



Rights in the Balance

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Abstract

Professor Walen’s book rejects the familiar argument of “double effect,” namely the doctrine that an action that knowingly causes the death of another person cannot be justified merely by its good consequences but only by its good intentions. Professor Walen offers a rival argument. He proposes that we rethink the killing of non-combatants in war on the basis of a theory of “the mechanics of claims” so that the intentional killing of civilians may be occasionally permissible. Such targeting of civilians may be justified, according to the book’s argument, by the aim of eliminating the threat that these civilians may pose—innocently or not—to other persons. In these circumstances, it will not only be permissible, but it would also be a matter of right to kill civilians, which would be derived from a balancing of “claims.” The argument is impressively made but is ultimately unconvincing. All the decisive questions appear to be matters of a balance of “goodness.” The “mechanics of claims” organizes a structure of welfare values that ultimately work as a proxy for act-utilitarianism. As a result, the argument is open to well-known objections regarding justice and the separateness of persons.

Keywords Rights · Justice · Welfare · War

Professor Walen’s impressive book *The Mechanics of Claims and Permissible Killing in War*¹ returns to familiar questions around the doctrine of “double effect” and applies it to the case of killing in war. The doctrine of double effect is the argument that an action that knowingly causes the death of another person cannot be justified merely by its good consequences, although it may be justified by the relevant intentions. The book deploys the well-known trolley problem not in order to vindicate the doctrine of double effect, but in order to make a broader point about the place of moral rights in practical thinking. The argument is skeptical towards the standard “infringement model” of rights, i.e., the view that in some cases, rights may

¹ Walen (2019).

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be infringed, but not violated. Professor Walen's view is that when properly understood, rights are such strong reasons that it is not acceptable that they should give way. It follows that the "infringement" model is misleading, and we need a different way of organizing the limits or scope of rights. Instead, he argues, rights should be seen as absolute and without exception because they express conclusions of moral deliberation. In his view, rights express the particular outcome of the balancing of "claims" among persons and relevant policy considerations. It follows that while rights cannot be infringed, individual claims can. The relative weight or priority of individual claims as they apply to human relations is organized by what Professor Walen calls the "mechanics of claims."

The book also covers a great deal of ground on matters to do with protecting life, but its central and startling argument is the claim that we may have to rethink the killing of non-combatants in war. Professor Walen's surprising conclusion is that once we understand the nature of moral claims of individuals for autonomy, equality, and welfare, we will see that it is permissible under certain conditions for a soldier or other person to intentionally target civilians. Such targeting is justified, according to the book's argument, by the aim of eliminating the threat that these civilians may pose—innocently or not—to other persons. In fact, if I follow the argument correctly, the killing of civilians in these circumstances is not merely permissible or excusable, but it is also a matter of right, since it emerges as the conclusion of the balancing of "claims." In some, perhaps rare instances, we thus have a right to kill innocent civilians. The conclusion is surprising because it contradicts not only established law, but also the best-known political philosophies of the last few decades, the justice-based theories of Nozick, Rawls, Nagel, Dworkin, and others.

1 The Power of Example

As is common in contemporary moral philosophy, the book focuses on simple factual examples of one-to-one interaction. The book concerns war, a large-scale social event where armies face one another in the name of a whole political community and within a context of detailed hierarchies and law-like structures. It is odd that this subject is addressed through examples of choices of a person and his various interests, desires, and judgments. At war, however, one does not decide just about himself, but also about others. Leaders make decisions with a view to the interests of other persons, to whom they owe duties of care. This institutional dimension of war is absent from Professor Walen's argument. The book does not discuss examples from the history of wars and from cases when states did target civilians intentionally, i.e., the Second World War, the Vietnam War, or the Balkan Wars. This is a shame because moral philosophers have offered sophisticated reflections on genocide and political terror in the twentieth century.²

² No one more suggestively than Glover (2001).

Instead, Professor's Walen's argument unfolds purely on the basis of a series of hypothetical scenarios of interpersonal dilemmas. They all seem to me variations of the "Trolley Problem," i.e., of a direct and clear choice between allowing five persons to die or acting to switch the trolley in the direction of an innocent person who will then be killed by it. The example was made famous by Judith Thomson and many of the examples derive from the debates that Thompson started. In Professor Walen's hands, however, the mortal choices proliferate beyond trolleys. People are regularly crushed, bombed, and impaled as the chapters unfold. These grizzly examples have a disorientating effect on the reader. It is not clear to me why Professor Walen believes that these examples provide anything of use to the morality of war.

I find two problems with that choice. The first is uncertainty. It is extremely rare that choices of life and death in the course of the conduct of war are so simple. All action at large scale is taken under circumstances of uncertainty. Even at a smaller scale, no one can be sure of all the effects of one's choices. By contrast, the examples that moral philosophers use assume perfect knowledge of the consequences. An agent is certain, for example, that the runaway trolley will kill this number of people. This is an implausible assumption. What would happen to a trolley after it careers down a hill is anybody's guess. The hypothesis that a criminal might have already tied a victim (or two) somewhere on the tracks below and that the victims have not managed to free themselves and will be killed is beyond implausible: it is a ridiculous assumption.

The second problem is that those who make decisions in wars do not do so for themselves, but for the sake of the people they represent. The more or less fiduciary duties owed to others by those who are in a position of leadership are crucial for the moral questions of fighting a war. A leader cannot decide a question of war on the basis of his or her personal interests or desires. This would be a sign of corruption. Leaders must decide on the basis of the interest of others and on the basis of moral constraints that apply to their role.³

Professor Walen addresses such criticism at a paragraph where he discusses examples with "unrealistic assumptions of knowledge."⁴ He responds to the potential criticism as follows:

These sorts of questions are all perfectly fair if we want truly realistic cases. But they also miss the point. The point of using cases as I and most other moral philosophers do is that we want to establish what one ought to do in various circumstances. We stipulate circumstances to test theories.⁵

This is not a convincing answer. Abstract examples will only enlighten us if they involve relevant circumstances. The criticism is not that the examples are artificial, but that they are artificial in the wrong way, for example they do not take into

³ For a relevant discussion see Nagel (1978) 75–90.

⁴ Walen (2019) 23.

⁵ Walen (2019) 23.

account circumstances of uncertainty, or that an agent is acting on behalf of others to whom he or she owes duties of loyalty and concern.

2 Institutional Roles

A related problem with Professor Walen's argument is that it fails to account for the institutional dimension of leadership roles. The fact that an action is taken by an official turns it into a different act, since it is also—or perhaps mainly—the act of the institution, not merely the act of a person.⁶

If we return to the “Trolley problem.” the fact that the direction of the runaway trolley is turned from the crowded tunnel to a near empty tunnel by a policeman who had been entrusted with the duty of protecting the public, changes its nature. A policeman, first, acts on behalf of the public under constraints of the law, while at the same time he or she a mandate to intervene in order to save lives. The same applies if a life and death decision is taken by a medical doctor looking after a person, or by a court. The difference is not merely in the scale of the action, which creates uncertainty, as I noted above, but in its *nature*. Institutional actions are not private actions. States are, moreover, bound by the treaties they have signed as well as customary international law. All these moral considerations are missing from the various examples we find in Professor Walen's book.

There appears to be a principled reason for this omission, which Professor Walen adopts from Jeff McMahan and calls “reductive individualism.” This suggests that official roles are more or less irrelevant to the right to kill. He argues that: “As individuals, or groups of individuals, come together to form a state, they gain no fundamentally new right to kill (or impose other serious harms on people).”⁷ This is a very common position among contemporary philosophers of war, but it is based on a very significant misunderstanding. Ever since Plato and Aristotle, philosophers have accepted that the actions of an individual have a different character when taken in the name of and for the sake of the commonwealth, not merely for that of the decision maker. For Plato, the private use of political power by a leader was a sign of corruption, typical of a tyrant. More recently, Rousseau and Kant spoke of the legitimacy of the state as a unique type of moral association.⁸ Sadly, none of these important insights about public duty survive in the *Mechanics of Claims*.

⁶ For this point, see also the illuminating discussion in Harel (2014) ch. 3.

⁷ Walen (2019) 29.

⁸ I offered my own reflections on the ethical role of the state and the “civil condition” in Eleftheriadis (2008).

3 Claims and Balancing

Professor Walen is explicit in his preference for reasons that derive from first principles. He says of moral theory: “An interesting feature of contemporary moral philosophy is how much weight most theorists put on matching intuitions in test cases. My own inclination is to lean the other way, to put more weight on finding plausible, relevant, high-level moral principles that can be used to generate mid-level principles and judgments in particular situations.”⁹ The view defended by the book is that there are reasons to “distrust” intuitions. Professor Walen rejects Rawls’ view of “reflective equilibrium” and concludes that “it makes sense to put more weight, relatively speaking, on good theoretical work.”¹⁰ So the argument relies on “deep, plausible moral theory” in order to reach “counterintuitive results.”

It is not clear, however, which first principles the book proceeds from. One relevant statement of general principle, in chapter three, asserts three competing principles that are equally fundamental and “axiomatic”: autonomy, equality, welfare. The fact that they are “equally fundamental” and “axiomatic” makes them extremely hard to interpret as any kind of general guidance. There is no clear way in which, for example, autonomy can guide our action, without at some point conflicting with equality and welfare. Professor Walen does not spend much time outlining any general principles, however. Instead, the argument proceeds slowly from chapter to chapter, examining particular examples and helping itself to principles in intricate ways.

Following the long chapter 3, where we have the presentation of a general theory of rights, we move to chapter 4, where Professor Walen puts the theory to work, by showing how his systematic arrangement of claims produces moral results. He argues there that a theory of the “mechanics of claims” is preferable to the currently dominant model, the “infringement model,” which argues that rights are reasons that can be properly “infringed” or overcome. He argues that rights are conclusions that follow from the consideration of claims and other moral reasons. The implications of the theory for the morality of war are developed in chapters 5 to 9. Chapter 10 gives a general conclusion. On the basis of many elaborate assessments of various accounts of life and death dilemmas, the book argues that there is “no principled reason” why civilians who assist their country’s war effort may not be intentionally killed, even when they are “non-culpable” aggressors. It is a startling argument, which for all its sophistication and ingenuity remains entirely unconvincing.

The fact that “welfare” is put alongside “autonomy” and “equality” means that Professor Walen rejects liberal argument that liberty and equality are prior to welfare, in that they ground categorical duties that cannot be the subject of balancing with welfare (as we find for example in Rawls, Nozick and Nagel).¹¹ Although Professor Walen wishes to defend some version of the priority of individual claims,

⁹ Walen (2019) 21–22.

¹⁰ Walen (2019) 22.

¹¹ I have discussed and defended the priority of rights as moral and legal reasons that give priority to a principle of equal freedom in Eleftheriadis (2008) and Eleftheriadis (2012).

he does not have in mind the simple priority of liberal principles. “Welfare” is a principle operating alongside “autonomy” and “equality.” But how can this lead to the priority of claims or rights? The book attempts to do this with the intervention of the “mechanics of claims.” This is a series of paths of moral argument that offer a more or less hierarchical structure of argumentative steps. These protect the “property like” claims of particular individuals, conceived as “agents.” i.e., those who act, or “patients.” i.e., persons that have actions have an impact on them. The “mechanics of claims” moderates the unconstrained effect of direct welfare balancing, which would have taken us straight to Bentham’s act-utilitarianism. So, the idea of individual “claims” is introduced to defend “autonomy” and “equality” in checking “welfare.”

At some point, however, the numbers count against the person. Autonomy and equality provide protection from the claims of the majority, but only up to a point. Later, in chapter 4, Professor Walen calls the idea that rights give way so to speak, cases of “threshold deontology”:

I say only that [the claims of individual persons] do add up, that there is no upper limit, and that there comes a point at which one cannot comfortably refuse to recognize that the moral reasons in favor of sacrificing one person outweigh his fundamental right to live his own life. I consider both of these cases—in which it seems right to say that it is in some sense permissible, if not obligatory, to do something inconsistent with the respect presupposed by the space of rights—cases of threshold deontology. That is, they are cases in which some sort of threshold is crossed such that it is no longer morally wrong to violate rights.¹²

I pause here to note that even here Professor Walen uses momentarily the terminology of “violating rights,” which he wishes to discard. More importantly, the argument here is that under “threshold deontology,” in some cases, the “space of rights” stops working and does not protect individuals. He distinguishes his view from simple consequentialism as follows:

On my model, at least, consequentialism only seems to take over because people have focused on cases like that of toppling the massive man to save a city. But that’s not consequentialism taking over in any robust sense. It’s just the welfare principle dominating the autonomy principle such that harmonization no longer works. Nothing about that suggests that we are ultimately always really committed to maximizing welfare or any other consequentialist good.¹³

It is therefore very important for Professor Walen’s argument to specify how exactly the “welfare principle” works in the balancing of claims. What exactly is put on balance?

¹² Walen (2019) 116. I think Professor Walen’s terminology here is erroneous. It is not the “right” that is being violated. The right has disappeared. It is the individual claim that is being “outweighed.” One might say that it follows that the individual has a duty to accept his killing.

¹³ Walen (2019) 122.

If we go back to chapter three and the “mechanics of claims” the relevant question is: what tips the argument against the “claim” that an individual has to have his or her life spared? What is the argument for his or her inviolability? We tend to think that what stops the calculus of consequences is an account of *unjust* or *wrongful*—not just “harmful”—action. In the work of various moral philosophers, the inviolability of a person is set out in some way as a wrong that escapes consequentialist balancing. For example, Thomas Scanlon’s offers in *What we Owe to Each Other* an account of right and wrong that he calls “contractualism” and which suggests that: “an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement.”¹⁴ This is just one example of a justice-based account of wrongness. I am afraid that Professor Walen is not offering anything approaching an account of wrongness or injustice, that would protect his argument from thoroughgoing consequentialism. If one follows the book’s argument in its detail, it emerges that the “mechanics of claims” is just a modified kind of balancing about harm and its significance.

When Professor Walen tries to give content to “individual claims” he speaks of means to good outcomes for agents, which must be appropriately allocated among individuals.¹⁵ For example, the emphasis of welfare is evident in the discussion of the useful killing of innocent workers at an enemy munitions factory at a crucial stage in the argument:

Generalizing, it should be equally permissible to perform an act that *minimizes harm* when doing so is a Pareto superior alternative for those affected, *harming* some less and no one more. Thus, if A could kill only 100 noncombatants in B and terrorize the other 9,900 workers into staying away from their jobs, that would be permissible too. And given that it would save so many lives, it would seem to be required by the principle of necessity. Thus, we seem to slip from eliminatively killing a large number to terrorism. I want to suggest that this is not a bug but at least a potential feature of the theory. Killing the 100 should not be confused with terrorism.¹⁶

In my view, this is for all practical purposes a *consequentialist* view of war crimes. The emphasis is not on the “autonomy” and “equality” of individuals, which have been set aside now by the “mechanics of claims.” but on outcomes in terms of harm. This is also evident in the fact that Professor Walen does not discuss the wrongness of the killing of one—or one hundred—noncombatants, independent of any outcome. He only discusses the consequences of actions that kill in terms of the harm they cause or are likely to cause to the victim. The idea that an action is wrong in itself, even if not harmful to anyone, is not taken seriously in the book.

¹⁴ Scanlon (2000) 153.

¹⁵ At pages 46–47 there is a discussion of owing a duty to a right holder, and of not assuming an “impersonal standpoint.” Professor Walen suggests there, however, that “this is a false dichotomy.” (p. 47).

¹⁶ Walen (2019) 166.

Professor Walen occasionally uses the term “interest” but most often he talks of “harm” as the criterion of welfare. Yet, it is very unclear what counts as harm in this context, and especially how it is to be measured or weighed. Since almost all the examples of the book are about life and death, we can only count the loss of life as one, possibly the ultimate, level of harm and no others. This is not helpful though. If autonomy and equality are also about harm, then all we have is degrees of “harm.” The risk for the theory is therefore this: if harm to interests collapses to the measuring of welfare, then there is only *one* moral criterion, not three.

4 The Mechanics of Claims

We thus need to turn our attention to the “mechanics of claims” and ask if the account of individual claims offered there is sufficiently independent from the balancing of welfare interests. At the start, Professor Walen suggests that the argument is a “Kantian conception for the space of rights.”¹⁷ This suggests something like Scanlon’s argument we saw above. Unfortunately, the subsequent argument offers very little in that direction. The argument begins by locating rights as a “normative space” that applies in moral relations among persons: “The basic function of rights is to provide a normative space in which we can each pursue our own ends while treating each other as free but responsible, equal fellow agents whose welfare morally matters.”¹⁸ This account is further specified by setting out the “three principles” that “ground” the “space” of rights. These are autonomy, equality, and welfare. The autonomy principle means that we all have our own lives to lead so that the space of rights must give us substantial freedom to do so, while also holding us accountable for our choices. The equality principle means that we are all fundamentally equal as members or “citizens” of the space of rights. The welfare principle means that our welfare matters, and that value affects the rights we have.

A Kantian approach would normally accept that the most basic principle was the second one, our equality as agents. Such an argument would say that everyone has the same innate right to freedom. There is no question of any balancing of welfare or harm in ascertaining that right’s content. Freedom is worth protecting in itself. This is, in principle, the position defended by Thomas Scanlon and the Kantians. Professor Walen rejects Scanlon’s position by arguing that the “autonomy principle” formulates the claims of individuals as a “strong claim” not be used as a means without one’s consent.¹⁹ This “strong claim” has value, which can be outweighed by other “claims” so that: ‘Given that we can rely on the autonomy principle to ensure respect for the individual, we can also allow the welfare principle to ground the common-sense thought that it is morally proper to let the numbers count, as long as we take into consideration the kinds of claims that are being counted.’²⁰

¹⁷ Walen (2019) 44.

¹⁸ Walen (2019) 44.

¹⁹ Walen (2019) 52.

²⁰ Walen (2019) 52.

In effect, Professor Walen's argument is that autonomy, equality, and welfare all contribute their own reasons to the space of rights and determine their contents by way of a different kind of balancing. So, autonomy does not stop numbers from "counting." Autonomy does not interrupt the process of balancing but is merely added to it as another personal "claim" with a certain value. Autonomy can be given a precise value as a type of human interest of welfare. The role of the "autonomy" principle is to organize a different aggregation. The balancing is supposed to be of the various claims, including claims to autonomy, not directly of the value of outcomes or harms. By focusing on the relations (or "mechanics") of focused "claims," Professor Walen believes that it is the principle of autonomy that organizes the "topology" of rights:

This is quite unlike consequentialism, in which the topology is much simpler: good things and bad things simply add up on different sides of a single agent-neutral balance—like positive and negative charges in an electrical field. In the space of rights, balancing is also in play; but it is claims, not values, that weigh in the balance, and the balances always operate on individual agents.²¹

But why is the balancing of claims any different from the balancing of outcomes? What is being "aggregated"? I believe that this is the weakest part of Professor Walen's argument. It is never explained what is the subject matter of this alternative "balancing."

I have tried to find an answer, but I cannot find it. As I read it, the argument proceeds from illustrations from artificial examples, whereby it is shown that one person has a "stronger" claim than another in various roles as an "agent" or "patient" in life and death choices. This will only work if the various individual "claims" are not entirely reducible to bundles of welfare. But we are never shown *how* this may be the case. The various comparisons of hypothetical scenarios fail to give any particular content to the idea of the claims of individuals as claims of "autonomy." All we have are ad hoc judgments.

The most we can say, when one looks at the examples, is that it turns out that the dominant principles are never those of autonomy or equality, but the principle of welfare whereby one makes overall assessments of welfare outputs. At some point, Professor Walen accepts that the balancing of claims is a balancing of "interests":

The weight or strength (I use those terms interchangeably) of basic patient claims reflects the magnitude of the interests in play, whether the claim is for help or not to be harmed, and other ways the patient potentially relates, causally, to the agent and to other patients whom the agent might affect by her choice.²²

Later in the argument, Professor Walen suggests that the very "function of rights" is not to protect justice, or the inviolability of persons, but to "enable a real harmonization of the different lives and moral interests involved", even if that harmonization occasionally "breaks down."²³ And when it comes to describing how autonomy

²¹ Walen (2019) 57.

²² Walen (2019) 66.

²³ Walen (2019) 77.

works, it is set out as a one element of people's valuable "interests." with significant weight, but not as something contrasted to other elements of goodness.

One could say that autonomy's priority is merely quantitative in this argument. Professor Walen's explains its relative priority as follows:

I think the truth is in the middle: a reasonable balance gives substantial priority to the autonomy principle, all else equal, but holds that negative agent-claims and property claims are outweighed when the interests they protect are relatively minor and the competing welfare claims are much greater. The key is this: the autonomy principle must have enough priority over the welfare principle for it to be true that agents have a meaningful normative space in which to lead their own lives for their own ends.²⁴

This all seems to lead to a theory of rights that consists, in the end, of a structured account of interests as elements or parcels of goodness. It is an interest theory with another name. Indeed, the principle of welfare appears to be the principle that Professor Walen believes is the most potent of the three.²⁵ The welfare principle explains Professor Walen's preferred answer to the trolley problem. He accepts that a person may be sacrificed to save, broadly speaking, three. We overcome the moral horror of killing that person because "numbers count," he says. This is a standard utilitarian argument, but Professor Walen transforms into the language of "claims" that are grounds for rights.²⁶

It thus follows that for Professor Walen, the autonomy or equality principles do not operate independently of the welfare principle but are, ultimately, subsumed under it. Autonomy in the end, counts just as one particular element of welfare that relates to individual fulfillment. Such elements can be outweighed by other elements of other welfare goods (although, admittedly, the required balancing of value is not a simple comparison between two entries in the same index, as in Bentham's felicific calculus). And if individual autonomy is an element of goodness, it can then be subject to balancing against other elements of goodness:

In the space of rights, balancing is also in play; but it is claims, not values, that weigh in the balance, and the balances always operate on individual agents. Two agents, confronting the same set of patients, may have different claims on them because of the different ways they relate to the various patients. Rather than a single balance, the topology of rights is one of multiple nodes, with the claims of all patients coming in separate lines to each agent.²⁷

²⁴ Walen (2019) 89.

²⁵ Professor Walen writes: "I turn now to the welfare principle, which, unlike the other two principles, fundamentally expresses a value. ... First, the welfare principle straightforwardly explains why claims add up. Each person's welfare matters, and it matters as a good thing, such that the more people do better, the better;" Walen (2019) 50.

²⁶ Even the claims that agents enjoy merely on the basis of their personhood are described by Professor Walen as valuable elements of our "toolkit," i.e., as valuable means. See Walen (2019) 87.

²⁷ Walen (2019) 58.

Professor Walen disowns utilitarianism. He intends to offer something like a Kantian argument. Alas, as far as I can tell, the “mechanic of claims” organizes a structure of welfare values, in a way that tracks “act-utilitarianism” perfectly. All the decisive questions here appear to be matters of the balancing of goodness.

5 Why Intentionally Killing Civilians Is Always Wrong

Let me attempt to summarize the alternative view, which Professor Walen does not address. This is a Kantian, or “deontological” or “agent-relevant” argument about killing of civilians in war, which could be summarized in two brief sentences. First, our duty to respect another as a person arises not because of any assessment of good consequences of this or that action from an impersonal standpoint, but merely on account of that person’s humanity. The duty is addressed to that person directly: I owe you the duty because you have a right to your own freedom. Hence, the requirement to respect other persons as ends in themselves has no relation to any beneficial outcomes that may ensue. These beneficial consequences are of course real and welcome. But they are not the ground of a duty of respect. Second, the inviolability of persons is moral, not material. Moral rights require us to consider others morally inviolable, not beyond reach. It is wrong to compare rights to a perimeter of protection or a property right to one’s body or range of actions. The right to the security of my person does not prevent a surgeon from operating on me in an emergency, while I lie unconscious in hospital.

For these reasons no amount of good can justify the killing of civilians at war, since no amount of good removes the innate right to freedom on account of one’s humanity. Such killing may, perhaps, be excused, but it can never be mandated or become a matter of right. The killing of enemy combatants, by contrast, asks an entirely different set of questions. These are addressed by the laws and the morality of war. The questions there are different, because they concern institutional duties. Such duties arise for commanders and fighters under institutional roles and under the framework of government. Unfortunately, there is little discussion of these matters of justice and legitimacy in the *Mechanics of Claims*.

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