

# The Right to Cause Harm as an Alternative to Being Sacrificed for Others: An Exploration of Agent-Rights with a Special Focus on Intervening Agency

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## I. INTRODUCTION

There are two ways an agent might have a right to act. First, her act responds to the balance of patient-claims on her—patients are people affected by the choices of agents—and in that sense is justified by the overall good it will do. Second, her act functions to keep or exercise control over herself and her resources.<sup>1</sup> Her claim to keep that control can ground a right not to respond to the balance of basic patient-claims—the claims of those who have no prior special relationship with her.<sup>2</sup> In this article, I focus primarily, but not exclusively, on the second way an agent can have a right to act, and I tie it to something it is not usually tied to: the right to harm others.

The idea that an agent is free not to sacrifice herself or her resources—I leave the phrase *her resources* implicit from now on—reflects a fundamental principle of liberal thought: that we each have our own lives to lead, that we need not think of ourselves merely as tools for the greater good.<sup>3</sup> It is easy to see how this principle grounds a right *not* to act for the sake of others. The picture gets more complicated, however, when dealing with actions that actively cause harm, rather than allowing harm to take place. Nonetheless, I argue that when an agent can justify her act as an instance of acting to protect herself from being used as a means for the sake of others to whom she owes no special duty, she has a strong claim to be free to cause harm to those who would benefit from her sacrifice. As long as the harm is necessary to her not being sacrificed and proportional to the harm she seeks to avoid, where proportionality in this context tilts heavily in favor of the interests of the agent who seeks not to be sacrificed, then she would normally have a right to cause the harm in question.<sup>4</sup> I

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1. The agent might equally be acting on behalf of others who have special claims on her or her resources—for example, people to whom she has made a promise, people who have claims for compensation, or dependents such as her children. I focus, however, only on her own claims over her resources.

2. I call the basic framework for this way of thinking about rights the “*Mechanics of Claims*.” Alec Walen & David Wasserman, *Agents, Impartiality, and the Priority of Claims over Duties: Diagnosing Why Thomson Still Gets the Trolley Problem Wrong by Appeal to the “Mechanics of Claims,”* 9 J. MORAL PHIL. 545, 547, 554 (2012). I develop this framework more fully in ALEC WALEN, *THE RIGHT TO DEFEND AGAINST THREATS: A CASE STUDY IN RIGHTS THEORY* (forthcoming 2018) (manuscript ch. 3) (on file with author). For a further elaboration on the Mechanics of Claims see *infra* Part II.

3. Walen & Wasserman, *supra* note 2, at 554–55.

4. Other considerations that might limit this right include laws that might require her to sacrifice herself. Such laws can have limited moral weight. As for proportionality,

call this the right to resist being sacrificed for others—or the *right of non-sacrifice*.

As an ancillary thesis, I argue that action on the part of others that would interfere with an agent exercising the right of non-sacrifice cannot be justified.<sup>5</sup> That is, the justification cannot successfully make essential reference to preventing or interfering with this right of non-sacrifice.<sup>6</sup> This is a special case of what I call the *agent–patient inference*. This inference moves from the agent’s right to act to the agent’s right, *qua patient*, not to be interfered with.<sup>7</sup> I do not think the agent–patient inference can be made *whenever* an agent has a right to act; sometimes other agents are permitted to try to interfere with an agent doing what she has a right to try to do.<sup>8</sup> But I argue that the default position is the agent–patient inference. Moreover, I argue that the agent–patient inference always holds when the agent’s right to act is a right of non-sacrifice.

I should explain why I state the agent–patient inference in terms of justifications, rather than the intentions of the other agent. Justifications are the objective counterpart of intentions. They too involve acts framed in terms of particular goals with particular means of achieving them. We should always ask, first, whether an act can be justified without regard to the particular intentions with which is performed. If it cannot, then it is impermissible. If it is justifiable in some way or another, then one can ask the next question: Might it be impermissible to perform the permissible act while acting on an illicit intention? If we invoke intentions too soon, we may overplay the significance of acting on an illicit intention.

These two theses are relevant to topics ranging from just war theory to criminal law’s doctrine of complicity. Discussing these applications is mostly beyond the scope of this article—although I will touch on just war

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the notion that proportionality assessments reflect the context is a cousin of Jeff McMahan’s distinction between proportionality in the wide and narrow senses. According to McMahan, proportionality in the narrow sense reflects how people’s interests should be considered given that they are liable to harm, whereas proportionality in the wide sense reflects how their interests should be considered if they are not liable to harm. *See* Jeff McMahan, *Proportionality and Just Cause: A Comment on Kamm*, 11 J. MORAL PHIL. 428, 435–36 (2014). I reject McMahan’s distinction as too bimodal; either one party has forfeited an important right or one must engage in purely consequentialist weighing. I think the weighing must always be done in a rights space, considering the strength of competing claims.

5. *See infra* Part IV.

6. Michael S. Moore, *Steinhoff and Self-Defense*, 52 SAN DIEGO L. REV. 315, 323 (2018).

7. *See infra* Part III.

8. I explore this permission in detail later on. *See infra* Part V.

theory in Part IX. But the implication for the theory of self-defense—which is central to much contemporary just war theory<sup>9</sup>—is the heart of the paper.

My strategy for defending the right of non-sacrifice and the connected agent–patient inference is to move through a series of cases, starting with easy cases—clearly permissible acts of non-sacrifice—and moving to more controversial ones. The controversial cases are those in which intervening agency is central to explaining why an agent should have the right of non-sacrifice. My argument will not simply be an attempt to explain intuitions. I take the intuitions on the easy cases to be reliable, but once we move to controversial cases, I think moral intuitions become unreliable. My argument fundamentally trades on two thoughts: (1) there is an account of the easy cases that is deeply grounded in important fundamental principles, and (2) these principles can be extended to give us a plausible set of answers for the controversial cases.

Along the way, I will engage with a number of difficult issues, the two most important of which are problems with counterfactuals and the significance of intervening agency. But first I argue that it is only the claim *not* to have to sacrifice oneself that is strong. That is, I argue in the next Part that we have strong negative agent-claims,<sup>10</sup> which is a very different proposition from saying that we have “agent-centered prerogatives” to favor ourselves.<sup>11</sup>

## II. NEGATIVE AGENT-CLAIMS, NOT AGENT-CENTERED PREROGATIVES

Negative agent-claims straightforwardly represent the fundamental liberal commitment to the thought that each person is fundamentally free to lead her own life, as long as she does so in a way that respects the rights of others and justice more broadly.<sup>12</sup> They are an agent’s claims *not* to have to do things for the sake of others who have positive claims for aid.<sup>13</sup> By contrast, positive agent-claims are claims to be free to do things despite their negative impact

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9. See generally, e.g., KAI DRAPER, *WAR AND INDIVIDUAL RIGHTS: THE FOUNDATIONS OF JUST WAR THEORY* (2016); HELEN FROWE, *DEFENSIVE KILLING* (2014); SETH LAZAR, *SPARING CIVILIANS* (2015); JEFF MCMAHAN, *KILLING IN WAR* (2009); Uwe Steinhoff, *Just War Theory: Self-Defense, Necessity, and the Ethics of Armed Conflicts* (2016) (unpublished manuscript) (on file with author).

10. The idea of an agent-claim is alien to Hohfeldian terminology, but I beg the reader’s indulgence as no better term exists and its meaning is clear enough. For the original Hohfeldian terminology, see Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 17 n.7, 46 (1913).

11. See SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS* 41 (1982); Steven Wall, *Perfectionism in Moral and Political Philosophy*, *STAN. ENCYCLOPEDIA PHIL.* (Dec. 15, 2017), <https://plato.stanford.edu/entries/perfectionism-moral/> [<https://perma.cc/YKJ9-BB6D>].

12. Walen & Wasserman, *supra* note 2, at 551, 554.

13. *Id.*

on others who have negative patient-claims not to be harmed.<sup>14</sup> The idea of agent-centered prerogatives, as the term is standardly used, fails to mark that distinction. Such prerogatives simply allow agents to give preference to their own ends over the competing ends of others.<sup>15</sup> They are like excuses, in that, unlike standard justifications, they do not extend from the agent to third parties. But they are more affirming than excuses. An agent may not plan to act on an excuse;<sup>16</sup> she may plan to act on an agent-centered prerogative.<sup>17</sup> Many people seem to think we enjoy agent-centered prerogatives. They are mistaken.<sup>18</sup>

Negative agent-claims must be strong because they are essential for giving agents the moral freedom to live their own lives, as opposed to being morally required to dedicate their lives to the goal of responding to the balance of claims on them. I, along with David Wasserman, have argued elsewhere that there are three reasons why agents do not also need, and should not be taken to have, meaningful positive agent-claims to complement their strong negative agent-claims.<sup>19</sup> First, such positive claims are not necessary for agents to avoid having to treat themselves as tools for the greater welfare; that task is achieved by negative agent-claims.<sup>20</sup>

Second, an agent's interest in being free to do what she wants to do is fairly taken into account by her property right to deny others the use of her property, the freedom to use it herself—as long as she causes no substantial harm in doing so—and her positive patient-claim to enjoy the benefits of her own acts.<sup>21</sup> These three factors sufficed to provide her the basic normative space necessary to lead her own life.<sup>22</sup> She needs no additional positive claim to be free to pursue her ends even to the detriment of others.<sup>23</sup>

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14. *Id.* at 551, 555.

15. The idea was first popularized by Samuel Scheffler. See SCHEFFLER, *supra* note 11. It has since been influentially taken up in self-defense literature by many people, but perhaps most notably by Jonathan Quong. See, e.g., Jonathan Quong, *Killing in Self-Defense*, 119 ETHICS 507, 516–17 (2009).

16. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 218 (7th ed. 2015).

17. See Steinhoff, *supra* note 9, at 30.

18. Victor Tadros makes essentially the same argument in THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 209–10 (2011).

19. Walen & Wasserman, *supra* note 2, at 555–56.

20. *Id.* at 555.

21. *Id.* at 555–56. The claim that she is free to use her property as long as she causes no substantial harm is defended in WALEN, *supra* note 2, ch. 3, § 2.1.3.

22. See Walen & Wasserman, *supra* note 2, at 555.

23. *Id.*

I can make the third point no better now, so I quote our earlier text at some length:

[G]iving [her] positive agent-claims significant weight would allow [her] to choose to harm others for the benefit of [herself] or those [she] care[s] about in ways that seem unjust. Consider [a] case in which [she] could turn [a] trolley from [herself] onto another. [Her] patient-claim is the positive claim to be saved from the trolley; the [other's] patient-claim is the negative claim not to be hit by the trolley. If we assume that negative patient-claims outweigh otherwise similar positive patient-claims, then the balance of patient-claims would (in the absence of other considerations) prohibit [her] from turning the trolley. If [her] positive agent-claim had substantial weight, it might tip that balance. But that seems unjust. [She] may not, we believe, turn the trolley from [herself] onto another. To capture the sense that it would be unjust for [her] to do so, we would say that [her] positive agent-claim does not have the capacity to tip the balance here. Indeed, we think it never has the capacity to tip the balance between lives or other weighty interests. Even to let a claim . . . break a tie between negative claims not to be killed would fail to respect the gravity of the latter claims, and the importance of impartiality when it comes to respecting patient-claims. In sum, if [her] agent-claim is positive, then [she is] required to defer to the balance of patient-claims.<sup>24</sup>

One might object that this rejection of positive agent-claims cannot handle the following example.<sup>25</sup> Suppose a trolley is hurtling down the hill toward ten people and Brenda could turn it onto one of two tracks: either the left track, where it will kill her son, or the right track, where it will kill a stranger. The balance of patient-claims calls on her to turn the trolley away from the ten people. It also calls on her to be impartial between turning it onto her son and the stranger. If she has no positive agent-claim to choose her son over the stranger, then she must do something to treat them fairly, such as flip a coin.<sup>26</sup> But imposing on her son a 50% chance of being killed, so that she can save ten, seems inconsistent with the special duty she owes her son. If the case were one in which she had to choose whether to turn the trolley from ten onto her son, his special claim on her would remove from her the liberty she would otherwise have to save the ten; she would owe him the duty of not turning the trolley onto him. It is no different if she were imposing on him a 50% chance of dying; that is much more than she may rightfully impose on him for the sake of strangers. But then it seems she must either allow the ten to die or invoke a positive agent-claim to favor her son and turn the trolley toward the stranger. Given the importance of saving the ten, the normative pressure here is to acknowledge a positive agent-claim to favor her son.

Indeed, we could make this pressure even stronger by changing the case such that there are *two* strangers on the other track. If she wants to save

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24. *Id.* at 556 (footnote omitted).

25. This example is based on one given by Steinhoff, *supra* note 9, at 203–04.

26. This is one of two positions that Wasserman and I considered plausible. Walen & Wasserman, *supra* note 2, at 562–63.

the ten, then she must sacrifice her son, as his basic patient-claim not to be killed is weaker than that of the two strangers on the other track. She would have a right, based on a negative-agent claim, not to have to sacrifice her son for the sake of the ten strangers. But that means that ten must die rather than two onto which she could turn the trolley. That, however, seems wrong. It might seem, then, that the only solution is to say that she must be free to exercise a positive agent-claim to favor her son over *two* strangers.

The problem with this argument is that it presupposes that the three-way choice has to be broken down as follows: first, decide whether to save the ten, then decide which of the others to kill. But there is another way to approach the choice that makes at least as much sense, avoids the problems, and retains the idea that agents enjoy no positive agent-claims. Start with the thought that Brenda has a strong negative agent-claim that grounds a right not to sacrifice herself or her son for the sake of others. She should then look at the remaining options: either allow ten to die or turn the trolley onto one or two strangers. Assuming that the balance of basic patient-claims favors five or more positive claims over one negative claim, all else equal, she may turn the trolley. At no point must she invoke a positive agent-claim to justify doing so.<sup>27</sup>

Given that this allows us to simultaneously respect Brenda's right not to have to sacrifice or risk sacrificing her son and the moral gravity of saving ten lives—and that it also protects patients from the overly broad privileges that would result from according agents positive agent-claims—this seems the better approach. It does lose the appeal of the thought that if Brenda decides to save the ten, then her son and the others are in some sense in the same boat and should be treated equally. But as objectors would reject that equality in the next move, by giving her a positive agent-claim that would allow her to turn the trolley onto the others to save her son, the idea of equality really provides no reason to accept the framing which is the basis for the objection. The simpler solution is to accept the framing of the situation according to which she gets to first withdraw the option of sacrificing her son and then consider the other options.<sup>28</sup>

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27. *Id.* at 563. This is the other position Wasserman and I considered plausible. I now conclude it is the better position.

28. Kimberly Ferzan asked me what I would say about a double switch case in which Brenda could save ten people by turning the trolley onto her son but then could save her son by turning the trolley onto two others. Each stage seems impermissible, but the outcome seems permissible. I am inclined to say that she may take the double switch. It is part of a single plan to save ten people at the cost of two, and at no stage along the way is

In sum, agent-claims are negative when they are claims not to have to make a sacrifice for the benefit of others.<sup>29</sup> Agents get to give substantial priority to their negative agent-claims.<sup>30</sup> If they protect relatively trivial interests, the balance of patient-claims can tip the overall balance and impose on the agent a duty that contravenes her agent-claim.<sup>31</sup> But if her agent-claims protect an important interest of hers, and she owes no one a special duty that effectively negates her agent-claim with respect to that claimant, then she must be free not to serve the welfare of the patients whose interests ground the positive patient-claims that compete with her negative agent-claim.<sup>32</sup> If, however, her interest is in doing something that runs contrary to the balance of patient-claims, when that balance is tipped in favor of negative claims not to be substantially harmed, then she must yield. She has no right to favor herself in such a case. There is no general right to be partial to oneself, and there are no general agent-centered prerogatives.

### III. INTRODUCING THE *MECHANICS OF CLAIMS*

To appreciate why positive agent-claims should have no normative weight when serious harms are at stake, one has to understand the model of rights that I mentioned in a footnote in the Introduction and have been using implicitly up to this point: the *Mechanics of Claims*.<sup>33</sup> The basic idea of the *Mechanics of Claims* is that rights, in the final analysis, reflect first and foremost the balance of patient-claims on an agent,<sup>34</sup> modified by whatever agent-claims the agent can bring to bear. If the balance of competing patient-claims pushes to require an agent to do X, then she must do X unless she has a sufficiently strong negative agent-claim not to do X.<sup>35</sup> And if the balance of competing patient-claims pushes to prohibit her from doing X, and protects significant interests of others, then she may not do X, because her positive agent-claims carry no weight in that sort of balance.<sup>36</sup>

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anyone unjustly harmed. Yes, her son is briefly threatened, but if she is confident she can throw the second switch, that does not violate his right not to be endangered by her. And the two are not really killed to save one; they are killed to save ten.

29. Walen & Wasserman, *supra* note 2, at 559.

30. *Id.* at 550, 565.

31. *See id.* at 569.

32. *Id.*

33. *See supra* note 2.

34. Ultimately, this has to be amended by noting that the liberty rights of agents can be restricted also by considerations of justice not well captured by the idea of patient-claims, such as restrictions on unfair free-riding. Walen & Wasserman, *supra* note 2, at 552.

35. *Id.* at 552.

36. *Id.* at 556.



The *Mechanics of Claims* contrasts with the more standard model of rights, which I call the *Infringement Model*.<sup>37</sup> The *Infringement Model* treats rights as inputs into further moral deliberation about what may be done. Sometimes the conclusion is that the right must be respected; sometimes the conclusion is that it need not be respected. Failure to respect a right that must be respected constitutes a rights violation; failure to respect a right when such failure is permissible constitutes a rights infringement. The stringency of the right along with other considerations, such as a consequentialist assessment of the good that might be done by not respecting it, determine whether the right may permissibly be infringed or must instead be respected. If an agent infringes another's right, she permissibly or rightfully wrongs him, and such wrongdoing normally gives rise to a right to compensation. But people can waive or forfeit their rights. If they do, then an act that would otherwise be a rights violation or infringement is simply permissible, as long as nothing else makes it impermissible.

Elsewhere, I discuss at length why I reject the *Infringement Model*.<sup>38</sup> I also discuss it briefly below, in Part V, Section F. But for present purposes I simply assert a few of the reasons, without defending them. First, I find it unnecessarily paradoxical to talk about permissibly or rightfully wronging another. Second, there are many ways in which the *Infringement Model* proves misleading on substantive issues. It also oversimplifies when compensation is due. It leads to the mistaken view that there is a large gap in the good that must be done to justify harming a person who, without having the right to do so, threatens others, depending on whether she has forfeited her right not to be harmed. And it implausibly limits the range of things we think of as rights, wrongly excluding, for example, rights to aid in many contexts. For these reasons, I will use my somewhat idiosyncratic *Mechanics of Claims* rather than the more common language of the *Infringement Model*.

#### IV. FROM DUCKING TO ACTIVELY CAUSING HARM

The idea that agents have negative, but not positive, agent-claims—when confronting patient-claims not to suffer significant harms—may seem to imply that they could never justify *doing* anything that would cause harm to another unless the balance of patient-claims—including their own—

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37. This model's most influential expositors are arguably Joel Feinberg and Judith Jarvis Thomson. See JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 230 (1980); JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 122 (1990).

38. See WALEN, *supra* note 2, ch. 4.

called for doing it. But that is too quick. One way to express the idea underlying agent-claims is by recognizing an agent's claims to protect herself from being used as a means of promoting the greater good. This reflects the same grounding in the fundamental principle that the space of rights should be structured so that each can lead her own life, without having to devote much of her body, property, time, or energy to the ends of others who have no special claims on her. An agent's claim to protect herself from being used as a means of promoting the greater good does not give her any extra freedom to harm bystanders for her own sake. But it can justify her harming others who can avoid harm only if she serves as a means of protecting them.

For a first illustration, consider the following:

*Cart Avoidance:* David is on a crowded sidewalk, and he sees a heavy cart rolling down a steep hill at him. He can tell that if he stays where he is, he will be knocked down and seriously injured by the cart. He can also tell that if he jumps out of harm's way, two strangers behind him will be knocked down and seriously injured by the cart. Moreover, he can tell that if he takes the blow, they will be unharmed. Paula sees that David might jump out of harm's way, and considers blocking him from doing so, so that the cart will hit and injure him rather than the two people behind him.

If one thinks David is not required to interpose himself in front of the cart, it is hard to see how one can deny that he may effectively duck by jumping out of the way. But note: if he jumps out of harm's way, he *does* something that makes the two behind him worse off. This is not a case of him *merely* allowing them to suffer harm. He allows them to suffer by removing what protects them: him. If he were removing some object they had a right to rely on—say a metal barrier installed by the city—then he would be impermissibly harming them. What makes his act permissible, and what makes us want to call it an *allowing*, is that by removing himself he is protecting himself from being sacrificed for them and doing so in a context in which he has a right not to make that sacrifice for them.

Not only is it clear that David may jump out of harm's way, it is also clear that Paula may not justify interfering with his act for the purpose of saving the two behind him. She cannot justify blocking him because that relies on using him as a means of saving them. One could imagine a case in which she had some other reason to impede his getting out of harm's way: perhaps to make room for him to get out of harm's way, she would have to jump in front of a truck and sacrifice herself. She would have a right to refuse to do that for his sake. Likewise, if she could make room for him to get out of harm's way only by pushing others off a cliff, causing them

a greater harm, then she would have a justification for refusing to do that. What she may not do is block him from getting out of the cart's path for the sake of the two who would thereby be saved. This is an example of the agent–patient inference in action: David's right to act gives rise to a claim of non-interference.

I also believe Paula has reason to support his choice. She may choose not to act on that reason insofar as it puts a burden on her. But assuming that helping David would impose no significant burden on Paula, she should offer to help him get out of harm's way, even though doing so would cause two to get hurt. The reason is a related one: she cannot justify refusing to help him by appeal to the benefit the others would gain because that justification relies on using him as a means of saving them.

This is *not* about responding to his right to act.<sup>39</sup> It is about his claim as a patient, unmediated by any agency he might be able to exercise. Nevertheless, it is grounded in the same core principles: that people have strong claims not to be used as a means for the welfare of others, both as patients and as agents.<sup>40</sup> I call patient-claims not to be used as a means *property claims*. This label reflects the thought that an agent is fundamentally free to use only what is in her own toolkit, her property; what others own, *their* property—including their bodies—is not part of *her* toolkit.<sup>41</sup> When an agent like Paula has to recognize that David is not in her toolkit to use for saving others, that blocks her responding to the needs of the two who have an interest in his body saving them. Given that she may not respond to their claims to be able to enjoy the benefits of his body as a shield, the only claim she is free to respond to is his claim for help. Thus, she has a reason to help him.

One might be tempted to object at this juncture that I am conflating *using as a means* and *relying on another as a means*.<sup>42</sup> One might argue that Paula does not literally use David as a means of saving the others if she blocks him or refuses to help him for their sake. She relies on his

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39. I am grateful to Yuan Yuan for helping me to see that these are separate points.

40. I developed this idea first in Alec Walen, *Doing, Allowing, and Disabling: Some Principles Governing Deontological Restrictions*, 80 PHIL. STUD. 183 (1995). I refined it substantially in Alec Walen, *Transcending the Means Principle*, 33 L. & PHIL. 427 (2014) and again refined it substantially in Alec Walen, *The Restricting Claims Principle Revisited: Grounding the Means Principle on the Agent-Patient Divide*, 35 L. & PHIL. 211 (2016) [hereinafter *Restricting Claims Principle*].

41. *Restricting Claims Principle*, *supra* note 40, at 225.

42. I am grateful to Peter Westen and Sam Rickless for pressing this objection.

presence to achieve the goal of saving two, but she does not *use* him to achieve that end.

This objection misunderstands the significance of the claim not to be used as a means of saving others. It is not fundamentally about what an agent may *do* to another. It is fundamentally about the role a patient can play in the justification of an agent's choice. If the justification for an agent's choice involves the agent acting to ensure the patient serves as a means of achieving some end, then the patient who would play that role has a claim, in the structure of that justification, not to be so used. He has a claim not to be treated as though the fact that he can serve as a means of helping others provides an agent with a reason to act to ensure he plays that causal role. Again, Paula may have an agent-claim not to help David avoid serving that role. But the balance of patient-claims on her should tip in his favor whether his claim is a positive claim for aid or a negative claim not to be harmed or not to be prevented from rescuing himself.

One may be tempted to think otherwise if one is tempted by the idea that David has an agent-centered prerogative to favor himself over the two, while Paula has a different point of view, and should be neutral between him and the two behind him. But that temptation should be resisted. As I argued in Part II, the idea of an agent-centered prerogative should be rejected. Here we see another reason why: it sets David in an implausibly antagonistic relationship with the others in the case. It presents the case as if he is entitled to favor himself, while the two are entitled to favor themselves, and Paula has reason to choose to favor the two because they outnumber him. But if this would justify Paula leaving him to get hit, even if saving him would impose no personal sacrifice on her, it is unclear why she may not take their side more actively. Why not block him from saving himself? If he is merely acting on an agent-centered prerogative to save himself, then, in terms of impartial considerations, he would be cutting against the grain. Clearly, it is wrong to block him. I can see no reason why it is not equally misguided to choose to let him suffer for their sake.<sup>43</sup>

It may also help to explain just what the right of non-sacrifice means if I add a fact to *Cart Avoidance*. Suppose that if David were to get out of harm's way, the two behind him would protect three behind them from an equally grave harm.<sup>44</sup> Can Paula now justify allowing David to be hit by the cart so as to prevent the two from serving as a means of protecting the three? It might seem like my account would say yes, as it is worse to have two serve as a means than to have one serve as a means. But the answer is no. What matters is not that some people happen to serve as a means

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43. For further discussion on the issue of moral competition, see *infra* Part V.

44. I am indebted to Russell Christopher for raising this example.

of saving others. What matters is only what has to be appealed to in order to justify Paula's choice.

The reason Paula must take the balance of patient-claims on her to call for her to help David is that she cannot justify treating David as a means of saving the two. Their claims on Paula to be saved are not property claims; they are simply claims to be saved. She can justify not saving them by appealing to the fact that she may not use David as a means of saving them. His claim not to play that role, given the nontrivial cost to him, is stronger than their claims to be saved. It does not matter whether they are merely being saved or being saved *and* serving as a means of protecting others. The fact that they would save three if they are hit is a moral bonus, but it plays no justificatory role in choosing to save David. The only thing that is relevant to that choice is that David's claim not to be a means of their survival is stronger than their claims to be saved.

One would get this wrong if one thought of claims as a consequentialist would. That is, if one thinks it is bad for people to serve as a means of saving others, then one might think it would be better if David served as a means of saving two rather than if the two served as a means of saving three. This is the essence of the so-called paradox of deontology.<sup>45</sup> But the paradox appears only if one starts with the consequentialist assumption that it is impartial *value* that determines what may be done.<sup>46</sup> If, however, what may be done depends on the competing claims on an agent, as represented by the *Mechanics of Claims*, then there is no paradox. Instead, it is clear that what Paula may do does not turn on whether the two would serve as a means of saving three if David were to get out of harm's way. It does not matter because that fact does not serve to justify her choice to save David.

A related point concerns the variation I mentioned above in which Paula might justify her choice not to get out of David's way by reference to the fact that if she did so, she would push two off a cliff. One might say, "Doesn't his claim not to be used as a means outweigh their claims not to be pushed off a cliff—just as it outweighs the claims of the two below him not to be hit by a cart—at least as long as the injuries caused by being hit by the cart are comparable to those that the two would suffer if pushed off a cliff?" But this, again, frames things too much as a consequentialist would, as though his claim not to be sacrificed as a means of saving two floats

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45. See generally SCHEFFLER, *supra* note 11.

46. *Id.*

free of the justificatory context in which it arises and simply has weight on Paula. That is not how the *Mechanics of Claims* works. Claims take their nature from the role they play in a potential justification for an agent's act. Paula might try to justify blocking David for the sake of the two behind him, but that justification involves treating him as a means of saving them. That justification fails. Paula might also try to justify blocking David from moving out of harm's way because making space for him would cause harm that is at least as grave to two others. In *that* justification, his only claim is a claim to be saved—*make room for me*—and that claim loses to the two competing claims not to be killed. Therefore, that second justification for blocking him succeeds where the other one does not. So much for *Cart Avoidance*.

Before wrapping up this part of the argument, I want to take one more step down the road. This next step involves interposing a shield that would deflect a harm from one onto two. Interposing a shield changes the causal relationship between the act and the death of others. Rather than merely allowing the two to die, it actively causes the two to die. Doing so would be impermissible if the threat were merely turned onto two who did not depend on David being there to absorb the threat—two negative claims not to be harmed are stronger than one positive claim to avoid the same harm, all else equal.<sup>47</sup> But one can imagine that the two are the very people who depend on the one being used. Then it would seem permissible. Consider:

*Shielding the Massive Man:* Mike, a massive man, has been toppled off a bridge onto the path of a boulder rolling down a ravine towards two people below. If hit, he will be crushed but he will prevent the boulder from crushing the two below. He cannot get out of the way, but he can position a shield in front of himself, thereby causing the boulder to bounce off to the side, where it will then continue down the ravine and hit the two below.

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47. See Jeff McMahan, *The Basis of Moral Liability to Defensive Killing*, 15 PHIL. ISSUES 386, 387–405 (2005). For a classic deflection case from the legal literature, see generally *Scott v. Shepherd* (1773) 96 Eng. Rep. 525, the “squib case.” In that case, a live small explosive device known as a squib was tossed into a crowded market. *Id.* at 527. It was picked up and tossed away twice and after the second toss exploded and took out plaintiff Scott's eye. *Id.* at 525. None of the intermediaries were held liable because they were held to be acting under “inevitable necessity.” *Id.* at 527. I agree that this should generally be excusing—the exception being for people who are trained to handle situations like this. But I also agree with judge Blackstone, who dissented in the case. According to him, those who tossed the squib were not justified in doing so. *Id.* They “had . . . a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others.” *Id.*

Clearly, Mike may position the shield to save himself from the boulder. Again, he is not merely deflecting it onto two others; he is preventing them from relying on him to absorb the danger. It so happens that the thing he does to prevent them from relying on him causes the danger to hit them after having taken a slightly different route. But he has a right to do it all the same. Moreover, just as he may save himself, so he may be saved. A third party—call her Sue—who had a shield may give it to Mike despite the fact that doing so will kill two others. In fact, she should give it to him as long as doing so would not impose a grave cost on her. Sue may not justify not giving him the shield by reference to the fact that if he is hit, two others will live. Their claim on Sue registers via Mike being used as a means to help them, and Sue may not take Mike to be available to use for their sake.

## V. FROM AGENT-RIGHTS TO PATIENT-RIGHTS

I have just discussed two cases, with some variations, in which the fact that an agent has a right to do something seems to imply that the agent has a corresponding patient-right to non-interference. But it is worth pausing here to note that agent-claims do not always come with corresponding patient-claims. They do in the cases I have just discussed: *Cart Avoidance* and *Shielding the Massive Man*. But that reflects a substantive moral point about competition and its role in these kinds of cases. As this Part of the paper is long, I break it into six sections.

### A. *The Problem with Moving from Agent-Rights to Patient-Rights*

The need to slow down here is established by the fact that the Hohfeldian category of a privilege or liberty right does not imply anything about a duty on the part of others.<sup>48</sup> An agent may have a right to act, and another may have a right to interfere with her act. Indeed, the other may have a right to interfere with her act for the very purpose of preventing the first agent from achieving her ends. Consider three examples: A might have the right to try to run a football down the field, and B might have the right to tackle him; C might have the right to set up a business, and D might have the right to set up a competing business aiming to drive C out of business; E

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48. This point is emphasized by Michael Moore's contribution to this issue, *Steinhoff and Self-Defense*. See Moore, *supra* note 6. Moore takes this to be a problem for Hohfeldian rights. *Id.* at 329. I think, to the contrary, that it is a virtue of Hohfeldian rights that it leaves this issue open for resolution on substantive grounds.

might have the right to give a speech, and F might have the right to organize a protest to drown her out. We need an account to explain why these cases should be different from what I said about *Cart Avoidance* and *Shielding the Massive Man*. Without an account of why those two cases should be different from the cases of sports, business competition, and free speech, one might think my argument in the previous Part missed something important.<sup>49</sup>

To accentuate the need for such an account, consider:

*Trolley Turners*: Brenda is a bystander who sees a trolley headed out of control down a hill towards five innocent victims. She can save the victims only by throwing a switch and turning the trolley from the path of the five onto another track where it will then hit a sidetrack man. The sidetrack man also has a switch, and it will do the same thing: turn the trolley from the five onto him.<sup>50</sup>

I take it that the sidetrack man has a right not to turn the trolley onto himself. But I also think it is clear that Brenda may turn it onto him.<sup>51</sup> This seems to be a counterexample to the agent–patient inference. Here, the sidetrack man is not even doing anything, he is merely choosing *not* to do something so as not to sacrifice himself for others, and yet Brenda seems permitted not only not to help him but to work to undermine that very right by killing him in just the way he is choosing not to be killed.

My response to this case has two parts. The first part appeals to the notion of responsiveness; the second part deals with the justifiability of competition.

### B. Responsiveness

*Responsiveness* shows why *Trolley Turners* is not actually a counterexample to the agent–patient inference. The explanation of the sidetrack man’s right not to turn the trolley onto himself is that he has a strong negative agent-claim not to have to sacrifice himself for the sake of others.<sup>52</sup> But that claim does not govern the choice of someone else with a switch. His claim with regard to what another agent does with the switch is only a negative

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49. See *supra* Part IV.

50. This is a variation on a case presented by Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 *MONIST* 204 (1976).

51. Thomson relied in part on this tension to change her long-held position and argue that someone in Brenda’s position may not turn the trolley onto the sidetrack man. See generally Judith Jarvis Thomson, *Turning the Trolley*, 36 *PHIL. & PUB. AFF.* 359 (2008). Wasserman and I wrote *Agents, Impartiality, and the Priority of Claims over Duties*, *supra* note 2, largely to respond to the mistakes we believe drove Thomson to her new position. The current argument brings out new arguments not covered in that paper.

52. Walen & Wasserman, *supra* note 2, at 549.



patient-claim not to be hit by the trolley.<sup>53</sup> His patient-claim is plausibly outweighed by the competing positive patient-claims of the five to be saved.<sup>54</sup>

Responsiveness is the dog that does not bark in this case. Brenda's choice to turn the trolley—should she make that choice—would not, in the relevant sense, be *in response* to him exercising his right not to turn it onto himself. It is responsive in a weak sense: if she sees that he has already turned the trolley onto himself, she would have no reason to throw her own switch, but if she believes he might not throw his switch, then she will have reason to throw hers. Still, her throwing her switch would not be a *response* to his inaction. A response to his inaction, in the strong sense that I have in mind, would be an effort to make him act. But *that* is not what she is trying to do.

The notion of responsiveness comes into greater relief if we contrast her act of turning the trolley with his possible act of shooting her in self-defense. Imagine that he has a gun and that he not only chooses not to throw his own switch but is bent on making sure that she does not throw her switch; he will kill her, if he can, to prevent her from turning the trolley onto him. His shooting her would be a response to her threatening to turn the trolley onto him. For his shooting her to be permissible, he would have to have a right to shoot her to prevent her from doing what she has a right to do—this is a possibility to which I return in Section E. Her throwing her own switch is not responsive to his inaction in the same way.

To further reinforce the point about responsiveness, let us return to the possibility briefly mentioned two paragraphs back: imagine a case in which Brenda would have the ability to save five only by causing him to act, even though he has a right not to act. Suppose that Brenda lacked a switch herself but could shoot him with a dart containing a serum that would have the same effect on him as hypnotizing him: it would cause him to do what she tells him to do. Suppose she shoots him with the dart and then tells him to turn the trolley onto himself. In that case, she would be responding to his right not to act and trying to make him act nonetheless. His right not to be used as a means in this context establishes that she may not do that. And that right is the responsive reflection of his own agent-right not to sacrifice himself for the five. In other words, it is an example of the agent-patient inference.<sup>55</sup> His right that she not respond to his choice by interfering

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53. *Id.*

54. *Id.* at 558–59.

55. *See Moore, supra* note 6.

with it—by forcing him to act—does not, however, give him a right that Brenda not take action that will effectively negate his choice. The justifications for the two acts are completely different, even though their effect—his death—is the same.<sup>56</sup>

### C. *Justified Competition*

Let us turn now to the role of permissible competition. As noted above, A might have the right to try to run a football down the field and B might have the right to tackle him; C might have the right to set up a business, and D might have the right to set up a competing business aiming to drive C out of business; E might have the right to give a speech, and F might have the right to organize a protest to drown her out. These are cases in which the second agent has a right to act in a way that is directly responsive to the first agent, even though the first agent has a right to do what he or she does.

Is there a principled way to describe when these cases arise and when such competition is unjustified? I believe there is. Moreover, I think that, if we examine the reasons why competition is sometimes good or at least justifiable, we will see they do not extend to allowing competition in cases that involve the right of non-sacrifice. Responsive competition is permitted, I will argue, only when the justification for the activity itself turns on a kind of general value that can be achieved only when competition is permitted.

To see this, let us look at our examples of responsive competition. In sports, competition is often the nature of the activity, and the activity itself can be good for health, entertainment, the sublimation of tribalism, and other reasons. These reasons seem to outweigh the reasons to limit or eliminate competitive sports, such as the claim not to be pressured into playing a sport that one does not want to play. Such pressure may be a side effect of permitting the practice to exist, but it should be possible to keep it from being unduly coercive, and the costs of banning sports to those who want to engage in them are, I presume, higher.<sup>57</sup>

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56. An interesting side question arises if she could turn the trolley onto him without using him as a means of doing so, but it would be better for him if he were forced to turn it onto himself—suppose that he would then be injured but not killed. Frances Kamm's principle of secondary permissibility suggests that in *that* instance, Brenda would be permitted to make him turn the trolley onto himself. See FRANCES KAMM, *INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM* 170 (2007). I suspect that Kamm is right about this, but it is not material to my argument, so I put it to the side.

57. This is not to say that all sports, as they now are practiced, are justifiable. For example, American football is arguably unjustifiable given the pressure on children to play and take the risk of concussions that endanger their long-term mental health.

In business, economics tells us that competition leads to better and cheaper products and services for consumers.<sup>58</sup> And, of course, certain entrepreneurial types will want to be free to set up businesses and compete to thrive in the marketplace. Framing the permissibility of competitive business practices in terms of claims on regulatory bodies, the idea is that consumers' claims to enjoy the fruits of a competitive marketplace, and entrepreneurs' claims to enjoy the activity of competing in the marketplace, outweigh any claims that business people might have to engage in business without competition. One might object that business competition need not involve acts that are directly responsive to a competitor; an entrepreneur can try to succeed in business simply by, for example, providing high quality goods and services for an attractive price and making that fact known to potential customers. If she succeeds, her competitors may suffer financial losses, but that need not be an essential part of the justification for the business plan on which one acts. At the same time, it is hard to deem all acts that aim to bankrupt one's competitors unethical and unjustifiable. Bankrupting one's competitors may allow one to expand one's business and make a greater profit, a perfectly appropriate goal in the capitalist marketplace.<sup>59</sup> Certain ways of trying to drive one's competitors out of business are and should be impermissible: monopolistic practices should generally be discouraged as bad for the economy.<sup>60</sup> But there is nothing per se morally inappropriate about making business decisions that aim to make more profit by driving out some of the competition.

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58. Adam Hayes, *Economic Basics: Competition, Monopoly and Oligopoly*, INVESTOPEDIA, <https://www.investopedia.com/university/economics/competition.asp> [<https://perma.cc/R8KQ-VYJM>].

59. WALEN, *supra* note 2, ch. 4 n.25 ("The law on anti-competitive practices limits how a company may act while seeking to drive a competitor out of business. But not all practices that seek to drive away the competition are anti-competitive. As the Federal Trade Commission says: 'A company violates the law only if it tries to maintain or acquire a monopoly through unreasonable methods.'") (quoting *Anticompetitive Practices*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/enforcement/anticompetitive-practices> [<https://perma.cc/FQ5X-XS36>] (last visited Aug. 11, 2018)); W. Michael Cox & Richard Alm, *Creative Destruction*, LIBR. ECON. & LIBERTY, <http://www.econlib.org/library/Enc/CreativeDestruction.html> [<https://perma.cc/28XQ-T9MB>].

60. Mark Thoma, *What's So Bad About Monopoly Power?*, CBS MONEYWATCH NEWS (Sept. 18, 2014, 5:30 AM), <https://www.cbsnews.com/news/whats-so-bad-about-monopoly-power/> [<https://perma.cc/8HXW-EYLW>].

Turning to the context of free speech, the rules governing speech generally support speaking in civil ways with those with whom one disagrees.<sup>61</sup> In that sense, they may permit competition over ideas, but not competition to shut down another speaker. But in certain settings, such as political rallies, it is at least arguably reasonable for them to permit a more raucous mode of interaction, ones that tolerate some speakers seeking to shout down others.

In all three contexts—sports, business, and speech—and in others as well, where competition is either encouraged or at least tolerated, one agent can justify performing certain acts in ways that are directly responsive to other agents taking rightful action because of the social value—which can be understood in terms of claims on the relevant regulatory authorities—that the activity provides.<sup>62</sup>

Note that the range of responsive actions that are permissible is always limited. It is not permissible for an agent to shoot her opponent in any of these contexts. The permissible responsive actions have to fit generalizable rules for competition that further the justifying goals of the activity, and the activity itself has to be justified. It cannot be justified by straightforward appeal to the idea that we should each be at liberty to lead our own lives. Competition is not like the freedom to do what one wants with one's own property as long as one causes no serious harm to others. Competition is a distinct permission to responsively engage another agent, trying to prevent her from doing what she has a right to do. That requires a special justification, one that draws on the benefits that are available only if competition is permitted and that is sensitive to the harms that competition can cause. Outside of the limited contexts in which competition is permissible, an agent may not act in a way that is directly responsive to another's permissible action, aiming to interfere with it. The default position for agents acting in a space of rights, a normative space designed to harmonize people living together, has to be support for others exercising their rights, except insofar as an agent has a negative agent-claim not to have to sacrifice her own ends for the ends of others.

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61. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (“[The protestors] peaceably assembled at the site of the State Government and there peaceably expressed their grievances ‘to the citizens of South Carolina, along with the Legislative Bodies of South Carolina.’”) (footnote omitted).

62. I think the liberty to engage in competition, when the competition is justified by larger social policy goals, should be conceived as akin to a property claim; an agent has a negative agent-claim not to have to give up that liberty for the sake of others who would benefit from the agent giving up that right. See *supra* p. 387; see also Walen & Wasserman, *supra* note 2, at 555–56. On the idea that some liberty rights can be grounded in social policy goals, rather than autonomy, see generally Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

#### D. *The Bear and the Plank*

One might object to my representation of the limited nature of justifiable competition on the ground that it does not fit certain other cases in which it seems people may compete with each other even though the effect is that the loser will die. Consider the famous example:

*Running from the Bear*: Two campers, Alex and Bruce, are confronted with “a ravenous bear. As Alex grabs his running shoes, Bruce points out that no one can outrun a bear. ‘I don’t have to outrun him,’ Alex replies. ‘I only have to outrun you.’”<sup>63</sup>

I share the common intuition on this case, namely that Alex is permitted to compete with Bruce to see who can go fastest, although the loser will die. Indeed, competition seems acceptable even though both hopes the other serves as the means by which he escapes from the bear. How can this be squared with the limits of competition just sketched? No special justification for competition seems to apply here.

Before trying to explain this case, it is important to note that the restrictions on permissible competition are still quite tight. As the authors who first brought the case into the literature point out, Alex may not “tie[] Bruce’s ankles, or knock[] Bruce unconscious and throw[] him to the bear.”<sup>64</sup> How can we explain why Alex can compete with Bruce over who lives and yet not let him use whatever means are available to him?

The answer, I think, is that the justification for Alex and Bruce trying to outrun each other is *not* that they are permitted to try to make the other serve as means by which he lives. Rather, it is that each is permitted to try not to be the means by which the other lives. In other words, rather than being permitted to responsively compete to use each other, which would presumably license more direct attacks, each is permitted to compete only to assert his right of non-sacrifice. One may in fact be relying on the other to serve as his means of escape, but he need not *justify* his act that way. He can justify it simply as an effort to escape and an effort not to be used as the means of saving the other.<sup>65</sup>

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63. Christopher Boorse & Roy A. Sorensen, *Ducking Harm*, 85 J. PHIL. 115, 115 (1988).

64. *Id.* at 116.

65. As Victor Tadros puts it, what this case shows is not that each person is simply allowed to prefer himself; rather, it shows that “[t]he fact that there is no duty to rescue grounds our entitlement to prefer our own survival, health, and projects in our decisions.” TADROS, *supra* note 18, at 209.

One might wonder why Alex and Bruce should not be required to find some fair method of deciding who should be allowed to run away and who should have to stay behind. As Victor Tadros says, “we have good reason to object to the idea that those who have more power are permitted to use that power against those who have less.”<sup>66</sup> Why then allow the fast to use his speed against the slow? Why not require them to flip a coin? There might be a practical reason not to do so. Flipping a coin might result in a Pareto inferior solution—perhaps the bear would be more likely to catch both of them while they sort out who can run away. That would be a good reason not to flip a coin. But if we assume there is time to do a coin flip without significantly reducing the odds that one could get away, and without significantly increasing the odds that the one who did not get away would die, then fairness seems to call for it.

Consider this case:

*Plank*: Two shipwrecked people find themselves on a plank. No one is aware of any reason why one has any priority over the other. The plank does not belong to one of them, nor did one get there, as far as anyone can tell, ahead of the other. However, the plank can only keep one of them out of shark infested waters; if both try to hang on, both will be eaten.

Tadros asks of this case: “Is each of us permitted to try to throw the other one off?”<sup>67</sup> His answer is no. “[Y]ou and I must find some fair procedure, such as tossing a coin, to determine who is to survive and we must submit to the outcome of that procedure.”<sup>68</sup>

If Tadros is right with regard to *Plank*—and I think he is—then why allow a foot race in *Running from the Bear*? Why is it permissible to try to outrun a slow person, but not to outwrestle a weak person? If a fair procedure is called for in the one, why not in the other? Or, if competition is permissible in the one, why is it not permissible in the other?<sup>69</sup>

The answer is that the cases are deeply different. The two on the plank have equal claim to enjoy the benefit of it, and when people have roughly equal conflicting claims over an indivisible good, the ultimate right to enjoy it should be established with some fair mechanism.<sup>70</sup> Fighting, even just trying to wrest the plank from the other’s grasp, is not a fair mechanism.

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66. *Id.* at 208.

67. *Id.* at 203.

68. *Id.*

69. Steinhoff criticizes Tadros on exactly these grounds. Steinhoff, *supra* note 9, at 203–05.

70. For a detailed discussion on the utilitarian concept of fairness as it relates to valuation of expected utilities, see John Broome, *Uncertainty and Fairness*, 94 *ECON. J.* 624, 628 (1984)

It is a mechanism which favors the strong over the weak. It may become necessary and justifiable to struggle if the other will not use and abide by a fair means of deciding who gets to stay on the plank, for then the other is culpable and has forfeited her equal claim to the plank. But if the other is willing to use and abide by fair means of determining who can stay on the plank, then both are obliged to use and abide by them.<sup>71</sup>

By contrast, in *Running from the Bear*, each is simply refusing to sacrifice his own interests for the sake of the other. That is to say each is exercising a negative agent-claim *not* to sacrifice himself for the other. The demand that the fast person submits to a coin-flip to decide who gets to run away and who has to stay behind and confront the bear is effectively the demand that the fast person accept a 50% chance of having to serve as the means by which the slow person could escape the bear. That is more of a sacrifice than anyone has a duty to make for another who does not have special claims on her.

It might seem that the fast one owes a debt of gratitude to the slow one because, but for the slow one, he could not escape the bear. But even if he owes some such debt, it is not enough of a debt to ground a duty to sacrifice himself, nor even to accept a 50% risk of having to sacrifice himself. To see that, change the case so that the bear simply came upon Bruce and was ready to kill him. Had it not been the case that Bruce was there, the bear would have come upon Alex and killed him. As it is, however, Alex is not threatened. Note, Alex is equally in Bruce's debt in this variation. Now imagine that Alex could throw himself at the bear and save Bruce. Even recognizing that, but for Bruce's presence, Alex would be the one facing death, it would be a supererogatory gesture for Alex to throw himself at the bear. It is Bruce's bad luck that the bear went for him first and he has to own that luck. Likewise, in the original case, it is Bruce's bad luck that Alex can get away faster. Bruce has no right to demand that Alex at least offer Bruce a 50% chance of getting away.

In the end, the puzzle presented by *Running from the Bear* reflects the fact that this looks like more of a competition case than it is. There is a competitive element, because the faster one can get away and the effort to

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71. I think the same is true of racing to the plank. If both see it and could get to it in time to save her own life, there is no reason to let racing determine who gets it. It is different if one gets there first, without racing to deprive the other of the resource, and then starts to rely on it. At that point, her luck vests and her claim shifts to a negative claim not to be deprived of the resource. For discussion of vesting luck, see WALEN, *supra* note 2, ch. 3, §§ 1.3.3, 4.3.

get away faster works just like a competitive race. But the faster one may not *responsively* act to ensure the slower one plays the role of threat absorber. They may each merely seek to avoid playing that role by running away themselves. If the slower one happens to lose, that is simply his bad luck.

### *E. Application to Self-Defense*

To further develop of the argument that the agent-right to act implies a patient-right of non-interference when competition is unjustified, I turn to the topic of self- and other-defense. This is a context in which many have thought competition is justified, even though it would not be justified in the way just discussed, in terms of the overall value of competition.

To make the argument, I return to *Trolley Turners*.<sup>72</sup> Brenda's right to act is based on the balance of patient-claims on her, which I assume favors saving the five. Though this is different from the right of non-sacrifice, it should have the same significance for others: they may not responsively oppose her act. To see why, we should ask: What would the justification for interfering be? Let us take the possible justifications one at a time.

First, consider the balance of patient-claims on the sidetrack man. Does it favor his shooting Brenda? Clearly not. In this scenario, there are seven patients: Brenda, the sidetrack man—he will be killed if he does not shoot Brenda—and the five others. How do the patient-claims compete? Against him shooting her we have her negative claim not to be shot, and five negative claims not to have their rescue interfered with.<sup>73</sup> Weighed against that, we have only the sidetrack man's positive claim to be saved from Brenda's action—his claim on her is negative, but his claim as relevant to his own possible agency is positive if we take her choice to act as a given. His claim clearly loses in that balance.

Second, consider whether Brenda would have forfeited her patient-claim not to be killed by trying to kill the sidetrack man. Let us first suppose she has done nothing wrong or culpable. Then there is no reason to take her to have forfeited her patient-claim not to be killed.<sup>74</sup> Indeed, Brenda deserves praise for taking on the burden of responding to the balance of patient-claims on her.<sup>75</sup>

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72. See *supra* Section V.A.

73. We should distinguish claims not to be killed from claims not to have a rescue interfered with. The latter are arguably weaker, though no weaker than claims to be saved. As far as I know, this distinction was first highlighted in Matthew Hanser, *Killing, Letting Die and Preventing People from Being Saved*, 11 *UTILITAS* 277 (1999).

74. See WALEN, *supra* note 2, ch. 4, § 2, where I argue for a high threshold for forfeiture.

75. See Seth Lazar, *Responsibility, Risk, and Killing in Self-Defense*, 119 *ETHICS* 699, 714–15 (2009) (arguing that only an individual who is culpably responsible for a forced choice should bear its burden, not someone who is innocently responsible).



Third, might the sidetrack man have an agent-claim that grounds his right to proceed nonetheless? No, his claim is merely the positive agent-claim to do something to others for his own interests, a claim that has no weight against negative claims not to suffer significant harm.

Finally, might this be a situation in which competition is called for? It is hard to see why. I see no plausible social good that would explain why the sidetrack man might be permitted to compete with Brenda. The closest thing to a plausible candidate is the thought that struggling to preserve one's life has value on its own.<sup>76</sup> But that value should be limited to struggling either against those who have no right to act or to situations like *Running from the Bear*, where one has a negative agent-claim not to have to give up for the sake of others. I see no reason to grant it a more general value. Rather, granting it broader value is just another way of resuscitating the notion of an agent-centered prerogative. And I have said enough about why I reject that idea.

Now imagine that Brenda has culpably brought about the situation in which the five need to be saved. Suppose she recklessly damaged the trolley's brakes and now sees that the five will be killed if she does not direct the trolley onto the sidetrack man. Her turning the trolley would still be justified. That is because, regardless of whether she was reckless, the claims of the five on her outweigh the claim of the sidetrack man. It is not that the claims on her are completely unchanged. The five would now have a special claim on her that she do what she can to save them. But the balance of claims on her, between the basic—that is, not special—patient-claims of the five and the sidetrack man's claim, should remain unaffected.

The question is: might the sidetrack man now have a right to stop Brenda in self-defense? Here is one reason why one might think that he does: Brenda's culpability causes her to be indebted to the five. If she turns the trolley, as she is obliged to do to satisfy that debt, she takes on a debt to the sidetrack man. If she could sacrifice herself to save him, she should do that. We are supposing she cannot sacrifice herself to save him, but he can engage in self-defense to save himself. Because, by doing that, he is only claiming what she owes him, he must have the right to engage in self-defense.

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76. See Daniel Statman, *On the Success Condition for Legitimate Self-Defense*, 118 ETHICS 659, 670 (2008) (arguing for a right of self-defense that would allow a defender to inflict harm on an attacker even if doing so would not prevent the attack). My argument in the text does not address the correctness of Statman's suggestion, at least with regard to unjust attackers. It does, however, imply that the suggestion should be limited so as not to apply to just attackers.

The problem with this argument is that it focuses too narrowly on Brenda and the sidetrack man, leaving the five out of the picture. If the sidetrack man shoots Brenda in a way that would save him, he will, per force, interfere with the rescue of the five. So the question has to be asked: What are their claims on him? The answer is they remain negative claims not to have their rescue interfered with. These claims still outweigh his positive claim to be saved. The fact that Brenda's claim not to be killed drops out does not change the overall balance in favor of letting the sidetrack man kill her.

The important thing to note about this variation is that Brenda's personal interest in turning the trolley can drop out. She might decide to turn it out of duty rather than out of a personal desire to save the five and yet she would retain her right to act and "her" related right—I use scare quotes because the right is not fully hers and not hers at all if she has culpably caused the problem—not to be responsively attacked.<sup>77</sup>

Now let us consider a third party, Thelma, who could help or interfere with the sidetrack man or *culpable* Brenda. The first thing to say is that Thelma could not permissibly shoot the sidetrack man simply to protect Brenda. That is, she may not shoot him for Brenda's sake. By her culpable act, Brenda has forfeited her own claim not to be shot. If the sidetrack man or another could shoot her in a way that would still save the five but cause her to die rather than him, then that would be permissible. But Thelma, like the sidetrack man, may not shoot Brenda to save him if doing so would prevent her from saving the five.

What, then, is culpable Brenda to Thelma if Thelma decides to act for the balance of patient-claims on her? She is not just a person in her own right, with her own claims—some of which she has forfeited; she is also a kind of tool for Thelma. Given that Brenda will do what Thelma would want done, Thelma has reason to protect Brenda for the sake of the five. She could even permissibly shoot the sidetrack man to stop him from shooting Brenda.

This highlights an important point: Brenda's right not to be killed is not fully grounded in her own interest. Indeed, it is not fully *her* right; it is partly the right of the five whose claims on her ground her agent right, and if she is culpable it is fully their right. Because culpable Brenda matters, in the balance of claims, not as an agent but as a tool, we need to ask: What if the sidetrack man could defend himself just by attacking the switching mechanism by which an agent like Brenda or Thelma would turn the trolley onto him?

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77. I argue why it is not fully Brenda's right at the end of this section.

One might be tempted to say that *surely* he may do that.<sup>78</sup> That is, one may be tempted to say that an essential part of the reason the sidetrack man may not attack *good* Brenda is that he would be inflicting a very serious harm—death—on an agent who has not forfeited her claim not to be killed. If we replace good Brenda with a mechanism set up by Thelma, the conflict is between the sidetrack man and Thelma, who would suffer only the frustration of her plan to save the five. His life, one might want to say, should win over her claim not to have her plans frustrated.

But this leaves out the claims of the five just as surely as it would if culpable Brenda were the mechanism. When it comes to determining what may be done, the agent–patient inference need not reflect the presence of an *agent’s* right. If her interests do not ground her right—if her agent-right is grounded in the balance of patient-claims on her—then the balance of patient-claims demands that other agents not interfere with the agent. And this would be true even if the agent had merely set up a mechanism to pursue that balance of claims.

In sum, an agent may have a right, or a duty, to act even if she has no agent-claims. And another may not responsively undermine an agent doing what she has a right or duty to do except insofar as competition is independently justified. If competition is unjustified, then the fact that an agent has a right to act implies that every other person’s interest has already been fully considered and that no other agent may respond by seeking to frustrate her aim.

#### F. Other Objections

I conclude this Part by considering two objections to the picture just laid out, both raised by Uwe Steinhoff. According to his first objection, people in the position of the sidetrack man have a right of self-defense against a justified attacker because they have a right not to be killed that they do not forfeit, having “done nothing to forfeit their right to life.”<sup>79</sup> Moreover, they retain a right of self-defense for the same reason: they have “done nothing to forfeit their right of self-defense.”<sup>80</sup>

The problem with this argument is the rather flat-footed understanding of rights as a given input into a situation—as though people simply *have*

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78. See Jeff McMahan, *Self-Defense Against Justified Threateners*, in HOW WE FIGHT: ETHICS IN WAR 104, 110 (Helen Frowe & Gerald Lang eds., 2014).

79. Steinhoff, *supra* note 9, at 190.

80. *Id.* (emphasis omitted).

a right not to be killed and a right to engage in self-defense, unless that right is waived or forfeited. According to the *Mechanics of Claims*, the better way to conceive of situations like this is to look at the competing claims and determine who, in the final analysis, has patient-rights and agent-rights.<sup>81</sup> If we assume the patient-claims of the five have been properly found to outweigh the sidetrack man's patient-claim on Brenda, then he has no right not to be killed by her. He does not have to forfeit any claims to lack a right not to be killed; his claim not to be killed simply has to be outweighed. Moreover, there is no need to say that killing him *wrongs* him. Saying she wrongs him is primarily just a shorthand way of saying that his heirs—assuming that he dies—have a claim for compensation. But his heirs' claim does not need to be premised on him being *wronged*.<sup>82</sup>

As for the right of self-defense, Steinhoff simply assumes the sidetrack man's right of self-defense is unaffected by the context in which he acts.<sup>83</sup> But how could that be? If he kills a justified actor like Brenda, then he kills someone for trying to do what she had both a right and morally sufficient reason to do. There is no reason to think such responsive action is justified in this context—for reasons already spelled out. The better view is that if the sidetrack man tries to defend himself against Brenda, he would thereby act wrongly and forfeit his patient-claim not to be directly attacked in response.<sup>84</sup>

Steinhoff articulates his second objection as follows: “if the [sidetrack man] *is required not to fight back . . . [he] is compelled to adopt the lives of those who are rescued as [his] own goal.*”<sup>85</sup> Steinhoff continues: he “is required to expend [his] life for the sake of the greater good.”<sup>86</sup> The problem with Steinhoff's argument, however, is that he is insufficiently attentive to the nature of the claims on the sidetrack man. The five have claims on him that he not interfere with their being saved. If those were claims not to allow them to die, then Steinhoff would be right: the sidetrack man would be sacrificing himself for their sake. But that is not the option he faces. He faces six negative claims: Brenda's claim not to be killed and five claims

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81. Note, the *Mechanics of Claims* should not be confused with specificationism. Steinhoff correctly complains that specificationism is ad hoc. *Id.* at 191. The *Mechanics of Claims* is *not* that; it is highly structured and principled.

82. In my view, A's claim for compensation depends on B's bad luck having been shifted onto him. It was in this case, so the sidetrack man's heirs have at least a *claim* for compensation. See WALEN, *supra* note 2, ch. 4, § 2. For more on why we should not take Brenda to *wrong* the sidetrack man, see *id.* at ch. 4, § 2.1.

83. See Steinhoff, *supra* note 9, at 105.

84. Steinhoff acknowledges that wrongly using self-defense would forfeit the right not to be attacked in response. *Id.* at 21.

85. *Id.* at 207.

86. *Id.* (emphasis omitted).

not to have their saving interfered with. He does not face the demand that he sacrifice himself *for* her or *for* them. The situation merely requires that he recognize and respect the moral principle that there are things he may not do to others to advance his own interests. This is the very essence of what working in the space of rights can justly demand of people.

## VI. FINAL STEP, SETTING UP THE PROBLEM

Returning to the main line of argument, Part IV ended with two examples of acts that a person has a right to take on his own behalf, and that third parties may not responsively interfere with and indeed have reason to take on his behalf: *Cart Avoidance* and *Shielding the Massive Man*. These cases involve acts that protect the agent from being used as a means of saving others from a threat, but then cause those others to suffer from that very threat. The next step down the road to the conclusion this article aims to establish—namely that agents sometimes have a right to bring other agents to wrongly harm third parties—involves engaging the will of others who aim to use a threat to potential victims to gain leverage over an agent.<sup>87</sup> Consider, then:

*Bomb*: Barry attacks Lisa. Lisa knows that if, and only if, she fends him off, he will detonate a bomb that will kill two people. She also knows that if she does not fend him off, he will cut off one of her legs.<sup>88</sup>

Intuitively, Lisa is permitted to fend off Barry's attack. Intuitively, this reflects the idea that she is not required to absorb such substantial harm to protect the other two. And intuitively, the fact that Barry is an intervening agent plays some role in explaining why Lisa is permitted to fend him off.

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87. I use the phrase “bring another to X” rather than “cause another to X” because I generally assume the other is a free agent, and the law regards such intervening free choice as breaking the causal chain: *novus actus interveniens*. See *novus actus interveniens*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100240793> [<https://perma.cc/YBW5-4Y29>] (“An act or event that breaks the causal connection between a wrong or crime committed by the defendant and subsequent happenings and therefore relieves the defendant from responsibility for these happenings.”). I reject the view that intervening agency generally breaks the chain of causal responsibility and, instead, offer a more limited account of when it does. Nonetheless, to avoid appearing to beg the question, I avoid saying causation transmits through intervening agency.

88. This case lightly modifies one presented in FROWE, *supra* note 9, at 135.

But it is important to be clear about just how much these intuitions need to be supported by argument. This is because an alternative account can be offered for the same ground intuition—namely that Lisa may fend off Barry.<sup>89</sup> The core of this alternative account is the thought that she may do so simply because Barry is an intervening agent. According to this account, she does not kill the two, he does. She may bring him to do so, but he does so of his own free will, and his choice screens her from responsibility for bringing him to do so.<sup>90</sup>

This alternative account draws support from the thought that what she does by fending him off is deflect a threat onto others. As I argued above in Part IV, deflecting threats onto others—when doing so causes at least as much damage—is normally impermissible.<sup>91</sup> For Lisa’s act to be permissible, then, it must be because Barry’s intervening act screens off her act and prevents her from being responsible for the harm he does.

In what follows, I argue this alternative explanation and the supporting thought are both mistaken. Intervening agency does not function to screen off responsibility as this account presumes. And Lisa does not deflect a threat; she exercises her right of non-sacrifice.

## VII. INTERVENING AGENCY AND CAUSAL ROLES

In this Part, I offer a case that contrasts with *Bomb* in a way that makes it more plausible that Lisa’s refraining from fending off Barry amounts to saving the two from him rather than refraining from deflecting harm onto them. But it also raises the issue of what is doing the moral work. Is it that Lisa is not sacrificing herself for the others, or that Barry is acting as an intervening agent? I will then have recourse to other cases to make the argument that Barry’s role as an intervening agent is relevant, but not for the reason many think. It is not because it gives Lisa some sort of discount that allows her to bring about harm to others. Rather, it is because his intervening agency makes it the case that by giving in to him, she would be sacrificing herself for them.

To get started, consider the following case:

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89. Another alternative account appeals to the thought that Lisa can give extra weight to her interest in not losing her leg because she would also suffer a rights violation. *See id.* at 130–36. I argue that this account fails in WALEN, *supra* note 2, ch. 9, § 2.2.

90. Many people believe the presence of intervening agency makes it easier for an agent to justify acting in a way that contributes to harm. *See, e.g.*, DRAPER, *supra* note 9, at 206; FROWE, *supra* note 9, at 130; David Rodin, *The Myth of National Self-Defense, in THE MORALITY OF DEFENSIVE WAR* 69, 82 (Cécile Fabre & Seth Lazar eds., 2014); Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 47–50 (2005).

91. *See supra* note 47 and accompanying text.

*Grenade and Bystanders*: Bobby is coming towards Laura. She knows that if he catches her, he will cut off one of her legs. She also knows that she cannot outrun him or fight him off if he gets to her. The only thing she can do to save herself is throw a grenade at him. But to defend herself with the grenade, she would have to throw it where it would not only kill Bobby but would also kill two bystanders.

Perhaps we would excuse Laura if she used the grenade; nonetheless, she may not use it. She may not prefer her leg to the lives of two bystanders.<sup>92</sup> But is there really a difference between Lisa and Laura in terms of their causal roles? Laura would kill two directly, whereas Lisa would kill two by bringing it about that Barry will kill two. But does that make their causal roles different in the sense that Lisa can appeal to an agent-claim to protect herself from being sacrificed and Laura cannot?

Yes, and Barry's intervening agency is part of the reason why. But before arguing that point, let us focus simply on the causal roles Laura and Lisa would play. Laura cannot claim that her submitting to Bobby is the means by which she refrains from hitting the two bystanders with a grenade. She can achieve that simply by not throwing the grenade. The unfortunate result of her not hitting Bobby and the bystanders with the grenade is that Bobby will cut off one of her legs. But that would happen as a result of her refusing to kill the bystanders. It is not a means by which she ensures that they are not killed. By contrast, Lisa can save the bystanders from Barry's bomb only by submitting to Barry. Both Lisa and Laura would have reason to make the decision that would lead to their losing a leg only because they do not want to play a causal role in two bystanders dying. But for Lisa, the decision would be whether to submit to Barry to keep him from harming them. That, I am arguing, is fundamentally like Mike choosing whether to allow himself to be hit as a means of saving the others in *Shielding the Massive Man*.<sup>93</sup> Conversely, for Laura, the decision is whether to refuse to harm others as a side effect of defending herself.

One might still think that what is really doing the moral work is that Barry, but not Bobby, serves as an intervening agent. But if one thinks this because one thinks intervening agency gives Lisa the right to discount the harm she indirectly causes the two bystanders—a discount based on the idea that *he* is the one primarily responsible for their harm—then one is misunderstanding the relevance of intervening agency. Intervening agency

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92. See *supra* Part II, where I reject agent-centered prerogatives.

93. See *supra* p. 394.

is relevant only if it helps establish that someone is indeed being used as a means of preventing others from suffering harm. It does not provide a general *discount* for harm caused indirectly to others.<sup>94</sup>

To establish this, I introduce two cases where agents are replaced by bears, who have some sort of agency but are not agents in the full sense of the term; they are, rather, forces of nature. Consider first:

*Hungry Bear:* A hungry bear has come upon Edith and is hoping to kill and eat her. Edith has bear spray and can fight the bear off. If she uses her spray, however, the bear will turn aside and find two other hikers who are not far away and will kill and eat them. Edith knows this.

Edith's fighting off the bear is much like Lisa's fighting off Barry. The bear wants to inflict harm on Edith just as Barry wants to inflict harm on Lisa. The bear will also harm others unless it can harm, that is eat, Edith—just as Barry will harm others unless he can harm Lisa. And just as Lisa may fight off Barry, so may Edith fight off the bear. Both may do this because they have a right of non-sacrifice. This shows that the structure of *Bomb* does not depend simply on the relevance of intervening agency. It depends primarily on the agent-claim not to be sacrificed for others.

But now consider another bear case that *also* seems like *Bomb*, only here the moral restrictions seem more like *Grenade and Bystanders*:

*Momma Bear:* Holly is out hiking and stumbles upon a bear cub in the woods. The cub lets out a squeal of fear and the momma bear comes running angrily at Holly. Holly can fight the bear off using her bear spray. But if she does, she sees that the enraged bear will then turn off down the hill where it will maul and kill two other hikers.

Holly's use of spray seems like a deflection of a threat from herself onto others. Deflections that would harm others as much as or more than oneself are not permitted.<sup>95</sup> The others have negative patient-claims not to be harmed that outweigh one's positive patient-claim to be saved, and one's agent-claim is the positive claim to save oneself—a claim that has no weight against their claims not to be harmed. That is why this case is

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94. See *supra* note 90.

95. Doug Husak posed this question in personal communication: What if there were a sign at the entrance to the park saying: "Beware of bears; do not enter without bear spray"? Then it seems that Hillary could permissibly deflect the bear onto others because they should be able to deflect it from themselves as well. In this instance, if they cannot defend themselves, it is not her fault, it is on them for assuming the risk of entering the park without bear spray. This is a quite general point: all of the cases assume the vulnerability of others is not their responsibility.



like *Grenade and Bystanders*: Holly, like Laura, threatens impermissibly to harm others to save herself.

These cases raise two questions. The first is: Why should we think that *Momma Bear* is different from *Hungry Bear*?<sup>96</sup> The answer is that the hungry bear wants to eat someone, and Edith has a negative agent-claim not to have to allow herself to be sacrificed for the others. The momma bear, however, would not harm Holly as a means of satisfying some general hunger that also threatens the other hikers. The momma bear was going for Holly because she believed Holly threatened her cub. If Holly could *duck*—say by climbing a tree—the momma bear, we can assume, would simply growl at her for a while and then leave. If that is not an option, and she refused to defend herself, she could not argue that she allowed herself to be used to save the others; her reason would be simply to avoid deflecting a harm onto the others.

The second question is: Why is *Momma Bear* different from *Bomb*? They are similar in that in both the force that threatens Holly or Lisa has it in for them and would go on to harm others only if Holly or Lisa fights the threat off. The difference is that Barry, the *agent* in *Bomb*, makes the connection between Lisa and the other two. His agency makes it the case that she would have to sacrifice herself to him to save them from him. He does not have to explicitly draw the link; he does not have to communicate to her: “If you do not allow me to cut off your leg, I will blow up a bomb and kill two others.” But if it is clear to her that this is how Barry has framed the situation, and therefore her choice, then his agency sets up the link. He sets up a causal structure, running through his choice, such that if Lisa does not submit to him, then he will harm others. Her submitting to him is, in that causal structure, a means of preventing him from harming others. Barry’s agency makes it the case that Lisa’s claim is a claim not to be the means by which the others are protected from him. Without that agency, with a mere animal’s will, Lisa’s choice would turn into Holly’s.

This change reflects the power of Barry’s free will as an intervening cause. He chose to create a situation in which Lisa must submit to him for the others to be safe, and he could choose to undo that link.<sup>97</sup> But we have to be careful to make sense of why his having free will matters. The real moral magic is not that his will simply happens to lie between her

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96. I acknowledge the intuition that they are different may not be strong, but the theoretical account of the difference, I think, is robust.

97. I am grateful to Johann Frick for helping me to see the relevance of this point.

choice and harm to others; it is that he requires her to bend to his will, to refrain from fighting him off, if she is to save the others from him.

In further support of this, consider a case in which Barry acts more like an animal than a person with a plan. Imagine he has a bomb strapped to himself and is coming to attack Lisa. She can defend herself with spray and cause him to go staggering away, where the bomb will go off in a crowd. If she does not use the spray on him, however, she will be unable to fight him off, he will come up and grab her, and then the bomb will go off, killing them both, but no bystanders. In this case, I think the only fair thing to say is that Barry's agency does not matter as it does in *Bomb*. It is as if he simply tossed a live bomb at Lisa. She can either toss it away toward others or refrain from doing so. She must refrain from doing so, as the alternative is to deflect a threat onto others.<sup>98</sup> What makes *Bomb* different is, again, that Barry has intentionally linked Lisa's submitting to him to his not blowing up the bomb that will kill others.<sup>99</sup>

The lesson of these cases is this: intervening agency is morally relevant because it can transform a deflection into an instance of using of another to achieve some end. It does so because we attribute to intervening agents the ability to establish a kind of conditional link that, in essence, uses others as hostages and requires an agent to choose whether to sacrifice herself to save them. Agents, however, have a strong claim not to have to sacrifice themselves for others and an equally strong claim to be free to prevent themselves from being sacrificed for others. Thus, *this sort* of intervening agency permits an agent to resist another, even if the other will then go harm third parties.

What about the discounting idea? That should be dismissed. To explain why, I need one more case:

*Coercion*: Alvin threatens to kill Carla unless Carla gives him her long-range rifle so that he can use it to kill Ken. Alvin cannot kill Ken without Carla's rifle. Neither Alvin nor Carla has a right to kill Ken.<sup>100</sup>

Alvin's agency intervenes between Carla and his other potential victims. If intervening agency worked via discounting, and discounting were

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98. See *Scott v. Shepherd* (1773) 96 Eng. Rep. 525, 527.

99. Frowe's central case in her discussion of mediated harm is *Angry Rape*, a case in which a rapist attacks a potential victim and the victim knows that if she fends him off, he will go and rape two other women. FROWE, *supra* note 9, at 129. But the reason he will rape two other women is not that he would be following through on a plan to use that threat to pressure her into giving in; he would do so because "he will be so angry" at having been fought off. *Id.* That case, I am afraid, has to be analyzed like the variation of *Bomb* just discussed, in which, if Lisa defends herself, Barry goes staggering away. Both are deflection cases.

100. See ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* 75 (1st ed. 2017)

substantially responsible for explaining why Lisa may fight off Barry, then Carla would be permitted to help Alvin—or at least it would be substantially more likely that she would be. But I believe Carla may not help Alvin. This is not because Carla is somehow complicit with Alvin. She does not share his goal of shooting Ken. She would help him only to avoid being shot herself. The real reason Carla may not assist Alvin is that his intervening agency does not free her of responsibility for the harm she would help him to cause, and she has no claim of non-sacrifice.

Why does Carla have no claim of non-sacrifice? Alvin is trying to use her as a means of harming the others. Is that not a matter of being used which she has a right to resist? It is, but it does not give her a right of non-sacrifice. If she refuses to be used as a means, the others are *not* harmed—quite the reverse of *Bomb*. Rather, if she refuses to be used as a means, she will then suffer harm. She can protect them simply by not helping him; she does not have to suffer to protect them. Putting it in terms of the causal chain: Lisa has to accept harm as a means of preventing Barry from harming others; Carla's harm would be the result of not helping Alvin harm another, but it would not be the means of preventing him from doing so. It, like the harm Laura would suffer in *Grenade and Bystanders*,<sup>101</sup> is simply a result of her choosing not to endanger others. And again, if one looked to discounting to explain the case, then any discount that would substantially explain *Bomb* would get *Coercion* wrong.

In sum, I think the idea that agents enjoy a substantial discount for intervening agency was always a confused notion. It conflates the fact that an intervening agent's will could turn a deflecting case into a using case with the thought that the intervening agent's will somehow generally makes it easier for agents to justify bringing it about that intervening agents cause harm to innocent victims. This is not to deny that Alvin deserves more blame than Carla if he shoots Ken. But blame and permissibility are not zero-sum games. We can blame both, say that one is more blameworthy, and say that both acted impermissibly.

#### VIII. APPLICATION TO JUST WAR THEORY

I have now completed the core argument of the article in favor of a right of non-sacrifice and the correlative patient-right of non-interference. As a coda, I want to turn the lessons of this discussion as regards self-defense

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101. See *supra* p. 411.

and competition to just war theory. I have argued that the agent–patient inference gives those who have a right to act in self- or other-defense a right not to be interfered with. But this conflicts with standard just war theory, not to mention the law of armed conflict, which both accept that privileged combatants—those who fight in accordance with the law of war—may act in self-defense and in defense of their compatriots, even if doing so requires them to attack those who are engaged in just self- or other-defense.<sup>102</sup> I want to make at least an initial argument that they cannot so easily escape the lessons of self-defense on a personal scale. There are many bases for trying to claim that war is different, and I will not try to address them all here in this final Part.<sup>103</sup> But there is one thought in particular that I do want to address: the thought that war is an example of justified competition.

I follow the recently dominant school of reductive individualism about just war theory.<sup>104</sup> According to reductive individualism, war is not a special activity with its own moral rules; rather, morally speaking, it must respect the rights of individuals just as every other activity must.<sup>105</sup> But then to justify war as an example of justified competition, it has to be a socially useful competitive activity like sports, business, or politics. According to a chivalrous notion of war, that is what it is: a competitive forum for expressing martial virtue. If, however, this view was ever sufficient to justify war—and I reject that claim that it was—it certainly cannot justify modern warfare, no matter how much modern armies draw on chivalrous attitudes to raise armies and motivate combatants to fight. War is, rather, a horror to be avoided if possible, and to be engaged in only when necessary to protect large groups of individuals from suffering serious injustices at the hands of one or more large, coordinated groups of others whose unjust activities are a threat to them. On this view, just combatants are like good Brenda: they may not be targeted for doing what they have both a right and morally sufficient reason to do.

It may be that the targeting of just combatants must be legally permitted, because the law cannot find adequate institutional ways of regulating it. Quite often, when conflicts arise between states—or between states and non-state actors—there is no impartial body with the power to enforce its judgment that can adjudicate who is in the right and who in the wrong. Lacking such a body, each side has no choice but to judge of its own case as best it can. Moreover, I accept that the law has some moral relevance. There

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102. See Jeff McMahan, *Innocence, Self-Defense and Killing in War*, 2 J. POL. PHIL. 193, 194–95 (1994).

103. I discuss the idea that war is different, and defend my reductive individualism, in more depth in WALEN, *supra* note 2, ch. 2, § 3.

104. See, e.g., FROWE, *supra* note 9, at 126–27.

105. *Id.* at 127.

are reasons to accept legitimate law, even if unjust.<sup>106</sup> This implies that combatants for an unjust side have some reasons to do as they are legally directed to do, even if their orders are unjust. But I have also argued that the duty to respect legitimate law has limited weight when contrasted with the duty not to do or tolerate substantive injustice.<sup>107</sup> The substantive injustice of attacking just combatants is clear and profound. Thus, I believe individuals of good conscience should recognize that it is impermissible to respond to the permissible acts of just combatants with attempts to interfere with their activities.<sup>108</sup>

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106. See generally Alec Walen, *Reasonable Illegal Force: Justice and Legitimacy in a Pluralistic, Liberal Society*, 111 ETHICS 344 (2001).

107. *Id.* at 345–46.

108. For an analogous view of how individuals of good conscience must not attack or engage in unjust wars, see MCMAHAN, *supra* note 9, at 95–103.

