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IN DEFENSE OF PATIENT-CENTERED THEORIES OF DEONTOLOGY: A RESPONSE TO LIAO AND BARRY

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ABSTRACT. S. Matthew Liao and Christian Barry argue that the patient-centered approach to deontology that I have developed—the restricting claims principle (RCP)—‘is beset with problems.’ They think that it cannot correctly handle cases in which a potential victim sits in the path of an agent doing what she needs to do for some greater good, or in which a person’s property is used to benefit others and harm her. They argue that cases in which an agent does what would be permissible but acts on a malicious reason show that agent-intentions, rather than patient-claims, are fundamental to deontology. And they claim that the RCP presupposes the means principle in a way that shows that it is not really offering anything new. I argue here that all of these charges are mistaken. Doing so allows me to offer important refinements to the RCP, to highlight two common mistakes in reasoning about cases, and to set challenges for agent-centered approaches to deontology.

S. Matthew Liao and Christian Barry recently published ‘A Critique of Some Recent Victim-Centered Theories of Nonconsequentialism’ (hereinafter ‘Critique’).¹ The focus of Critique was recent work of Gerhard Øverland and mine.² This was work in which we offered patient-centered (not just victim-centered) accounts of why the means principle (MP), or something like it, is morally correct. I accept their criticism of Øverland’s work and my earlier work. But I reject it with regard to my more recent work. Indeed, while they were working on Critique, I was refining my views further, in part based on conversations I had with them, and in *The Mechanics of*

¹ *Law and Philosophy* 39 (2020): 503–526.

² Gerhard Øverland, ‘Moral Obstacles: An Alternative to the Doctrine of Double Effect’, *Ethics* 124 (2014): 481–506; Alec Walen, ‘Transcending the Means Principle’, *Law and Philosophy* 33 (2014): 427–464; and ‘The Restricting Claims Principle Revisited: Grounding the Means Principle on the Agent-Patient Divide’, *Law and Philosophy* 35 (2016): 211–247 (hereinafter RCPR).

*Claims and Permissible Killing in War*³ (hereinafter ‘MOC’), I already took positions that address, in some way, all of the objections they press in Critique.⁴ Nevertheless, there are two reasons to write this reply. First, doing so allows me to fix a few mistakes in the way I have handled certain cases.⁵ Second, by pointing out some of their mistakes, I hope to make progress in the debate between agent-centered and patient-centered accounts of deontology.

I. A SKETCH OF THE RESTRICTING CLAIMS PRINCIPLE

Before responding to the challenges that Liao and Barry raise to my view, I should say something about what my view is. The restricting claims principle (RCP) is the name I use for my patient-centered account of the MP. It is based on the thought that some claims that patients have on agents push to restrict them relative to their baseline freedom. Those ‘restricting’ claims thereby push to impose costs on others who might benefit from that freedom.⁶ Non-restricting claims, which I now call ‘property’ claims,⁷ do not push to restrict an agent relative to her baseline freedom.⁸ Rather, they work to *establish* that baseline freedom. Because restricting claims push to impose costs on others, given an agent’s baseline freedom, while property claims do not, restricting claims should be weaker than non-restricting claims, all else equal.

To explain this better, I will show how the RCP allows for a solution to the trolley problem, i.e., the problem of explaining why the following two cases are intuitively different.

Trolley Switch: Brenda, a bystander at a switch, can throw the switch and thereby turn a trolley that is hurtling down a hill, out of control, away from five innocent people and towards one

³ New York: Oxford University Press, 2019.

⁴ Though Critique was published in 2020, over a year after MOC, our publications sailed past each other, like emails missing in the ether. Given that they submitted Critique for publication in 2018, I cannot blame them for not responding to MOC.

⁵ The one criticism in Critique that I do not address here is that I am too ready to dismiss intuitions as unreliable. Critique, pp. 517–521. I defend my methodology with regard to intuitions in MOC, pp. 21–22, and I stand by that discussion. I admit here, however, that there were instances in which I was too ready to accept a counter-intuitive position because I was making a substantive mistake. I try to clear up those mistakes here.

⁶ Øverland used the term ‘costs’; in earlier work, I referred to them as the patient-analog of the externalities an agent might impose on others. For simplicity, I here adopt his term.

⁷ MOC, p. 87.

⁸ For convenient pronoun reference, I treat the generic agent as female and the generic patient as male.

innocent person on a sidetrack (the 'sidetrack man'), thereby killing the sidetrack man and saving the five.

Massive Man: Bertha, a bystander at a switch, can throw the switch and thereby cause a massive man to topple into the path of a trolley that is hurtling down a hill out of control, thereby killing him and saving five people whom the trolley would otherwise kill.

The standard intuition about *Trolley Switch* is that Brenda may turn the trolley from five onto the sidetrack man. To see how the RCP accounts for this standard intuition we first need to establish Brenda's baseline freedom. That is set, I say, by the things she can count as hers to use, the things in her 'toolkit' for action. Brenda has the baseline freedom to turn the trolley because she is permitted to consider the switch hers to use, i.e., as in her 'toolkit.' This permission may seem odd because Brenda is just a 'bystander' at the switch; presumably she does not normally have the authority to throw the switches of the trolley company. But the five have 'empowering' claims to be saved. Those claims push to empower her to act for them by putting the property that would normally not be hers to use in her toolkit for a particular purpose. They compete with the property claims of the trolley company to keep the switch out of Brenda's toolkit. Given that her using the switch to save five lives would impose no great cost on the company and that the lives of the five are literally on the line, their empowering claims succeed in putting the switch in Brenda's toolkit for the purpose of saving the five. Thus, Brenda has the baseline freedom to throw the switch. She also has the baseline freedom not to throw it, given that she can count her time and energy as her own.

Second, given that baseline freedom, the five have positive restricting claims (claims to be saved) that push to restrict her freedom *not* to turn the trolley, and the sidetrack man has a negative restricting claim (a claim not to be killed) that pushes to restrict her freedom *to* turn the trolley. Many are inclined to think that claims not to be killed are *much* stronger than claims to be saved.⁹ But that's where the RCP comes in to say: not so. The negative claim of the sidetrack man pushes to impose a cost on the five, turning them from people who Brenda may save into people she may not save. Such costs should not be allowed to get too large. Thus, even if one claim not to be killed would outweigh one claim to be saved, it

⁹ I argue that negative patient-claims *are* stronger than positive ones, all else equal, in MOC, pp. 58–59.

should not outweigh it by much, and five claims to be saved could plausibly outweigh one claim not to be killed.¹⁰ That is why Brenda is permitted to turn the trolley onto the sidetrack man.¹¹

Turning to *Massive Man*, the standard intuition about that case is that Bertha may not topple the massive man into the path of the trolley. The RCP accounts for this standard intuition as follows. The massive man has a property claim over his body that limits Bertha's baseline freedom: he is not in her toolkit. The five have empowering claims that push to put him in her toolkit. Those claims could succeed if the cost to him were slight (or if his property claim over his body were somehow seriously compromised). But given that his life is at stake (and assuming that his property claim is not seriously compromised), their empowering claims fail. They *must* fail in such a case because property claims are the patient-analog of an agent's claim not to have to make sacrifices for the sake of others to whom they owe no special duty of aid. As an agent, a person may be expected to make small sacrifices for the welfare of others, but respect for her autonomy requires that she not be treated as a mere tool for the production of the greater welfare. The same is true for her as a patient. She may be put in the toolbox of others—even if she has no special duties to help them—if the costs to her are relatively small and the benefits to others great. But unless she has done something to forfeit, waive or transfer her property claim over her body, she may not be put in the toolbox of another if the cost to her would be grave. That too would treat her as a mere tool for the greater welfare; it too would be inconsistent with respect for her as an autonomous person.

Because the massive man is not in Bertha's toolbox, and because what is in her toolbox would not enable her to save the five, she has no baseline freedom to save the five. Having no baseline freedom to save the five, she has no baseline freedom to be restricted by their claim to be saved. As a result, the five have no relevant restricting claims on her. All the claims-work is done at the level of his property claim defeating their empowering claims. The result is that she may not kill him.

¹⁰ I defend the idea that claims can aggregate in this way in MOC, pp. 50–52.

¹¹ She is not required to turn it because she has her own agent-claim not to have to act as a tool that responds to the balance of patient-claims on her.

II. A POTENTIAL VICTIM IN THE PATH OF AN AGENT'S ACTION

The first challenge in Critique is that the RCP cannot properly handle cases in which a potential victim is trapped in the path of an agent seeking to achieve some greater good: I call my version of such a case *Rescue Ahead*. My views on that case have flip-flopped, but I now agree with Liao and Barry that it is impermissible to allow the 'trapped ahead man' to be run over for the sake of reaching and then rescuing five. Moreover, I stand by what I said about the case in MOC—essentially, that he has a property-like claim to the space he occupies, which the agent needs to use to reach and then save the five.¹² My purpose in discussing the case here is not to rehash my position on it; it is to address a confusion in their discussion of the case.

Liao and Barry repeat a charge I have encountered elsewhere, namely that the RCP cannot distinguish *Rescue Ahead* from *Trolley Switch* because the sidetrack man also has a property-like claim to the space he occupies.¹³ That misses the point in a deep and important way. In *Rescue Ahead*, the agent needs to *use* the space the trapped-ahead man occupies—she needs to run over that ground to get to the five. Thus, she needs that space in her toolkit. The trapped-ahead man's right to exclusive use of that space keeps it out of her toolkit. That is why she may not proceed. By contrast, Brenda does not need the space the sidetrack man is on as a means to save the five. She needs only that bit of track that would turn the trolley off to the side, the turnout, so that it does not go straight ahead. Beyond the turnout, the rest of the sidetrack is irrelevant to her having the means to avoid the five. The sidetrack man's claim to some space further down the track, then, is not a claim relevant to her having the means to avoid the five. It is simply a claim not to be killed, and it is a restricting claim.

III. PROPERTY RIGHTS THAT DO NOT PROTECT THE OWNER

The second challenge in Critique is that I fail to properly account for a variation on *Trolley Switch*, in which the sidetrack man owns a tool

¹² MOC, pp. 90–92. One mistake I made in an earlier treatment of the case, connected to my defense of a counter-intuitive position, was to offer squeamishness as the source of an error theory. RCPR, p. 246. Given my current substantive views, it can be cast aside as an unfortunate error.

¹³ Critique, p. 509, n. 17.

that Brenda would need to turn the trolley, a case I call *Trolley Switch Tool*.¹⁴ Liao, Barry, and I are all in agreement that it is intuitively permissible for Brenda to use the tool to turn the trolley. But it is a puzzle how that can be correct on the RCP. How can the empowering claims of the five fail to put the massive man's body in her toolkit because the harm to him from doing so would be serious if she used him, but at the same time put the sidetrack man's tool in her toolkit despite the same potential cost to the owner?

One might think the answer is that claims over one's body are much stronger than claims over external property. To see why that is implausible, consider this case:

Drug Owner: To save the lives of five people, Dr. Aspire needs to give them a certain drug. But all the readily available supply of that drug is owned by one person, Bryson. Moreover, Bryson is not simply hoarding the drugs; he bought what he owns because he needs all of it to live.¹⁵

It seems to me about as clear that Dr. Aspire may not take Bryson's drugs as that Bertha may not topple the massive man in front of the trolley. The question is: what could distinguish *Trolley Switch Tool* from *Drug Owner*?

The answer can be found, I think, by examining the connection between the harm the owner would suffer and the agent's use of the property.¹⁶ If the harm of death is tightly connected to the use, then the strength of the property claim in question is set by the importance of avoiding death, and no collection of empowering claims will suffice to outweigh it.¹⁷ If the connection to the owner's death is loose, however, in the sense 'that one could imagine the use having a small effect on the owner and the ultimate harm [of death] befalling someone else,'¹⁸ then only the small harm tightly connected to the use determines the strength of the property claim; the claim not to be killed would register as a restricting claim.

Applying this idea of tightness to the two cases on the table, we can see that the connection between the drug owner, Bryson's, claim on the drugs and the harm he would suffer if the drugs were taken

¹⁴ Critique, pp. 523–524.

¹⁵ For the complement to this case, one showing that property claims over one's body can be as weak as those over a tool, see *Massive Man Tool*, MOC, p. 92.

¹⁶ MOC, p. 93 (I now use 'tightness' rather than 'directness' of the connection).

¹⁷ If competing interests are strong enough, it may be morally permissible to use a person as a means even at the cost of his life. But permissibility then registers as a matter of threshold deontology, outside what I call 'the space of rights.' MOC, ch. 4, § 3.

¹⁸ MOC, p. 93. The other person would have to be one who didn't have a special claim on the owner, that she use it on his behalf, such as a child who needs the drug owned by her parent.

from him is tight. Depriving him of his drugs—at least without resupplying him in short order—would cause his death. Thus, his property claim registers as the very strong claim not to be killed by having his property taken from him. By contrast, the sidetrack man’s claim to his tool is not so tightly connected to preserving his life. I presume he does not rely on the tool to stay alive. Rather, his interest in it is the less significant sort of interest one generally has in property: ‘having access to [it] when [he] wants to use it, excluding others from using it if [he] wants to, and being able to sell it, loan it, or give it away as [he] sees fit.’¹⁹ The empowering claims of the five outweigh these lesser interests and give Brenda the right to put his tool in her toolkit for the purpose of turning the trolley away from the five. The fact that she would also thereby turn the trolley onto the sidetrack man does not change that analysis. Once she has the tool in her toolkit, his claim is a restricting claim not to be killed, which is outweighed by the restricting claims of the five to be saved.

Now consider a case in which the sidetrack man relies on the tool to stay alive the way the drug owner relies on his drugs:

Trolley Switch Tool 2: The case is just like *Trolley Switch Tool*, but at the time Brenda would use the tool to throw the switch, the sidetrack man would need access to it to open an oxygen tank; if he does not have access to the tool, he will asphyxiate in the airtight suit in which he is working.

It seems to me that her taking his tool during the time when he would need it to stay alive is akin to Dr. Aspire taking Bryson’s drugs. To see that, imagine that there were two sidetrack men on different sidetracks: one gets hit by the trolley, and the other asphyxiates because Brenda cannot get the tool back to him in time for him to open his second oxygen tank. The one who got hit by the trolley would have only a restricting claim not to be hit, but the tool owner would have a very strong property claim not to be killed by Brenda borrowing his tool. His strong property claim would outweigh the empowering claims of the five and deprive her of the baseline freedom to use his tool. As a result, she may not save the five. This is true whether we separate the case into two sidetrack men or leave it one sidetrack man who gets hit by a trolley before asphyxiating.

I discuss that case because I now think that Liao and Barry were right to criticize my earlier discussion of a previous version of *Trolley*

¹⁹ RCPR, p. 231.

Switch Tool 2. In my earlier version, the sidetrack man would only need the tool at a later point in time, long after he would be hit by the trolley.²⁰ Liao and Barry criticize my treating that case as similar to *Drug Owner* as counter intuitive.²¹ I now think that they are right. Using the split victim test, if the tool could be returned to the original owner in time, then the empowering claims of the five would allow Brenda to use it to turn the trolley, whether onto another or the owner. That would be permissible, like taking the drug owner's drugs and replacing them before he became gravely ill.

But now I want to turn the tables on them and ask whether they would agree with me that *Trolley Switch Tool 2*, as now described, is more like *Drug Owner* than *Trolley Switch*. I think it is. If they disagree, then I would hazard the hypothesis that it is only because of their own commitment to a different theory, one which prioritizes the thought that he is still killed only as a side effect, and not intentionally. But if that is their theoretical commitment, then I challenge them to make sense of *Drug Owner*.

IV. THE (LIMITED) RELEVANCE OF INTENTIONS

The third challenge in Critique was based on a set of cases that Liao and Barry think can be handled correctly only by focusing on the intentions of an agent. I addressed similar cases in MOC,²² but I revisit their variations here to point out a mistake in the way they handle them, a mistake that is quite common.

Their cases are two variations on *Trolley Switch*. In one, Brenda decides to turn the trolley only because she wants to kill her enemy, the sidetrack man, though she would not kill him but for her recognizing that the act of turning from five onto one is permissible. In another, they change the number who would be saved from five to 10,000.²³ While they think it impermissible for Brenda to kill her enemy because he is her enemy in the five-to-one case, they think she *must* kill him, even if acting on that malicious reason, in the

²⁰ RCPR, p. 232.

²¹ Critique, p. 524. They also criticize it on the ground that I appeal to his purpose in owning the tool, which they think is inconsistent with a patient-centered account. Ibid, p. 523. In my new version, I no longer appeal to his purpose in owning the tool, only his need for it. But see section IV below on why it is not a problem for me to appeal to intentions or purposes in some ways.

²² MOC, pp. 127–134.

²³ They call the case *Enemy 10,000 to 1*. Critique, p. 512.

10,000-to-one case. They conclude that a bad intention can make an otherwise permissible act impermissible, but if the act is required, then a bad intention's force as a wrongmaking feature of action is outweighed.

I say that this is simply mistaken. I agree with them that Brenda acts impermissibly if she kills out of malice and not for the sake of the five. But I think that not because the killing itself, when done for bad reasons, becomes a murder. It is still permissible *qua* killing. What is impermissible is her acting on a disrespectful reason. And she need not do so to save the five. She can save the five for a better reason because she can commit herself, on the spot, to acting for the sake of five in such cases, regardless of whether her enemy or another would be killed. One might worry that if she is told that she has to act for an acceptable reason then she might simply choose not to save the five. But on my view, by being willing to kill the one out of malice, she forfeits her claim to be free not to save the five. Thus, if she is willing to kill for a bad reason, morality can demand *both* that she not act on that reason *and* that she save the five. On this analysis, the same situation confronts her in the 10,000-to-one case: even if the claims of the 10,000 mean that she must kill regardless of how much she would hate doing so, it is *also* true that she must not act only for the sake of killing her enemy.

The fact that these two features of the case—the significance of patient-claims and the significance of intentions—come apart in this way lends further support to the idea that the fundamental problem with violating the MP and killing has nothing to do with the agent's intentions; it has to do with the patient's claims. The agent's intentions may be wrongmaking, but they give rise to a different and lesser wrong.

V. THE EXPLANATORY SIGNIFICANCE OF THE RCP

Finally, Liao and Barry charge that the RCP ends up being nothing more than a recapitulation of the MP.²⁴ This is literally a *fundamental* misunderstanding, so I end with a brief discussion of why that charge is mistaken.

²⁴ Critique, p. 524–525. Part of their argument focuses on an Øverland case called *Armor*. I will say here only that they fail to appreciate how having a *successful* restricting claim imposes costs that give rise to duties that others, who have imposed no such costs, would not have.

The basic aim of the RCP is to provide a deeper account of why the MP is true. This is important because it has been difficult for defenders of the MP to say why it should be particularly hard to justify using another as a means. If one thinks that intentions should not matter in the way that defenders of the doctrine of double effect think they do, then one has to say that causal roles matter. But that is superficially mysterious. The RCP aims to resolve that mystery by pointing out (1) that causal roles relate to the types of claim in play, and (2) that restricting claims push to make others worse off than they otherwise would be, and by arguing that that should, in fairness, limit the strength of restricting claims. More specifically—and this is a point I have not been clear on in the past—it should limit the dominance of *negative* restricting claims over positive ones, helping thereby to explain why it is possible to justify killing one as a side effect of saving five while it is not likewise possible to justify killing one in virtue of using him as a means of saving five.

That explanation would be incomplete without also explaining why claims not to be used as a means are strong. Another feature of the RCP is that it gives an account of why property claims should have a sort of priority over empowering claims. I end, then, by quoting and commenting on two paragraphs from *The Mechanics of Claims* discussing the property baseline for the application of the RCP.

As I now understand the [RCP], the distinction between restricting and non-restricting claims reflects the fact that there are two ways we see ourselves in relationship to others. First, there is the agent-agent way of dividing up the world into that which is available to each agent for her own use, that which is reserved for others, and that which is available for all (or none). This is, obviously, a division along property lines. Then there is the way we, as patients, confront agents who seek to use their property to promote their ends. We have an interest in limiting their freedom so that it does not inflict undue harm and so that they act in ways that benefit us. I call these, respectively, the *agent-agent division* and the *agent-patient frontier*.

The agent-agent division is important because the essence of agency is the ability to choose how to act. For an agent to be free to act, she needs to have the means [with] which to act. ... These [means] comprise her toolkit, so to speak. What is reserved for others in the agent-agent division is not in her toolkit. A fellow agent with a claim to deny her the use of some part of the world contributes to defining the limits of her toolkit and, with that, the limits of her baseline freedom. Such a claim is not 'restricting' because its moral effect is not to restrict an agent relative to her baseline freedom; it occurs at a morally prior stage, that of setting her baseline freedom.²⁵

²⁵ MOC, p. 87.

What I want to highlight about this text is that I am trying to explain *why* the notion of baseline freedom should be set by reference to property claims. I am not simply assuming that the means principle is true. The account goes deeper into the nature of autonomy and what it takes to live in a world with others.²⁶ It identifies a primary way we have to address each other, as fellow agents who divide up the world for our agency, and it distinguishes that from the way we, as patients who wish to be helped or not harmed by others, have claims on agents. We have claims on agents in two ways: first, we have empowering claims that push to shift property around, from toolkit to toolkit, to help us. Second, we have restricting claims that push to limit what agents can do with their baseline freedom, so that they neither harm us nor fail to aid us. But these empowering claims must be weaker, all else equal, than property claims; if not, the latter will not serve their purpose of giving us qua agents the ability to live our autonomous lives. And positive restricting claims, that push to make agents serve patient interests, must for the same reason be weaker than negative agent-claims not to have to serve in that way. Finally, negative restricting claims must be not much stronger than positive restricting claims because otherwise negative restricting claims would impose too much of a cost on others.

In sum, this account of different types of claims and how they operate—both which kinds of claims compete against which others, and what kinds of strengths they have, holding interests constant—*explains* how the MP is grounded in deeper considerations of what a space of rights does: it allows us to live together, respecting each other as free and equal citizens of that space, citizens whose welfare matters.²⁷

²⁶ An anonymous reviewer for *Law and Philosophy* asks if this focus on autonomy implies that infants, who lack autonomy, may be used as a means. I think animals, because they lack autonomy, may be so used; their claims are limited to restricting and empowering claims based on their welfare interests. But there is good reason to grant infants property rights, on the ground that they can be expected to grow to have autonomous moral agency. For those marginal humans who cannot be expected to become autonomous, I think we also have reason to treat them with most of the same protections, but it is a reason grounded in our sentimental attachment to them, not in their intrinsic moral status.

²⁷ See MOC, pp. 47 and 115.

VI. CONCLUSION

Liao and Barry argue that the RCP 'is beset with problems.'²⁸ I reject that conclusion; I think it works well both in terms of its concrete implications and in terms of its ability to ground our intuitions in deep, plausible, moral principles. I have argued here that none of the objections they raise are real problems for the RCP, and I have argued, to the contrary, that their version an agent's-intentions based account of deontology faces problems they do not own up to. But their arguments have helped me to see the need for further refinements in the RCP. For that, I am once again grateful.

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²⁸ Critique, p. 526.