Philippa Foot in "The Problem of

Abortion and the Doctrine of the Double Effect," reprinted in P. Foot *Virtues and Vices* (Berkeley: University of California Press, 1978). Prominent among those who reject it are Kagan, Jonathan Bennett and Judith Thomson – see respectively: *The Limits of Morality*; "Morality and Consequences," in S. McMurrin, ed., *The Tanner Lectures on Human Values II* (Salt Lake City, Utah: University of Utah Press, 1981): 46–116; and "Killing, Letting Die, and the Trolley Problem," *The Monist* 59 (1976): 204–17.

<sup>3</sup> Kagan, *op cit.*, presents a helpful introduction to what those problems are (see pp. 87–91).

<sup>4</sup> *Anarchy, State, and Utopia* (New York: Basic Books Inc., 1974), p. 30.

<sup>5</sup> ASU, pp. 30–31.

<sup>6</sup> ASU, p. 33.

<sup>7</sup> One place this line of thought occurs is in *The Rejection of Consequentialism*, p. 88.

<sup>8</sup> This is the first of four cases that I will introduce in the text that are based on cases introduced by Foot, this one in PADDE, on page 25. There will also be a fifth case only brought up in the footnotes.

<sup>9</sup> In order to avoid unnecessary awkwardness, I will not bother to distinguish between cases in which people are competing for the same type of good, such as life, and cases in which people are competing for the same exact good, such as a particular piece of property, or use of a particular organ. Context should make it clear which is meant, and nothing hangs on the difference.

<sup>10</sup> Richard Brook correctly argues that deontological restrictions have to be understood as having a patient focus, but he incorrectly identifies being threatened as being in a condition so that your rights are weaker than they otherwise would be – see "Agency and Morality," *Journal of Philosophy* 88 (1991): 190–212. Frances Howard-Snyder points out just why this is wrong – see "The Vulnerable and the Secure: Is It Less Wrong to Harm the Vulnerable than the Secure?" *The Journal of Philosophy* 89 (1992): 643–7.

<sup>11</sup> Thomas Nagel makes a similar point – see *The View from Nowhere* (New York: Oxford University Press, 1986), p. 178. He credits Tim Scanlon for the original example. Amartya Sen also makes such an observation – see "Rights and Agency," reprinted in S. Scheffler, ed., *Consequentialism and its Critics* (New York: Oxford University Press, 1988), p. 201.

<sup>12</sup> See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), p. xi.

<sup>13</sup> Thomson argues that we should not view rights as absolute, but as something that can be violated – Chapters 3 and 4 of *The Realm of Rights* (Cambridge: Harvard University Press, 1990). I find her arguments can be accounted for by talking of claims where she talks of rights. Also, when I say that rights may not be violated, I do not mean to contradict my assertion in the introduction that deontological restrictions need not be taken to be absolute. Rights on my account are only as absolute as deontological restrictions. However, that will be fairly close to absolute; whereas the normal state of things is for some claims properly to be overridden.

<sup>14</sup> Even that model is a bit too simple. There are certain duties that indicate individuals

lack a right to act otherwise which cannot be explained by appealing to the claims of individuals. For example, you have a duty to pay your taxes even though there is no one in particular, nor any specific segment of the population, who will be noticeably harmed if you do not pay your taxes. Likewise, even if you own a precious work of art, you have a duty not to destroy it, even though no one in particular, nor any special interest group, has a claim to prohibit you from doing so sufficiently strong to override your claim to be free to destroy your property. I believe we can handle these cases by talking about the claims of society as a whole, based on its overriding interest in such goods as the just distribution of burdens and the protection of significant cultural artifacts. But for our purposes here, we can stick to the simpler model of conflicting individual claims.

<sup>15</sup> I don't believe there could be cases in which the positive claims for aid could ever gain enough strength to compete with the strength normally attributed to negative claims not to be harmed. For example, even if I promise to take care of one of the hostages in *Mad Man*, I still am prohibited from killing the woman to save my ward.

<sup>16</sup> This is not exactly Kant's original definition of autonomy – see his *Groundwork of the Metaphysics of Morals*, trans. H. Patton (New York: Harper Torchbooks, 1964). Academy pages 431–3. His definition holds that you act autonomously if and only if you act on maxims which you have willed to be universal laws. But I think it is in the spirit of his thought that morality can be understood as the conditions for your being worthy of your own happiness.

<sup>17</sup> It would not make hash out of the idea of investing to redistribute some of the wealth of winners to losers, but insofar as we want to encourage investment, winners would have to be left with enough profit to make the effort of investing worth their while.

<sup>18</sup> It goes (almost) without saying that if you are reckless, negligent, or criminal in the pursuit of your ends, and you end up in conflict with someone else who has been more responsible, your competing claims will often justifiably be weaker than they otherwise would be.

<sup>19</sup> We might want to make the precedence of someone's negative claims to control her property over someone else's positive claims to be able to make use of it less overwhelming than other kinds of precedence, such as that involving lives. Warren Quinn plausibly addresses this by suggesting that the amount of precedence should depend on "how important [in our understanding of how our lives are our own] the relevant forms of legitimate control are to us" – see "Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing," *The Philosophical Review* 98, 3 (July 1989), p. 310.

<sup>20</sup> Throughout this discussion we should assume that no one has been systematically mistreated by the operation of a system of rights. Injustice on a social level taints all claims, and would complicate the picture. But if we assume that the injustices perpetrated by the likes of the mad man occur at the micro level, affecting only a few victims and perpetrators, then the claims of those not directly involved should not be affected.

<sup>21</sup> The view of value implicit in this paragraph is something I explore in a paper entitled "The Good Posterior to the Right" (forthcoming).

<sup>22</sup> I take this case from Foot's PADDE, p. 23. I don't want to make it appear as if the choice to kill someone in cases in which I think you are allowed to kill someone is ever an easy choice. I am informed by a professional fire chief, who has actually faced choices like those discussed here, that people will generally try to convince themselves that even by doing something like turning the trolley onto the one they leave the one a chance to survive. When pushed on what he would do if he could not convince himself that the one still has a chance to survive he said that those are the situations that "separate the men from the boys," and the ones that bring people to an early retirement.

<sup>23</sup> This is in fact Foot's solution for this case.

<sup>24</sup> This problem was first brought into the literature by Thomson in KLDTP.

<sup>25</sup> It is interesting that some consequentialists (e.g. R. M. Hare in his *Moral Thinking* (New York: Oxford University Press, 1981)) want to offer a backhanded defense of our intuitions in support of deontological restrictions. The thought is that it is better for the masses to think they ought to restrain themselves from killing some for the sake of many because of the tremendous harm that could follow from abuse of the license to kill for the greater good. The problem with this view, aside from its intrinsically odious condescension, is that it too fails to explain why our intuitions hold that in cases like *Trolley*, even in a bystander version, it is permissible to maximize the welfare.

<sup>26</sup> Francis Kamm introduces this turnaround for a somewhat different purpose, to reply to Quinn's account of *Trolley* in AICDDA, in "Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status," *Philosophy & Public Affairs* 21, 4 (Fall 1992), pp. 369-70.

<sup>27</sup> It is not always perfectly clear whether what you do causes a harm or merely allows it, even if we look at the causal influence you will have at the moment of choice. But for the cases we are concerned with, it is clear enough. And, as Quinn points out, we would have to shut down moral theory completely if its distinctions had to be clear in all cases, "dependent as [moral theory] is on the as yet unreduced and potentially vague distinctions between what is and is not a person, a promise, an informed consent, etc." (AICDDA, p. 295).

<sup>28</sup> Not everyone has given up on using the DDA to account for our intuitions in cases like *Trolley*. Quinn's defense of the DDA in AICDDA includes a modification of the basic distinction which is meant to allow it to handle *Trolley* along with a number of other cases. But using considerations such as the change in the initial direction of the trolley noted above, Kamm convincingly argues that Quinn's use of the DDA to account for our intuitions does not work - see NC, pp. 367-70. There seem to be no other going modifications.

<sup>29</sup> We will see in section 6C that this formulation is imprecise. The point will ultimately have to be put by saying that the woman has no prior rightful claim on the means necessary to save the five. For now, what I have said is a useful approximation of the ultimate formulation.

<sup>30</sup> In fact, it may make sense to allow people to be used simply as a means if they have already earned the status of a disabled.

<sup>31</sup> I say they are more or less on a par because I think her individual claim may still be slightly stronger than any one of theirs, so that it would be wrong to kill the terrorist and his hostage if he were only aiming to kill one other. This will come up again in section 6B.

<sup>32</sup> It may be objected that I said earlier, in section 2, that letting the numbers count was falling into a consequentialist trap. But my point was not that it is wrong to let the numbers count if you have already taken into account how the claims are addressing the agent who is to act. My point was only that it is a trap if you let the numbers count without first determining who was being addressed by competing claims. Thus it would be wrong to let the total number of negative claims in *Mad Man* determine what you should do since the choice you face is between one negative and five positive claims.

<sup>33</sup> This is a "collective" right insofar as it is even more clear that you should not kill five for the sake of one than it is that you should not kill one for the sake of one.

<sup>34</sup> This may be because of a special protection due her, one which would hold up even if the numbers were against her. See footnote 40 for an example.

<sup>35</sup> See "The Trolley Problem," in J. Thomson *Rights, Restitution, and Risk* (Cambridge: Harvard University Press, 1986), pp. 101–2.

<sup>36</sup> I should qualify this remark by saying that it seems intuitively clear that one's claims are weakened further if one is a threat to another than if one is, say, a simple bystander who functions as a disabler. This intuition has, however, recently been challenged in a pair of articles. See Jeff McMahan's "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (January 1994): 252–90; and Michael Otsuka's "Killing the Innocent in Self-Defense," *Philosophy and Public Affairs* 23 (Winter 1994): 74–94.

<sup>37</sup> James Montmarquet makes a similar point in "On Doing Good: The Right and the Wrong Way," *The Journal of Philosophy* 79 (1982), p. 449.

<sup>38</sup> What about this case? Suppose the mad man will kill either five hostages in one room, or one in the other, but not both. Further, suppose that he will kill the five, but that if you were to rescue them, he would then kill the one. It seems clear that you should be entitled to rescue the five. But suppose you can't rescue them. Suppose instead that you can only save the five by killing the one yourself. May you do so? It seems not, but how is this case different from *Loop Trolley*? I believe the answer is that although the death of the one would result if the five were rescued, we would not be tempted to say that if the one lives it is because the five died. The five do not literally absorb the same threat that would otherwise have killed the one. The source of the threat is the same, but it seems to be a distinct threat.

<sup>39</sup> Since one of the central features of Kamm's argument that Quinn's modified DDA won't work as it is supposed to is that he cannot handle her variations on *Trolley*, one might wonder whether this move could save Quinn. It can't. On Quinn's account, both leaving the trolley headed for the five and turning it onto the five are positive actions or doings. Thus, both come up against prohibitions, and there is therefore no way to tell the two variations apart.

<sup>40</sup> In the interest of covering the cases which have been particularly significant in the

discussions on deontological restrictions, I include this case from Foot here in a footnote. Foot introduces (PADDE, p. 28) the case of five patients who can only be saved in a hospital by creating a gas which will kill one who cannot be removed from a room next door. This case is a problem case for the DP because, according to the common intuition, you may not save the five in that case and yet the one here seems to be a disabler, not someone who would be used as a means to saving the five. In fact, this case constitutes the second reason Thomson rejects what is essentially the DP (footnote 13 from TP).

I think the reason it seems that you may not kill this disabler can be found in the norms of hospital life. Hospitals are conceived of as sanctuaries where people are protected, i.e. where their negative claims not to be harmed are taken very seriously. Of course, their positive claims to be given aid are also taken very seriously, but not, it seems, if there is any sense that they are being addressed at the cost of respecting negative claims.

<sup>41</sup> The roots of this case are in a car version originally given by Foot in "Killing and Letting Die," in J. Garfield and P. Hennessey, ed., *Abortion: Moral and Legal Perspectives* (Amherst: University of Massachusetts Press, 1984), pp. 179–80. Quinn then modified it to a train case in AICDDA, p. 298. I have modified his case slightly, and have changed the title from his "Rescue III" since I don't use Rescue I and II.

<sup>42</sup> I am less sure you may not allow the train to hit the one than I am that you are not allowed to choose to run over the one to get to the five, this second description being Foot's original. My hesitation may come from the problem with requirements that was just discussed, as in *Rescue Ahead* we are supposing you are not merely prohibited from running someone over but are required to prevent someone from being run over. But even if it is less than clear that you must not allow the one to be run over, the appeal of the thought that you are required to stop the train calls out for explanation given that you would thereby allow even more to die.

<sup>43</sup> This case also comes from Foot. The first version comes up in PADDE on p. 28, but another version comes up in "Morality, Action and Outcome," in T. Honderich, ed., *Morality and Objectivity* (Boston: Routledge & Kegan Paul, 1985) – see pp. 25–6 and note 6.

<sup>44</sup> If Bob's claim were over something much less significant than his life, then the needs of the others could well justify you using those means. For example, if you need to break into Bob's house to call for help, you would be allowed to do so (although you would, of course, acquire an obligation to make up for any damage caused).

<sup>45</sup> A number of contemporary philosophers seem to think the DDA can provide an account of deontological restrictions. See, for example, Elizabeth Anscombe's "War and Murder" reprinted in R. Wasserstrom, ed., *War and Morality* (Belmont, Ca: Wadsworth, 1970); Nagel's *The View from Nowhere*, pp. 179ff; Gerald Dworkin's "Intention, Foreseeability and Responsibility," in F. Shoeman, ed., *Responsibility, Character and the Emotions* (New York: Cambridge University Press, 1987); and J. L. A. Garcia's "Love and Absolutes in Christian Ethics," in T. Flint, ed. *Christian Philosophy* (Notre Dame,



Ind.: University of Notre Dame Press, 1990). This is not the place to argue in any detail that these people are mistaken to think that deontological restrictions can be defended by appealing to the DDE. But I will point out that none of them gives any account of the relational nature of claims, without which I think Scheffler would be right to insist that deontological restrictions are paradoxical.

Garcia can argue that they are not paradoxical because he refuses to let the numbers count. But such a refusal seems not to be grounded in the DDE, and even if it were, it seems implausible. For a classic argument that the numbers should not count, see John Taurek's "Should the Numbers Count," *Philosophy and Public Affairs* 6 (1977): 293–316. For a response that seems fairly devastating, see Derek Parfit's "Innumerate Ethics," *Philosophy and Public Affairs* 7 (1978): 285–301.

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