

Rights, Conflicts, and the Mechanics of Claims

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Abstract

There is a distinction between two different ways in which people's interests might figure as inputs into the reasoning that determines verdicts of moral permissibility and impermissibility. Their interests may receive a certain priority in that reasoning, as for example the interests of the people whose lives are at stake in the famous *Bystander* example should. Or they may not, as for example the interests in spectacle that people watching on the sidelines might have should not.

A theory of rights needs to make sense of this distinction. One of the chief attractions of Alec Walen's theory of rights in *The Mechanics of Claims and Permissible Killing in War* is that it promises to do so, thanks to the concept of a claim that it introduces and the structural role this concept plays in the theory. However, I argue here that the substantive content of the mechanics of claims – in particular, a principle Walen calls the 'welfare principle' – privileges welfare interests to a degree that threatens to undermine the theory's advantages. I consider and reject some ways of modifying the welfare principle so as to avoid this implication, suggesting that their failure raises much deeper questions of moral theory that must be confronted if the mechanics of claims is to make good on its promise.

Keywords

claims – moral conflict – moral reasoning – rights

1 Introduction

There is a distinction between two different ways in which people's interests might figure as inputs into the reasoning that determines verdicts of moral permissibility and impermissibility. Their interests may receive a certain priority in that reasoning, as for example the interests of the people whose lives are at stake in the famous *Bystander* example should. Or they may not, as for example the interests in a spectacle of people watching on the sidelines might have should not. This distinction, between what we can label 'primary' and 'secondary' interests, is phenomenologically compelling and has significant normative implications, for example in respect of who might be owed explanations or amends of some sort for what the agent does.

It is tempting to elaborate the distinction in terms of the idea that the former interests are protected by rights, which are therefore special inputs into the relevant reasoning. However, doing this threatens to deprive us of various key features of rights as they are standardly understood – most obviously, the feature that they constrain agents by imposing duties on them. On the other hand, if we do not appeal to rights as inputs in this way, treating them as the outputs of moral reasoning instead, it is not clear how else to make sense of the distinction between primary and secondary interests, or therefore the phenomenology and normative implications associated with it.

That, at any rate, is what I argue briefly in Sections 2–3 below. I then turn, in Section 4, to the 'mechanics of claims,' the theory of rights that Alec Walen presents in *The Mechanics of Claims and Permissible Killing in War*.¹ Set against the background of the argument of Sections 2–3, the mechanics of claims looks very attractive. For the concept of a claim and the role it plays in the theory seem perfectly suited to distinguish primary interests in a theoretically satisfying way.

However, as I go on to argue in section 5, the substantive content of the mechanics of claims – in particular, a principle Walen calls the 'welfare principle' – privileges welfare interests to a degree that threatens to undermine its advantages by representing virtually all interests at stake in any given situation as primary interests. In Section 6, I review and reject some ways of modifying the welfare principle so as to avoid this implication. I conclude in Section 7 that their failure raises much deeper questions of moral theory that must be confronted if the mechanics of claims is to make good on its promise.

1 Alec Walen, *The Mechanics of Claims and Permissible Killing in War* (Oxford: Oxford University Press, 2019).

2 Conflict Permissions and Clean Permissions

Let me start, then, by distinguishing between two kinds of circumstance of moral permission. On the one hand, there are what we can call *conflict permissions*. Conflict permissions are the permissions that agents have in circumstances of the sort of moral conflict depicted in the famous *Bystander* example. In that example, an agent faces a choice between either causing the death of one person by diverting a runaway train down a side track towards him, or else doing nothing, allowing the train to run on down the main track, where it will kill five others.² As most people analyze *Bystander*, it is not a genuine moral dilemma – that is, it is not true that the agent cannot avoid acting wrongly whatever she does. Indeed, it is morally permissible to divert the train and it is also morally permissible not to. Nevertheless, agents in such circumstances would (and should) appropriately feel a sense of moral conflict. And – relatedly – they would take themselves to have responsibilities to justify themselves, and perhaps to compensate or otherwise apologize or make amends to those who come to harm as a result of what the agents permissibly choose to do. As the point is sometimes put: even though it is morally permissible to do harm in such circumstances, the harm leaves a ‘moral residue.’³ The responsibilities of justification or compensation are a response to that residue.

Conflict permissions are of particular interest to moral philosophers, as the huge body of philosophical work on *Bystander* or the literature on saving the greater number – also concerned with what are intuitively such permissions – suggests. They contrast with what we can call *clean permissions*, which attract much less interest. Clean permissions are moral permissions that obtain in circumstances that are not circumstances of moral conflict in the sense I have just been describing. That is not to say that action licensed by a clean permission is never contrary to anyone’s interests. After all, in virtually every situation I ever face, I always have the option of simply devoting all my time and resources to you, so there is a sense in which you have interests at stake in virtually every choice I make. But such interests – which I labeled ‘secondary interests’ above – are not like the primary interests of the people whose lives are at stake in *Bystander*. Unlike competing primary interests, competing secondary interests do not give rise to the sense of moral conflict or to justificatory or compensatory responsibilities. Secondary interests

2 See N. Ann Davis, ‘The Priority of Avoiding Harm,’ in Bonnie Steinbock and Alastair Norcross (eds), *Killing and Letting Die*, 2nd edn. (New York, 1994), 327; Judith Jarvis Thomson, ‘The Trolley Problem,’ *Yale Law Journal* 94 (1985): 1395–1415, at 1397.

3 The term ‘moral residue’ is due to Thomson (1990, 84).

will be present in most circumstances of conflict permission – think of the beneficiaries of the wills of the five in *Bystander*, for instance – but they are not what makes the permission a conflict permission. That is done by competing primary interests.

According to everyday moral thinking, most of our actions are licensed by clean rather than conflict permissions. For example, the permission you presumably have to be reading this now is a clean permission, as is the permission to spend some time playing swingball with your daughter or going to the doctor or sleeping at night. (Note that clean permissions can be permissions to do things that we are morally required to do: the point just is that in doing them, we are not acting contrary to any primary interests – so no compensatory responsibilities, etc.) Although conflict permissions are of great interest to moral philosophers, as I said, the fact is that they are relatively rare. I take it that the distinction between conflict and clean permissions is intuitive, and the ubiquity of the latter a familiar fact.

3 Rights and Conflict Permissions

Conflict permissions are distinguished from clean permissions, then, by the presence of competing primary interests. But what makes a primary interest primary? A natural thought is that primary interests are interests protected by rights.

Consider that it would ordinarily wrong a person not to save her life by diverting a runaway train away from her down a deserted side track where it would do no harm.⁴ It would also ordinarily wrong a person to kill her by diverting a runaway train away from a deserted main track, where it would do no harm, towards her. Reflecting on these examples, you might conclude that people have rights to rescue and rights against being killed, rights that explain why we must normally refrain from diverting runaway trains towards them and why we must normally divert runaway trains away from them. And they have these rights, you might further suppose, even when they conflict with other such rights – as in *Bystander*. Hence, they can be appealed to explain why *Bystander* is a case of competing primary interests, so that the permission to divert the train (or not) in *Bystander* is a conflict permission.

However, if we elaborate the distinction between primary and secondary interests in this way, we treat rights as inputs into the reasoning that

⁴ Assume that any of the various conditions that might be supposed to justify or excuse not diverting the train are absent.

determines moral permissibility and impermissibility.⁵ And that prevents us from understanding rights as the constraints they are standardly supposed to be. The standard Hohfeldian analysis of rights says that rights correlate with duties.⁶ This substantiates the idea that rights are a kind of constraint on agents, since we are of course bound to comply with our moral duties on pain of moral wrongdoing. It also explains the responsibilities that we have to rightsholders to make amends in the wake of action contrary to their rights, and the standing that rightsholders have to resent us if we do not. For to do moral wrong is to act in ways that are incompatible with due regard and concern for others; resentment is a response to insufficient such regard and concern; and the appropriateness and significance of making amends lies in large part in the way that it provides assurance that such regard and concern is restored.

But duties so understood are the *output* of moral reasoning. So none of this is available to someone who makes sense of the distinction between primary and secondary interests by appeal to rights. The sense in which rights are a constraint must therefore be elaborated in some other way. Yet it is not at all clear what this should be.⁷

So perhaps instead we should take rights to be the output of the moral reasoning that determines permissibility and impermissibility. Output

5 This is how influential rights theorists including Joel Feinberg, Judith Jarvis Thomson, and Jeff McMahan understand rights. See Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life,' *Philosophy & Public Affairs* 7 (1978): 93–123; Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990); Jeff McMahan, 'The Basis of Moral Liability to Defensive Killing,' *Philosophical Issues* 15 (2005): 386–405.

6 Wesley N. Hohfeld, *Fundamental Legal Conceptions* (New Haven, CT: Yale University Press, 1923).

7 I do not mean to suggest that input theorists of rights have been silent on this question. Input theorists have suggested among other things that rights are constraints in the sense that acting contrary to them wrongs rightsholders even when it is not wrong, in the sense that they imply a need to seek release in advance of action contrary to them or a duty of compensation in the wake of such action, and in the sense that they are Rossian *prima facie* duties, among other things. But these proposals either look as if they will not vindicate the idea that rights are constraints associated with the relevant justificatory responsibilities and standing to blame, or they do not track cases of what input theorists want to say are rights accurately, or they merely push the question of in what sense the rights constrain one step further back. For discussion, see: Thomson (1990); F. M. Kamm, 'Rights,' in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford: Oxford University Press, 2002); Victor Tadros, 'Causation, Culpability, and Liability,' in Christian Coons and Michael Weber (eds.), *The Ethics of Self-Defense* (Oxford: Oxford University Press, 2016); Jonathan Quong, *The Morality of Defensive Force* (Oxford: Oxford University Press, 2020); Jonathan Dancy, 'More Right than Wrong,' in Mark Timmons and Robert N. Johnson (eds.), *Reason, Value, and Respect: Kantian Themes from the Philosophy of Thomas E. Hill, Jr.* (Oxford: Oxford University Press, 2015).

theorists of rights, unlike input theorists, can help themselves to the standard account of the relation between acting contrary to rights and acting contrary to duty. They take rights to be the outputs of the reasoning that establishes permissibility and impermissibility, so if someone has a right against me that I not ϕ , I violate a moral duty by ϕ -ing (i.e., I act impermissibly); and if it is permissible for me to ϕ , then no one has a right against me that I not ϕ .⁸ So it is easy for output theorists to make sense of the idea that rights are a kind of constraint associated with special justificatory responsibilities to rightsholders in the wake of action contrary to rights, along the lines described a moment ago.

But, since they cannot appeal to rights as inputs to distinguish between primary and secondary interests, output theorists will need to find some other way to elaborate that distinction. Otherwise, they will not be able to make sense of conflict permissions in cases such as *Bystander*. All such permissions will come out as clean, and the phenomenology and normative implications of permissible action in the relevant circumstances will simply look mysterious. Once again, it is not clear how they can do this.⁹

4 Enter the Mechanics of Claims

Set against this theoretical background, Alec Walen's theory of the 'mechanics of claims' offers a novel and promising account of rights. For it is an output theory of rights that appears to have the resources to distinguish between primary and secondary interests in a theoretically attractive way, making sense of both conflict and clean permissions and the phenomenology and normative

8 Output theorists are therefore *specificationists*, taking the fullest accurate formulation of a right against ϕ -ing to include a list of all and only the circumstances in which it would be morally impermissible for the relevant duty-bearer to ϕ . Well-known specificationists include John Oberdiek and Russ Shafer-Landau. See Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights*, *Law and Philosophy* 23 (2004): 325–346; Shafer-Landau, 'Specifying Absolute Rights,' *Arizona Law Review* 37 (1995): 209–225.

9 Output theorists have made proposals that might be thought to help with this problem. But it is not clear how successful these are. For example, R. Jay Wallace (citing Susan Wolf) appeals to the 'nameless virtue' "whereby we take responsibility in an expansive sense for our actions and the harms they may cause" (Wallace, *The Moral Nexus* [Princeton, NJ: Princeton University Press, 2019], 261). But this does not distinguish between primary and secondary interests in any clear way. Oberdiek (2004, 333) appeals to the existence of a plurality of values other than respect for rights to explain the appropriateness of compensation. For a compelling reply to this proposal, see Hallie Liberto, 'The Moral Specification of Rights: A Restricted Account,' *Law and Philosophy* 33 (2014): 175–206, at 182–184.

implications – most notably the presence or absence of justificatory and compensatory responsibilities – of each.

According to the mechanics of claims, our moral rights against each other reflect three core principles that structure what Walen calls the ‘space of rights.’ These core principles are the *autonomy principle*, the *equality principle*, and the *welfare principle*.¹⁰ The contribution of these core principles to structuring the space of rights is a theoretical rendering of the idea that in respecting others’ rights, we recognize the autonomy and equality of others and the moral importance of their welfare.

Each principle privileges (or ‘picks up,’ as Walen typically puts it) a specific type of interest as a factor that contributes to determining what rights people have. The interests so picked up are *claims*, or the basis of claims. Thus, the autonomy principle privileges our autonomy interests – our interests in being recognized as members of a community of people who are “equally free to pursue their own ends, all of whom deserve respect and all of whom can be held responsible for their choices” – as factors that contribute to determining our rights.¹¹ The equality principle privileges our equality interests – which Walen treats as interests in having our interests registered equally in the space of rights – as factors that contribute to determining our rights.¹² And the welfare principle privileges our welfare interests as factors that contribute to determining our rights.¹³ Accordingly, we have claims under the autonomy principle, claims under the equality principle, and claims under the welfare principle. The mechanics of claims is the theory of the way in which these claims interact so as to yield a distribution of rights and permissions.

Now, the mechanics of claims on its own is not strictly speaking quite an output theory of rights in the sense given above – that is, of rights as conclusions about our all-things-considered moral duties and permissions. For Walen allows that considerations other than claims may in some cases bear on what rights we have. Among others, he gives the examples of considerations of fairness that tell against cheating on one’s taxes, considerations of retributive justice, and considerations that tell in favor of discharging official duties.¹⁴ Moreover, Walen is open to the possibility that considerations beyond rights may bear on what it is morally permissible to do, all things considered. Such considerations would not compete with rights, but narrow the field of what is morally permissible beyond that left open by rights. So, for example, although

¹⁰ Walen (2019, 47).

¹¹ Walen (2019, 48).

¹² Walen (2019, 49–50).

¹³ Walen (2019, 50–55).

¹⁴ Walen (2019, 56).

uncharitableness, ingratitude, and the wanton destruction of natural beauty may all be compatible with everyone's rights, they may nevertheless be morally impermissible.¹⁵

All the same, the autonomy, equality, and welfare principles pick up almost all the considerations that bear on how it is morally permissible for us to behave, at least within the distinctive Scanlonian sphere of what we owe to each other. And the remaining considerations that bear on permissibility look as if they serve only to narrow rather than expand our options, so that it will never turn out that we are permitted all things considered to act contrary to the rights that emerge from the mechanics of claims. So the mechanics of claims can still be treated as a species of output theory.

As advertised above, however, the mechanics of claims has a major advantage over other output theories. For its structure allows it to distinguish between primary and secondary interests in a theoretically satisfying way, and thereby make sense of the distinctive sense of moral conflict associated with situations such as *Bystander*. Primary interests, Walen can say, are the interests privileged by the three principles that structure the space of rights, which are therefore marked out or protected by claims. Claims can and do conflict in the mechanics of claims, since the three principles may pick up, in any given situation, different interests that cannot all be satisfied at the same time. So, although any given right that is the output of the mechanics of claims may require acts that are contrary to some of the claims that were inputs into it, the losing claims remain available to explain the phenomenology of conflicting moral 'pulls' and ground compensatory responsibilities.¹⁶

The mechanics of claims has other advantages over rival theories of rights too. Since the principles that pick up some interests as claims can pick up interests that many input theorists may be reluctant to describe as rights or the basis of rights – interests in being rescued, for example – the mechanics of claims can make sense of the phenomenology of conflict situations in a more satisfying way than many input theories. If they do not want to assign people general rights to be rescued, as many will not, input theorists may have to interpret situations such as *Bystander* as conflicts between rights and something like the greater good. But this is theoretically rather unsatisfying, as Walen notes.¹⁷ And it does not do justice to the sense of conflict that arises in such cases, which is much more akin to the sense of conflict that arises in cases of what input theorists would represent as a conflict between two rights – a

¹⁵ Walen (2019, 56–57).

¹⁶ Walen (2019, 101).

¹⁷ Walen (2019, 113–114).

sense of having failed particular individuals whatever one does, rather than of having failed to bring about (enough) good.

By contrast, the mechanics of claims can interpret *Bystander* as a case of conflicting claims without implying that the five have rights to be saved, since it can assign claims to both the person on the side track and the five in the theoretical reasoning that determines what it is permissible to do in the circumstances.¹⁸ For the same reason, the unity of the mechanics of claims' explanation in terms of the three structuring principles and the claims that they imply also gives the theory an advantage over specificationist output theorists whose explanations as to why a given right obtains only in the precise circumstances listed in its fullest specification draw on considerations (e.g., of the greater good) that do not intuitively ground the rights.¹⁹

An associated further attraction of the mechanics of claims lies in Walen's recognition that there may be circumstances in which it is in some sense justifiable to go beyond the limits of what is compatible with respect for others, as this is expressed in the three core principles structuring the space of rights (together with the other rights-determining factors of fairness, retributive justice, etc.). Rather than fold such justifications into the account of rights, as a specificationist might (provoking the objection described at the end of the preceding paragraph), Walen claims that in such circumstances the harmonization of the values of autonomy, equality, and welfare to which the space of rights aspires simply breaks down. For example, he suggests that although it may be justifiable to push a massive man into the path of an onrushing train in order to prevent the destruction of a whole city full of people, this is nevertheless not a case in which we can be confident that the man has no right not to be sacrificed in this way. Similarly, he suggests that a mother faced with allowing her child to die or diverting an onrushing train towards an innocent bystander instead may in some sense be justified in diverting it, but the bystander nevertheless has a right against her doing so.²⁰ In such circumstances, Walen says,

All sides may acknowledge that what the others do makes sense and is in a sense justified. It would be justified in the sense that an agent can say, "If I were in her shoes, I would do the same thing." But the justification

¹⁸ Since claims can but need not ground duties of compensation, assigning claims to the five need not imply that they (or their heirs) must be owed compensation if the train is not diverted. Walen explains why he takes them not to be owed compensation despite their claims at Walen (2019, 102–103).

¹⁹ As Walen (2019, 45) argues.

²⁰ Walen (2019, 118).

does not appeal to a general good that can be pursued in a way that respects the rights of all. Rather, the justification appeals only to what each would say is the balance of reasons for her. An agent claiming that justification should be able to see that the competition arises only because what makes most sense for her cannot be harmonized with what makes most sense for another.²¹

It seems to me a virtue of the theory that it recognizes the possibility of a sort of justification in such cases without complacently insisting that the ideal of respect for the autonomy, equality, and welfare of all would remain intact.

5 Does the Mechanics of Claims Live up to its Promise?

The theoretical upshot of all this is a sophisticated, three-level theory of rights and moral permissions, as represented in Figure 1 below. At the first level (A), we have claims, distinguished as such by the three core principles, reflecting people's autonomy, equality, and welfare interests. At the second level (B), rights, and what rights leave open as morally permissible, harmonize those claims (together with a few non-claims-based considerations such as fairness). The mechanics of claims is really a theory of these first two levels; the third level (C) is distinguished in recognition of the possibility that some acts may be in some sense justifiable even when they are not compatible with the ideal of respect for others enshrined in the space of rights and determined via the mechanics of claims.

As I said, a key attraction of the mechanics of claims is its promise of a theoretically satisfying way of distinguishing between primary and secondary interests and thereby making sense of the distinction between conflict and clean permissions and the phenomenology and normative implications of each.

A	Claims (reflecting autonomy, equality, and welfare interests)
B	Rights and permissions (reflecting the harmonization of claims)
C	Justification beyond rights (reflecting the limits of harmonization of claims)

FIGURE 1 A three-level theory

21 Walen (2019, 118).

However, I want now to raise some doubts about how far the mechanics of claims can really deliver on this promise. Although its structure makes room in principle for the distinction between primary and secondary interests, there is a doubt about whether in the end it can actually recognize any interests as secondary, and therefore about whether it can really accommodate clean permissions. If it cannot, its structural superiority over rival theories of rights in this respect may turn out to be of no substantial advantage.

The doubt is cast in the first instance by the role and operation of the welfare principle in the mechanics of claims. According to that principle, “all welfare that can register through competing claims on agents does register that way.”²² This is a way of saying that each person whose welfare would be affected by a choice facing an agent has a claim (picked up by the welfare principle) to the agent’s choosing the option that advances her welfare. It follows that the welfare principle picks up both primary and secondary interests, generating claims from them in every circumstance in which they are at stake.

Since secondary welfare interests are at stake in virtually every situation that anyone ever faces, as I noted earlier, virtually every permission in which the mechanics of claims issues will turn out to be a permission to act contrary to claims generated by the welfare principle. The implication of this seems to be that the mechanics of claims must represent virtually every permission as a conflict permission. The implication holds even if some of the claims generated by the welfare principle are weaker than others, as Walen supposes.²³

It is not incoherent to think that every permission is a conflict permission, but it is hugely phenomenologically implausible. You might be prepared to accept that the present state of the world is a kind of emergency in which no agent can escape the claims of those in dire poverty, so that we really are caught up in a kind of pervasive conflict situation.²⁴ But the welfare principle implies a position even more radical than this. For even in circumstances of peace, plenty, freedom, and equality, people will continue to have secondary welfare interests at stake in everything anyone does who can affect their welfare at all. And so every permission, even in circumstances of peace, plenty, freedom, and equality, will be rendered by the mechanics of claims as a conflict permission – as akin to the permission that we have to divert the train, or break a promise in order to attend to the victim of a traffic collision, or save the many rather than the few, with all the accompanying responsibilities to claimholders that are present in those cases. Surely this cannot be right.

22 Walen (2019, 53).

23 See Walen (2019, 53).

24 Compare Elizabeth Ashford, ‘Utilitarianism, Impartiality, and Integrity,’ *The Journal of Philosophy* 97 (2000): 421–439.

Moreover, the fact that the welfare principle gives rise so cheaply to claims casts doubt on the idea that the space of rights reflects or aspires to any kind of genuine harmonization of claims. After all, no realistic world could satisfy this aspiration, given the ubiquity of claims generated by the welfare principle.

It is helpful to contrast the mechanics of claims in this respect with Kant's theory of rights, which Walen cites as an inspiration.²⁵ Kant's view can without much distortion be thought of as underpinned by something like Walen's autonomy and equality principles. We have rights over parts of the world and each other, according to Kant, just insofar as our having them is necessary for and compatible with the innate freedom and equality of each person.²⁶ We might think of the value of freedom as generating claims to 'have things as our own' (to be rightsholders) and the value of equality as generating claims to have these rights determined in a way that does not subject anyone to anyone else's will. These claims really can be harmonized, according to Kant: given an appropriately constituted state, we can all have things as our own sufficient to satisfy the requirements of freedom, and we can have them without compromising our independence from others, satisfying the requirements of equality.

On Kant's view, then, in the absence of an appropriately constituted state, the aspiration to harmonize freedom and equality cannot be satisfied, but it is not in principle effectively unsatisfiable.²⁷ By contrast, the aspiration to harmonize claims that is at the heart of the mechanics of claims appears to be rendered more fundamentally unsatisfiable by the welfare principle.

An interpretation of the mechanics of claims that treated the permissions emerging from the mechanics of claims as clean permissions would avoid at least the first of these problems, of course. But that interpretation would be phenomenologically implausible in a different way, since it would be unable to account for the sense of moral conflict associated with conflict permissions. More generally, insofar as the mechanics of claims avoids problems with other output theories of rights by appealing to claims to account for the sense of moral conflict and the compensatory responsibilities that attach to permissible action in cases of conflict permissions, this interpretation would largely abandon the promise that the mechanics of claims seemed to offer.

25 Walen (2019, 44).

26 See Immanuel Kant, *The Metaphysics of Morals*, ed. by Mary Gregor (Cambridge: Cambridge University Press, 1996), Part I.

27 This is of course only a brief sketch. For a detailed exposition, see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).

It does not help to address the problem that I have raised that the mechanics of claims is not supposed to settle all questions of moral wrongdoing. As I noted above, Walen thinks that there can be acts that are ruled out in the space of rights but are not the product of the mechanics of claims, e.g., acts ruled out by considerations of fairness or legitimately imposed law. Moreover, the mechanics of claims is compatible with the possibility of wrongs that are not ruled out in the space of rights, such as the wrong of ingratitude and ‘impersonal’ wrongs.

But the most that these further considerations could do would be to convert clean permissions into conflict permissions, so to speak. If the problem is that the permissions yielded by the mechanics of claims are all already represented as conflict permissions, as they are if claims are what explains the sense of conflict that accompanies conflict permissions and the welfare principle is given full rein, then the introduction of further wrong-making considerations is not going to solve the problem.

Alternatively, if the problem is that the (rights-relative) permissions yielded by the mechanics of claims are represented as clean permissions, then introducing these further wrong-making considerations might help to explain why some permissions represented as clean by the mechanics of claims turn out to be conflict permissions, all things considered. But this looks like the wrong explanation. For the sense of conflict in a situation such as *Bystander* is not generated by opposition between – on the one hand – the rights that obtain in the situation, as determined by the interactions between people’s equality, autonomy, and welfare interests, and – on the other hand – fairness or legitimate law or something like the gratitude that we owe to benefactors or impersonal value. It is generated by opposition between the very interests that are picked up by the equality, autonomy, and welfare principles themselves.

6 Revising the Mechanics of Claims

Could the mechanics of claims be revised so as to avoid these problems? One obvious suggestion would be to eliminate the welfare principle, so that claims reflect only autonomy and equality interests, as in Figure 2 below. Walen calls this position ‘libertarianism.’²⁸

This would bring the mechanics of claims closer to the Kantian view, and it would avoid the problems just described, since in a mechanics of claims so revised, secondary welfare interests would not automatically generate

²⁸ Walen (2019, 47).

A	Claims (reflecting autonomy and equality interests)
B	Rights and permissions (reflecting the harmonization of claims)
C	Justification beyond rights (reflecting the limits of harmonization of claims)

FIGURE 2 A Kantian revision

claims – although Walen would not welcome the revision, since he thinks that libertarians do not give enough weight to welfare interests.²⁹

In any case, however, the mechanics of claims so revised would not be able to treat situations such as *Bystander* as cases of conflict permission belonging to level B, since now the welfare interests of the five would not be picked up as claims. To account for such situations, we would have to look beyond the mechanics of claims to level C, treating them as cases of moral breakdown in which acts may in some sense be justifiable even though they are not compatible with the ideal of respect for others enshrined in the space of rights.³⁰ But the moral status of acts at level C is much less clear and much less systematically determined. So many of the advantages of the mechanics of claims over rival theories would be lost. Like the specificationist theories that Walen criticizes, it would have to “look outside of those narrow considerations that ground a right” to account for justifiable action in situations such as *Bystander*, and like the input theories that Walen criticizes, its judgments would reflect an unsatisfying fusion of rights and non-rights considerations.³¹

Moreover, the mechanics of claims would be unable to validate the judgment that diverting the train in *Bystander* and analogous acts are straightforwardly (even if not cleanly) morally permissible, muddying the moral distinction that Walen wants to make between situations such as *Bystander* and the case of the massive man or the mother diverting a train towards a bystander in order to save her child.

It would seem more promising, then, to restrict the operation of the welfare principle, rather than eliminate it altogether. What is really wanted, of course, is a restriction of the interests that it picks up to primary interests. We might hope that this could be done by restricting the principle to pick up

29 Walen (2019, 89).
30 Compare Walen (2019, 122). Note that such situations could no longer be regarded as a case of breakdown *in the harmonization of claims to which the space of rights aspires*, since the welfare interests generating the breakdown would not be the basis of claims at all.
31 See Walen (2019, 45, 113–114).

only fundamental welfare interests or needs.³² This would give us the position represented in Figure 3 below:

This more moderately revised version of the mechanics of claims could, it seems, represent the permissions arising from the appropriate balancing of competing claims as conflict permissions without thereby ruling out clean permissions. We might reasonably expect that, at least in circumstances of peace, plenty, freedom, and equality, many and perhaps most of the permissions issued by the mechanics of claims so reformulated would be clean permissions. For in such circumstances we might reasonably expect that people's autonomy, equality, and fundamental welfare interests – and hence the claims based on them whose processing issues are in rights and permissions – would be fully compatible with one another. By the same token, the harmonization of our claims to which the mechanics of claims aspires would not be a fantasy, unrealizable even in principle. So this might hold out the best prospect for the mechanics of claims as a theory that makes sense of conflict permissions without eliminating the possibility of clean permissions.

This strategy might go some of the way towards solving the problem, but ultimately it fails too. The trouble is that not all fundamental welfare interests are primary. For all we have seen, for instance, the interests of the beneficiaries of the wills of the five in *Bystander* might be fundamental welfare interests. Those beneficiaries might be destitute – even on the verge of death from illnesses that only the five's legacies would suffice to cure. But their interests nevertheless remain secondary, not primary, in the situation facing the agent in *Bystander*. As before, it is not in any part due to them that *Bystander* is an example of a conflict permission, and an agent faced with situations such as *Bystander* would not have responsibilities to compensate or otherwise make amends to the beneficiaries if she diverted the train. Restricting the welfare principle in the way envisaged cannot account for this. So the problem remains.

A	Claims (reflecting autonomy, equality, and fundamental welfare interests)
B	Rights and permissions (reflecting the harmonization of claims)
C	Justification beyond rights (reflecting the limits of harmonization of claims)

FIGURE 3 A moderate revision

32 E.g., as analyzed by David Wiggins, 'Claims of Need,' in *Needs, Values, Truth: Essays in the Philosophy of Value* 3rd edn (Oxford: Oxford University Press, 1998). Walen (2019, 53) expresses hostility to such suggestions for reasons that I will discuss more below.

As is obvious from this particular example, some secondary welfare interests are interests that we might feel objectionably treat others as a means to take into account in moral reasoning. For the only role that the beneficiaries' interests could play in moral reasoning about *Bystander* would be as a consideration in favor of allowing the train to continue along the main tracks, i.e., of allowing the five to die so that the beneficiaries might profit by their deaths. Noting this, Walen might argue that the restriction of the welfare principle to pick up only fundamental interests would be sufficient to solve the problem after all. For he argues that the autonomy-grounded claims of a person whose life is threatened block the welfare-grounded claims of others who might benefit from an agent's not saving her in the moral reasoning that determines what the agent may do. The beneficiaries' claims here are not outweighed, but undermined altogether.³³

It is not altogether clear what justifies taking them to be blocked rather than outweighed. In what sense can the welfare principle be said to be doing its work, reflecting the fact that all welfare matters, if welfare claims do not register at all in the circumstances? The risk is that this response is merely ad hoc.³⁴ But even setting that point aside, not all secondary interests can be addressed in this way anyway. People related to the five in *Bystander* might have fundamental welfare interests in their survival, rather than in their death. The only role that *these* interests could play in moral reasoning about the situation would be as considerations favoring diverting the train towards the person on the side track. But if it were objected that taking them into account as such in moral reasoning treats the person on the side track objectionably as a means, then taking the five's survival into account as considerations favoring diverting the train would also have to count as treating the person on the side track objectionably as a means. Yet it is precisely the fact that it does *not* do this that is supposed to make diverting the train permissible, according to both the standard analysis of *Bystander* and Walen's sophisticated elaboration of it.³⁵

Perhaps some move analogous to the blocking of the claims of the beneficiaries of the five's wills could be made to prevent secondary interests of this sort from giving rise to claims too (though once again that would raise questions about what explains their being blocked rather than merely outweighed). But it is not clear to me what it would be. What is supposed to license the blocking move is in essence the idea that the five's status as

33 Walen (2019, 174).

34 Walen (2019, 174) seems to see the blocking as a reflection of the priority of autonomy. But it is not clear why the priority of autonomy-based claims must imply undermining defeat as opposed to outweighing.

35 Walen (2019, 84–90).

autonomous beings, as ratified in their claims on the agent, stands in the way of their use by the agent as a means to benefit the beneficiaries in the circumstances. The welfare of the beneficiaries cannot give rise to what Walen calls ‘empowering claims’ on the part of agents to use their bodies in such harmful ways. But if the person on the side track is not being objectionably used in the same way to save the five, then the only empowering claims that the welfare of those who would benefit from the five’s *survival* could give rise to would be over the agent or the five themselves. Yet the agent does not need to use the five in the relevant sense, and Walen allows that welfare interests can give rise to empowering claims over agents.³⁶

In any case, restricting the welfare principle to pick up only fundamental welfare interests in the first place calls for further justification if it is not to appear objectionably ad hoc. Walen’s defense of the welfare principle as it stands is simply that people’s welfare matters morally.³⁷ Perhaps he could justify the more restricted welfare principle by saying that welfare matters to *rights* only insofar as it is a matter of fundamental interests. But, as we have seen, the space of rights amounts to almost the entirety of the space of interpersonal morality for Walen. So if all welfare matters from the point of view of interpersonal morality, there seems to be no option in the mechanics of claims but for it to matter to rights.

7 Going Deeper

Let me end with a tentative diagnosis. The difficulties that I have been describing for the mechanics of claims flow, I believe, from Walen’s attempt to combine three commitments. Insofar as these commitments are plausible and widely shared, as I think they are, there is reason to think that the problems that I have presented for the mechanics of claims are also going to be problems for other rights theorists. The difficulties are merely clearer in Walen’s case because he is so careful and systematic in elaborating the mechanics of claims.

The commitments are: (1) a conception of rights that recognizes them as belonging to a special moral domain that is governed by general principles rather as the legal domain is governed by laws; (2) a plausible phenomenology of ordinary interpersonal morality in which others’ welfare interests can be

³⁶ Walen (2019, 22).

³⁷ Walen (2019, 50).

an overriding concern, as in (say) the case of a drowning child whom you can save at no cost to yourself;³⁸ and (3) a conception of interpersonal (directed) wrongs as wholly or at least primarily a matter of rights-violation.

These three commitments combine to give rise to the sorts of problems that I have been describing in the following way. The conception of rights suggests an impartial perspective from which moral reasoning is treated as a quasi-legislative process aimed at maximizing or harmonizing the satisfaction of interests, all of which are counted in the same way from that perspective regardless of whose interests they are or how their bearers relate to one another. This makes it hard to distinguish between primary and secondary interests from that perspective. There is no question, of course, of appealing to prior moral conclusions to establish that secondary interests do not give rise to rights or should otherwise be discounted. So if wronging has to be a matter of rights-violation, as per the third commitment, then the only way for morally important welfare interests to register in interpersonal morality at all (as they must according to the second commitment) is via the quasi-legislative reasoning that belongs to the impartial perspective. So it becomes extremely difficult to rule out secondary welfare interests as irrelevant to wronging.

It may seem difficult to rule out secondary autonomy interests, too. Walen effectively recognizes this concern in seeing the need to explain why two people's claims on an attacker not to be killed by him are not as powerful as claims on a third party who can prevent their killing only by killing a bystander.³⁹ Walen's solution is to emphasize the agent-relativity of claims, which allows claims to vary in strength according to the claimholder's relationship to the agent. The two people being attacked have stronger claims against being killed than they do to the third party's aid, because the claims against being killed are negative claims under the autonomy principle, whereas the claims to aid are positive claims under the welfare principle.⁴⁰ Even if this kind of solution can be made to work in this case, however, it will not help to distinguish between primary and secondary welfare interests, which are both picked up in the mechanics of claims as positive claims under the welfare principle. As I have said, it is not clear to me how else Walen might be able to recognize and appropriately manage the distinction while maintaining the three commitments.

The problems that I have been highlighting take us deeper into moral theory than it might at first seem, therefore. Consider that a possible solution would

38 This is of course the central example in Peter Singer, 'Famine, Affluence, and Morality,' *Philosophy & Public Affairs* 3 (1972): 229–243.

39 Walen (2019, 59).

40 Walen (2019, 58–59).

be to drop the third commitment, allowing for the possibility of wrongings that are not rights violations, and removing the more troublesome welfare claims to this domain, which – we might hope – need not be structured in the same way by ideas of impartiality and legislation that seem internal to the domain of rights. Even if this could be done in a way that left all and only the appropriate welfare claims to be picked up in the space of rights – and it is far from clear that it could – this kind of justification would obviously call for a much fuller exploration of the relationship between the space of rights and wider interpersonal morality than Walen offers, as well as an account of the role that people's welfare interests play in each.

Walen says at one point that any attempt to consign welfare interests to some domain outside the space of rights “just leads to confusion.”⁴¹ But if what I have said is on the right track, we may have to risk that confusion in the hope of eventually emerging from it into greater clarity. It is not as if dropping or modifying either of the other two commitments would be less theoretically demanding.

8 Conclusion

As I have argued, the mechanics of claims represents an advance in the theory of rights, thanks to a structure that allows us to distinguish claims from mere interests – claims being special inputs into moral reasoning that have priority in determining rights and moral permissions. This allows the mechanics of claims to make sense of the phenomenology and normative implications of moral conflicts that are not genuine moral dilemmas, all the while preserving the standard analysis of rights as imposing moral constraints in the form of (directed) moral duties.

But at the heart of the mechanics of claims, the welfare principle threatens to undermine this promise by making such conflicts ubiquitous. There may be ways of limiting this principle or its effects, but it turns out that none of these are straightforward. At best, I have suggested, Walen needs a deeper explanation of the role of welfare in rights and interpersonal morality more broadly, and one that dovetails with an account of the interaction of claims as inputs that explains why what I have called secondary welfare interests are blocked rather than merely weakened by other claims. This will be a challenge, but I think it is worth taking on in order to fulfill the promise that the mechanics of claims holds out. The sophistication, ambition, and insight exhibited by *The*

⁴¹ Walen (2019, 53).

Mechanics of Claims and Permissible Killing in War are cause for optimism that it can be met.

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