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The Scope of the Means Principle

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Abstract

This paper focuses on Quong's account of the *scope* of the means principle (the range of actions over which the special constraint on using a person applies). One of the key ideas underpinning Quong's approach is that the means principle is downstream from an independent and morally prior account of our rights over the world and against one another. I raise three challenges to this 'rights first' approach. First, I consider Quong's treatment of harmful omissions and argue that Quong's view generates counter-intuitive results. Second, I argue that cases of harmful omissions raise problems for Quong's claim that intentions are irrelevant to permissibility. Third, I consider Quong's extension of the means principle to include uses of persons' rightfully-owned *property*. I suggest that, *contra Quong*, questions of distributive justice are not morally prior to the ethics of defensive harm. Instead the two normative domains mutually inform one another.

Keywords

harm – means principle – rights – Jonathan Quong – defensive harm – distributive justice – property

1 Introduction

One of the central contributions of Jonathan Quong's fascinating *The Morality of Defensive Force* is its detailed articulation and defense of the means principle, which holds that there is an especially stringent constraint on harmfully *using* persons. The means principle captures the intuitive difference between,

for example, diverting a runaway trolley away from five people towards one, and pushing one person in front of a trolley to prevent it from hitting the five. While both actions involve killing one and saving five, the latter involves making use of the one in order to save the five. The means principle is thus an important aspect of the broader non-consequentialist idea that the moral status of actions is determined not only by the value of their outcomes, but also the 'mode of agency' by which those outcomes are produced.¹

Quong defends the following formulation of the means principle:

It is morally wrong to harm Y in the pursuit of an objective if doing so involves using Y's body or other things over which Y has a rightful prior claim, unless Y is duty bound to suffer this harm, or has consented to this harm.²

In order to determine when the means principle is violated, Quong proposes the following counter-factual test:

To test whether X's act violates the means principle, we can ask whether X's act could succeed in the absence of Y and Y's rightful property. If the answer is no, then X uses Y as a means.³

Quong's defense of the means principle is not only an independent (and valuable) contribution to moral theory. It also plays an important role within his broader theory of the morality of defensive force. According to Quong, the permission to use force in self-defense has two independent justifications. First, the targets of harm may be *liable* to defensive harm in virtue of posing an unjust threat, and so lack their normal right against harm. Quong's 'Moral Status' account of liability sets out the conditions under which this loss of rights takes place. Second, and more controversially, the targets may retain their usual right against harm, but that right is overridden by the defender's *agent-relative prerogative* to add additional weight to their own interests. This hybrid view allows Quong to shield his account of liability from the objection that it is implausibly restrictive: though the Moral Status account excludes

1 This is not to say that all non-consequentialists endorse the means principle. For skepticism, see, e.g. Uwe Steinhoff, 'Wild Goose Chase: Still No Rationales for the Doctrine of Double Effect and Related Principles,' *Criminal Law and Philosophy* 13, No.1 (2019): 1–25.

2 Jonathan Quong, *The Morality of Defensive Force* (Oxford: Oxford University Press, 2020), p.82. (*MDF* hereafter).

3 *Ibid*, p.178.

some intuitively permissible targets of defensive harm from liability (such as ‘innocent threats’ who lack responsibility for posing a threat), the permissibility of using force is explained by the agent-relative prerogative. However, the standard objection to agent-relative prerogatives is that they will be overly permissive: if one is permitted to kill the innocent in order to preserve one’s life, where does the carnage end? This is where the means principle comes in, as a constraint on the permission to engage in self-preferential harming.⁴ On Quong’s view, our agent-relative prerogatives permit us to harm others only if we do not use them as a means. Hence, Quong’s version of the means principle, his Moral Status account of liability, and his defense of agent-relative prerogatives all hang together.

In this paper, I focus on Quong’s account of the *scope* of the means principle, by which I mean the range of actions over which the special constraint on using a person applies. One of the key ideas underpinning Quong’s approach is that the means principle depends on an independent and morally prior account of our rights over the world and against one another.⁵ On this view, we first determine what we owe to one another as a matter of inter-personal and distributive justice. This account of our rights then determines the scope of the means principle: the stringent constraint on harmfully using persons applies only to usings which violate an independently-grounded right. This approach to the means principle exemplifies a major theme running throughout *The Morality of Defensive Force*: that “we cannot understand the principles regulating the use of defensive force in isolation from wider-questions about the just distribution of rights over persons and property.”⁶

In what follows I raise a series of challenges to this ‘rights-first’ approach. First, I consider Quong’s treatment of harmful *omissions* under the means principle. On Quong’s view, failing to aid a person only falls within the scope of the means principle if the subject of the omission has a right to be aided. I argue that this ‘rescue proviso’ generates counter-intuitive results: there seem to be clear cases of wrongful use in which the subject has no independent right to aid.

4 Of course, the agent-relative prerogative is also constrained by the amount of weight that one may add to one’s own interests.

5 For a similar view that the constraint on using persons “only pronounces on the moral status of various actions when supplemented by an independent account of the claims we have in various circumstances,” see Ketan Ramakrishnan, ‘Using People as Tools,’ *Philosophy and Public Affairs* 44, No.2 (2016), 133–165, at p.157, n.33.

6 Quong *MDF*, p.7.

Second, I use the case of harmful omissions to cast doubt on another aspect of Quong's means principle. Unlike some defenders of the means principle, Quong holds that the wrong of using someone does not depend on the intentions or motives of the agent. It depends only on whether the agent's actions satisfy an objective standard of conduct (captured in Quong's rights-sensitive counter-factual test). I point out that there are cases of harmful omissions in which the agent's intentions seem crucial to whether their act violates the constraint on using a person.

Third, I consider Quong's extension of the means principle to harmful uses of persons' rightfully-owned *property*, and not just their bodies. I suggest that the relationship between the morality of harming and distributive justice may be more complex than Quong alleges. Rather than the morality of harming lying downstream from a prior account of distributive justice, the two normative domains interact and inform each another. My central contention is the question of what counts as a just allocation of property is itself sensitive to whether or not the constraint on harmful use applies to the use of property. On this alternative picture, the means principle partly *informs* a theory of distributive justice, rather than simply *reflecting* an independent theory of our distributive entitlements.

2 Omissions and the Means Principle

Quong's position on the application of the means principle to omissions is developed in response to the following case, proposed by Ketan Ramakrishnan:

Room: Five people and one other person, Archibald, are suffering from a deadly virus. Waldo has enough medicine to save the five or to save Archibald, but not both. For Archibald has an especially malicious strain of the virus, and curing him would thus require Waldo's entire stock of medicine. Archibald's legs are in the doorway to the room that contains the five, keeping the door ajar; if Archibald's legs were not in the doorway, the five people would be inaccessible to Waldo, and Waldo would be unable to treat them. Waldo chooses to save the five instead of Archibald.⁷

⁷ Ramakrishnan, 'Using People as Tools,' p.146. Ramakrishnan is responding to Quong's earlier presentation of his view. Jonathan Quong, 'Killing in Self-Defense,' *Ethics* 119, No3 (2009): 507–537.

Ramakrishnan objects that Quong's test for violations of the means principle counter-intuitively implies that it is impermissible for Waldo to save the five: since Waldo would not be able to save the five if Archibald were absent, Quong's counter-factual test appears to classify saving the five as a violation of the means principle.

Quong agrees that this would be an unwelcome result, but denies that it is in fact an implication of his view. He points out that his formulation of the means principle applies to *causing* harm, and not *allowing* harm to occur. Quong argues that only *some* omissions fall within the scope of the means principle:

Waldo does not harm Archibald, he merely fails to save him, and thus his act is not prohibited by the means principle. The means principle does not prohibit failures to save a victim *unless the victim has a right to be rescued or provided with resources*. Thus, the means principle only prohibits Waldo's act in Room if Archibald has a right to the medicine or a right to be rescued by Archibald.⁸

On Quong's view, in order to bring a harmful omission within the scope of the means principle, we must establish an independent right to be aided on the part of the harmed party.⁹ And, by hypothesis, Waldo lacks a right to be rescued in the *Room* case. If, for example, Waldo were Archibald's bodyguard and had sworn to protect him, then Waldo *would* violate the means principle by saving the five. But absent rights to be aided, omissions are not covered by the means principle.¹⁰

However, while this 'rescue proviso' seems to allow Quong's means principle to deal with cases like *Room* (I will revisit this assumption below), it runs into problems with other, more central, cases. Consider:

⁸ Quong, *MDF*, p.194. My emphasis.

⁹ For a discussion of Quong's account of the right to be rescued, see Lisa Hecht's contribution to this symposium.

¹⁰ Warren Quinn and Larry Alexander also endorse the 'independent right' condition on whether omissions violate the means principle (as well as a broadly 'right-first' approach to the means principle in general). Warren Quinn, 'Actions, Intentions and Consequences: The Doctrine of Double-Effect,' *Philosophy and Public Affairs* 18, No.4 (1989): 334–351, at p.346; Larry Alexander, 'the Means Principle' in Ferzan, K.K. and Morse, S.J. (eds), *Moral, Legal, and Metaphysical Truths: The Philosophy of Michael Moore* (Oxford: Oxford University Press, 2016): 251–264 at p.261. See also Niko Kolodny, 'Political Rule and Its Discontents' in Sobel, D., Vallentyne, P. and Wall, S (eds) *Oxford Studies in Political Philosophy: Vol 2* (Oxford: Oxford University Press, 2016): 35–70, at p.46.

Icy Trolley: In icy conditions, an out of control trolley is heading towards five innocent people who will be paralysed if it hits them. Sarah wants to save the five, but she cannot divert the trolley. However, another innocent person – Billy – has just slipped on the icy pavement and is uncontrollably sliding into the path of the trolley. If the trolley hits Billy, his body will slow the trolley and the five will be saved. But Billy will be paralysed. Sarah can easily reach out and stop Billy from sliding into the path of the trolley. Sarah refrains from saving Billy in order to save the five.¹¹

I assume that it is morally wrong for Sarah to fail to save Billy in this case. Moreover, the wrong is grounded in the fact that Billy would be *used* for the sake of the five. Failing to rescue Billy seems morally on a par with pushing Billy into the path of the trolley. Applying Quong's initial counter-factual test, we get the intuitively correct result: If Billy were absent, Sarah could not succeed in saving the five. Hence, Sarah violates the means principle.

However, on Quong's view, we also need to establish that Billy has a right to be rescued in order to account for this judgement. Note that we cannot claim that Billy has a right to be saved *because* failing to save him would involve using him as a means. This would be circular. For Quong, the fact that an individual has a right to be saved is meant to explain when and why the constraint on using comes into effect.

The problem is that it is not clear why Billy would have such a right. Excluding the fact that Billy will be used to save the five, the *Icy Trolley* case is morally equivalent to a case where Sarah must choose between saving one or saving five from independent threats. Consider:

Icy Trollies: Trolley A will hit five innocent persons and paralyse all five. Trolley B is also hurtling down a hill, where Timmy has slipped on the ice and will fall into the Trolley B's path and be paralysed. Sarah can stop one trolley, but not both. Sarah refrains from saving Timmy in order to save the five.

I take it as uncontroversial that Sarah is permitted to allow Timmy to be paralyzed in this case. Moreover, Sarah does not permissibly *infringe* a right of Timmy's to be rescued. Rather, Timmy has no right against Sarah that she

¹¹ Based on a case of Victor Tadros's. See *The Ends of Harm* (Oxford: Oxford University Press, 2011), p.122. For other cases of allowing-as-a-means, see Quinn, 'Actions Intentions and Consequences,' p.236; Ramakrishnan, 'Using People as Tools.'

rescue him in the first place, in virtue of the fact that rescuing Timmy precludes rescuing the five.

Here are two arguments for the claim that Timmy lacks a right to be rescued by Sarah in *Icy Trollies*. First, and following many theorists (including Quong), I take it as a hallmark of a permissible infringement of a right that the right-holder is owed compensation for being wronged (or some other remedial measure).¹² But it seems obvious that Sarah does not owe Timmy any special compensation for failing to save him.

Second, differences in the conditions for permissibly harming, compared to permissibly not-aiding, also indicate that Timmy lacks a right to be aided. In cases of harming, it is intuitively permissible to harm one person as the lesser evil only if it prevents *significantly* greater harm to others.¹³ Consider, again, the case of diverting a runaway trolley from five towards one. While it seems permissible to kill one to save five, it seems impermissible to kill four to save five. By contrast, when it comes to choices between saving a greater or smaller number of persons from harm, it seems permissible to save the greater number even if it is only marginally greater. For example, it seems clearly permissible to rescue five rather than four (or, indeed, to rescue 100 rather than 99). Since another hallmark of a right is that it is resistant to marginal trade-offs,¹⁴ this is good evidence that persons typically lack a right to be rescued when doing so would preclude rescuing a greater number.¹⁵

These points illustrate how rights against harm work differently to rights to be aided. Whereas rights against harm *persist* in cases where the importance of aiding a greater number justifies inflicting harm on an innocent person as the lesser evil, rights to be rescued are *extinguished* by the importance of aiding a greater number of persons.

Given that Timmy has no right to be rescued in *Icy Trollies*, it is hard to see why Billy would have a right to be rescued in *Icy Trolley* (independent of the fact that failing to rescue him would involve using him as a means). In each case, the interests of one are opposed by the similar interests of five. If the

12 Quong accepts this view. *MDF*, p.14.

13 As Helen Frowe explains: “Lesser-evil justifications obtain when one will prevent substantially more harm than one causes, such that the disparity between the harm and the good overrides the deontological presumption against causing harm.” Helen Frowe, ‘Claim Rights, Duties and Lesser-Evil Justifications,’ *Proceedings of the Aristotelian Society* 89 (2015): 267–85, at p.274.

14 Quong accepts this view. *MDF*, p.14.

15 The exception being cases where the right to be rescued is grounded in, e.g. a promise or special relationship between the rescuer and rescuee, and not simply the agent-neutral value of the rescuee’s life and well-being.

interests of the five extinguish Timmy's right to be rescued, they should do the same with respect to Billy. I cannot see a way of morally differentiating the two cases without appealing to the fact that Billy, but not Timmy, would be used as a means to save the five.

If this is correct, then we cannot extend the means principle to omissions by appealing to prior rights in the way that Quong claims. To differentiate *Icy Trolley* from *Icy Trollies*, we can either: (i) accept that there is no right to be rescued in both cases, and appeal to wrongful use directly to explain why failing to rescue Billy is impermissible, or (ii) appeal to the means principle directly to explain *why* Billy (and not Timmy) has a right to be rescued.¹⁶ But neither of these strategies are available to Quong. The case of omissions suggests, *contra Quong*, that the relationship between rights and the scope of the means principle is not unidirectional: the means principle does not simply *track* a pre-existing account of our rights, it also *informs* the initial assignment of rights.

This general lesson also illuminates why Quong's strategy for dealing with cases like *Room* will not do. The reason why Archibald lacks a right to be rescued by Waldo is presumably that rescuing Archibald would preclude saving the five, who collectively have a stronger claim to be rescued. (If the five were not present, then Waldo would intuitively have a right to be rescued, since saving him would be costless and we have rights to easy rescue).¹⁷ But focusing on prior rights to rescue renders *Room* equivalent to cases like *Icy Trolley*, which are paradigm cases of wrongful use. In both cases, Quong's counter-factual test for using is met (it would not be possible to save the five in the absence of the one) and the prior rescue-claims of the one are opposed by the prior rescue-claims of five. If the claims of the five extinguish Archibald's right to rescue in *Room*, they should also extinguish Billy's claim in *Icy Trolley*. So, either both cases are instances of wrongful use, or neither are. This shows that any solution to the *Room* case will have to focus on revising the counter-factual test, rather than the assignment of independent rights to rescue. In order to explain why the means principle condemns allowing Billy to be harmed, but not Archibald (and thereby derivatively explains *why* Archibald, but not Billy,

16 If I understand him correctly, Ramakrishnan takes the latter approach to these cases: the fact that the five would be saved via the use of Billy's body diminishes the strength of their claims to rescue, such that Billy's right to rescue is undefeated. Ramakrishnan, 'Using People as Tools,' pp.149–150. Alec Walen's distinction between 'restricting' and 'non-restricting' claims (which is extensionally similar to the means principle) also seems to build the distinction into the determination of what rights people have. Alec Walen, 'Transcending the Means Principle,' *Law and Philosophy* 22, No.4 (2014): 427–464.

17 Quong accepts the existence of rights to easy rescue. *MDF*, p.185.

lacks a right to rescue) we need to identify some quasi-causal difference in the relationship between the harmful omission to the one and the benefit to the five. This difference will have to be more fine-grained than counter-factual dependence.¹⁸

3 Omissions and Intentions

The case of harmful omissions also raises problems for another aspect of Quong's account of wrongful use. One issue that divides defenders of the means principle is whether the constraint on harmfully using a person depends on the agent's intentions or motivations. Proponents of a 'subjective' interpretation of the means principle hold that the wrong of using a person is partly grounded in the wrong of taking up an instrumentalizing attitude towards one's victim.¹⁹ Defenders of an 'objective' interpretation, such as Quong, argue that an agent's mental states are irrelevant to whether their actions violate the means principle. All that matters is whether the agent's actions satisfy some objective standard of conduct, such as that captured in Quong's counter-factual test.²⁰

I contend that cases of harmful omissions provide some support for an intention-based interpretation of the means principle. Consider:

Costly Icy Trolley: Billy slips on the icy pavement and starts sliding into the path of an oncoming trolley, which will paralyse him. Sarah can easily reach out and grab Billy, preventing him from being hit by the trolley. However, if she does so her arm will be ripped off by the force. Sarah is willing to bear the cost of rescuing Billy and reaches towards him. However, at that moment she spots five people down the tracks, who will be paralysed if the trolley hits them. She refrains from rescuing Billy, in order that his body be hit by the trolley, thereby saving the five.

I find it intuitively obvious that Sarah acts impermissibly by allowing Billy to be harmed. Just as in the original *Icy Trolley* case, Sarah wrongfully uses Billy

18 For one such attempt, see Ramakrishnan, 'Treating People as Tools,' esp. Section II.

19 See, e.g. Tadros, *Ends of Harm*, Chs.6&7; Quinn, 'Actions Intentions and Consequences.' See also, Ramakrishnan, 'Using People as Tools,' p.152.

20 Quong, *MDF*, p.8; pp.187–189. For other proponents of the objective interpretation, see, e.g. Walen, 'Transcending the Means Principle' and Alec Walen 'The Restricting Claims Principle Revisited: Grounding the Means Principle on the Agent-Patient Divide,' *Law and Philosophy* 35, No.2 (2016): 211–247; Alexander, 'The Means Principle,' p.261.

as a means to save the five.²¹ But it seems hard to account for this judgement within Quong's version of the means principle.

One initial problem is independent of the intentions debate. This is simply another version of the problem discussed in the previous section: in this case, the means principle is intuitively violated, but it is not clear that the victim has an independent right to be rescued. Since we only have rights to be rescued *at a reasonable cost* to the rescuer, Billy presumably has no right to be rescued by Sarah (on the assumption that an individual is not required to sacrifice an arm to prevent one person from becoming paralyzed). Just as rights to be rescued can be extinguished by the importance of saving a greater number (as in *Icy Trollies*), they can also be extinguished by the costs to the rescuer. So if a violation of the means principle requires the presence of an independent right to be rescued, it is hard to explain how Sarah acts wrongly. This again suggests that whether an action involves using a person as a means plays a direct role in determining the moral status of actions.²²

However, the main conclusion I want to draw from cases like *Costly Icy Trolley* is that the violation of the means principle seems to crucially depend on the agent's plans and intentions. Consider a variation on the case in which Sarah is aware of all the facts, but refrains from rescuing Billy only because she is unwilling to bear the supererogatory cost of losing her arm. In this case, I find it intuitive that Sarah does not act morally wrongly. But the only difference between the two cases is the intention with which Sarah acts: whether she allows Billy to be paralyzed *for the sake of her arm* or *for the sake of the five*. Since Sarah's conduct is identical in both cases, it is hard to see how objective versions of the means principle such as Quong's can account for the intuitive difference in permissibility.²³ By contrast, versions of the means principle which incorporate a mental-state component are well-placed to do so: When Sarah refrains from saving Billy for the sake of her arm, she does not incorporate Billy into her plans, nor take up an instrumentalizing attitude towards

21 Quinn suggests in passing that, in cases of this kind, it is permissible to refrain from aiding, but does not give a concrete example. Larry Alexander also agrees that failing to carry out a supererogatory rescue cannot violate the means principle. I think that cases like *Costly Icy Trolley* show this to be very counter-intuitive. Quinn, 'Actions Intentions and Consequences,' p.346; Alexander, 'The Means Principle,' p.261.

22 After writing this paper, I discovered that Jeff McMahan makes a very similar objection to Quinn's 'independent right' condition for violations of the Doctrine of Double Effect. Jeff McMahan, 'Revising the Doctrine of Double Effect,' *Journal of Applied Philosophy* 11. No.2 (1994): 201–212, esp. Section III.

23 For analogous points, see McMahan, 'Revising the Doctrine of Double Effect.'

him.²⁴ Cases of supererogatory rescue thus speak in favor of including some role for intentions within the means principle.²⁵

4 Distributive Justice and the Means Principle

One of the most interesting, and controversial, features of Quong's version of the means principle is that it applies not only to the use of persons' bodies, but also to harmful uses of persons' rightfully-owned property.²⁶

Quong appeals to the following pair of cases to support this extension:²⁷

Driftwood: Albert and Betty are each at risk of drowning in the open ocean. There is a piece of driftwood floating nearby, but it is very small, and only one person can use it to remain afloat until help arrives. Albert swims more quickly than Betty, and gets to the driftwood first. As a result, he survives and Betty drowns.

Life Jacket: Albert and Betty are each in the open ocean. Betty is wearing her life jacket (purchased with her fair share of resources). Albert, however, has no life jacket and will not survive without one. Albert swims over and steals Betty's life jacket. As a result, he survives and Betty drowns.

It seems intuitive that Albert acts permissibly in the first case, yet wrongly in the second (or at least there is clear moral asymmetry between the two cases). Quong argues that the wrong-making feature of the second case is that it involves the harmful use of Betty's rightful property, and that the wrong is of the same type that obtains in paradigm cases of wrongfully using a person's body (such as pushing someone in front of a trolley to save others).

24 Tadros, *Ends of Harm*, pp.153–154.

25 Of course, this is not a conclusive argument. As Quong points out, views which make instrumentalizing intentions *necessary* for violations of the means principle will also face tricky cases (*MDF*, pp.178–179).

26 Quong also includes the use of the physical space a person occupies. For other proponents of a property-inclusive means principle, see Walen 'Transcending the Means Principle'; Walen, 'The Restricting Claims Principle Revisited'; and Alexander, 'The Means Principle.' Judith Jarvis Thomson, though skeptical of the means principle, also holds that there is an especially stringent constraint on harmful use of a person's property. 'The Trolley Problem,' *Yale Law Journal* 94 (1985): 1395–1415, at pp.1409–1412.

27 Quong, *MDF*, pp.181–182. See also, pp.3–15, pp.183–187; pp.207–208.

Quong's extension of the means principle to property is perhaps the clearest example of his general view that "we cannot understand the principles regulating the use of defensive force in isolation from wider-questions about the just distribution of rights over persons and property."²⁸ Importantly, Quong does not merely think that the morality of defensive harm and distributive justice inhabit the same unified normative domain; he also holds that distributive justice has a certain kind of priority over principles of defensive harm. As he puts it:

[T]he common purpose of [defensive] acts is to defend people's rightful entitlements – they enable people to defend what is rightfully theirs as determined by the appropriate principles of social or distributive justice.²⁹ Principles of distributive justice allocate to each person rights to control a fair share of the world. The special prohibition against harmfully using a person's body or property is a reflection of this more general idea.³⁰

On Quong's general picture, the morality of defensive harm is downstream from a prior account of our rightful entitlements over the world.³¹ Principles of social and distributive justice come first, and the morality of defensive harm (and the constraint on using persons in particular) comes later. On this view, the means principle itself has no distributive implications. It simply reflects whatever the correct theory of distributive justice and property rights happens to be.

4.1 *Counter-Intuitive Implications*

Extending the means principle to property has implications that strike many as implausible. One kind of example is prominent in the literature:

Trolley Tool: A trolley is heading towards five innocent people who will be killed if it hits them. Bystander can divert the trolley onto a side-track where Barry is standing. Diverting the trolley requires the use of Barry's wrench, which is lying nearby.³²

²⁸ Ibid., p.7.

²⁹ Ibid., p.7.

³⁰ Ibid., p.207.

³¹ Walen seems to endorse a similar general view. 'The Restricting Claims Principle Revisited,' at pp.234 & 240.

³² This kind of case is discussed in Thomson, 'The Trolley Problem,' p.1411; Walen, 'Transcending the Means Principle,' p.455; S. Matthew Liao and Christian Barry, 'A Critique of Some Recent Victim-Centered Theories of Non-Consequentialism,' *Law and Philosophy* 39, No.3 (2020): 503–526, at pp.523–524; Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press,

According to Quong's version of the means principle, it is impermissible for Bystander to divert the trolley in this case, since it would not be possible to save the five in the absence of Barry's rightful property. For Quong, using Barry's wrench to divert the trolley towards Barry is morally on a par with pushing Barry in front of the trolley in order to prevent it from hitting the five. Even some defenders of extending the means principle to property find this counter-intuitive, and attempt to qualify the kinds of property over which the means principle applies.³³

Quong, however, is unmoved and concludes that we should accept this verdict in this kind of case.³⁴ Below I will offer some more theoretical considerations against Quong's extension of the means principle to property, but first let me point out an even more striking implication of Quong's view. Consider:

Three-Track Trolley: A trolley is heading towards 15 innocent people who will be killed if it hits them. The track has two side-tracks. Bystander can either lethally divert the trolley towards innocent Barry who is standing on the first side-track (Option 1), or towards three innocent people standing on the second side-track (Option 2). Diverting towards Barry requires the use of Barry's wrench, which is lying nearby. Diverting towards the three innocent people requires the use of an unowned tree branch.

On Quong's view, Option 1 is morally equivalent to pushing Barry in front of the trolley to save the 15 and is therefore impermissible.³⁵ Now consider Option 2. Since (by hypothesis) it is permissible to kill one person as a side-effect of saving five (as per the standard trolley case), it is presumably also permissible to kill three as a side-effect of saving 15. So, in virtue of Barry's property right in his wrench, the only permissible way for Bystander to save the 15 is to divert the trolley towards three innocent persons rather than one.³⁶

2014), p.62; F.M. Kamm, 'Harming Some to Save Others,' *Philosophical Studies* 57, No.3 (1989): 227–260, at. pp.229–230.

33 Walen, 'Transcending the Means Principle,' p.455.

34 Based on conversations with Quong and *MDF*, pp.191–193.

35 Recall that according to Quong's formulation of the means principle, it would only be permissible to lethally use Barry as a means to save the 15 if Barry is duty-bound to suffer this cost for the sake of the 15 (or if he had consent to being used). I assume that we are not required to sacrifice our lives for the sake of saving 15 lives.

36 The only options I can see for Quong to resist this implication is to argue either: (i) that Option 1 becomes permissible conditional on the presence of Option 2 or (ii) that Option 2 becomes impermissible conditional on the presence of Option 1 (i.e. Bystander is required to allow the 15 to die). But I cannot see any plausible rationale for either move.

Whereas cases like *Trolley Tool* illustrate how a property-inclusive means principle sometimes requires agents (counter-intuitively) to *refrain* from killing (and thereby allow a greater number of persons to die), *Three-Track Trolley* shows that the principle also permits agents to *kill* a significantly greater number of persons in order to save lives, compared to a property-exclusive means principle.³⁷ This seems far more counter-intuitive.

4.2 *The Relationship between the Means Principle and Distributive Justice*

Putting aside intuitions about particular cases, I want to focus on Quong's more general picture of the relationship between the morality of harm and principles of distributive justice. One interesting issue, which Quong himself raises, is what we should say about the morality of harm (and the means principle in particular) in situations where the conditions of distributive justice are not met (which likely includes all real-world societies).³⁸ This will require a novel theory of property rights under background injustice. But I want to consider a more fundamental challenge, which holds even under ideal conditions. The challenge addresses Quong's picture of distributive justice as morally prior to principles of permissible harm. Rather than conceiving of the morality of harm as downstream from a theory of our just entitlements over the world, my suggestion is that the morality of harm (the means principle in particular) may itself play a role in determining the correct principles of distributive justice.³⁹ On this view, there is a bidirectional relationship between the morality of harm imposition and distributive justice, in contrast to the unidirectional model which Quong endorses.

What exactly is the difference between the unidirectional and bidirectional views? And what exactly needs to be shown in order to support the bidirectional view? Here is a test to help make the idea more precise.

37 More strongly, if agents are (at least sometimes) required to act on lesser-evil justifications for harming, then Quong's means principle entails that property rights entail that agents are sometimes required to kill a larger number of innocent people in order to prevent harm to others. For a defense of the requirement to act on lesser-evil justifications, see Helen Frowe, 'Lesser-Evil Justifications for Harming: Why We're Required to Turn the Trolley,' *Philosophical Quarterly* 68, No.272 (2018): 460–480.

38 Quong, *MDF*, p.13.

39 Larry Alexander also suggests that the means principle has distributive implications. 'The Means Principle' (see, in particular, section VIII of the SSRN version of this paper, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2378608). My argument differs in that it does not rely on connecting the means principle to self-ownership, as Alexander does. On the view I propose, reflection on the means principle gives rise to a distinctively egalitarian distributive concern.

Imagine two worlds, which are identical except for one difference in their moral systems. In World A, the means principle covers the use of persons' bodies only. In World B, the means principle covers both the use of person's bodies and their property (in the manner defended by Quong). Apply the following test: Is there some distribution of property rights which would be morally acceptable in World A, but not in World B? If we answer 'no,' then this supports Quong's unidirectional view. But if the answer is 'yes,' then this would show that the unidirectional view is false: what counts as one's 'fair share of the world' itself depends on the implications of that distribution for the morality of harm. If so, we cannot straightforwardly derive conclusions about permissible harm from a prior and independent theory of our distributive entitlements.

I contend that we should answer this test in the affirmative. The argument has two parts. The first simply posits (what I take to be) a fairly widely-accepted general view about the justification of property rights and distributive entitlements (and one which I think Quong would be sympathetic to). On this approach, we evaluate a property system by considering the extent to which it serves important interests (defined broadly) and reflects various values, as well the various complaints that may be raised against such a system. We then do the same for alternative possible property systems. Lastly, we appeal to some more general moral theory to determine whether the balance of benefits and complaints justifies that particular system, compared to some alternative.⁴⁰

To illustrate the idea: Consider a property system which grants individuals strong rights to exclude others from previously unowned objects via acts of acquisition. Such a right may be valuable for several reasons (it serves our autonomy, enables us to meet our needs, incentivizes productive use, etc.). But it also seems subject to legitimate complaints. Most obviously, those who are constrained by others' property rights may be unable to meet their important needs.⁴¹ Given this objectionable feature of the system, justifying the system

40 For a helpful discussion, see Leif Wenar, 'Original Acquisition of Private Property,' *Mind* 107, No.428 (1997): 799–820 at pp.801–802. This approach obviously excludes strong libertarian or historical entitlement views, since it offers a broadly instrumental justification of property rights.

41 This is not to say that *every* act of acquisition places the same kind of burdens on the property-less. Some acts of acquisition may only be possible for certain agents and impossible for others. In such cases, one agent's acquisition does not deprive others of the opportunity to use the object. (Of course, the property-less might nonetheless have a legitimate claim that the property-holder share the value of the property).

may require the strong right to appropriate be qualified in various ways.⁴² By contrast, in a world in which the objectionable feature was absent (if, for example, we could meet our basic needs without the use of external objects, or if the means of meeting our needs fell like manna from heaven), the stronger right might be justified.

The second, more substantive, part of the argument holds that a moral system in which property is included within the scope of the means principle (World B) would be subject to additional legitimate complaints, compared to an otherwise-identical system in which the means principle is restricted to the use of person's bodies (World A). In virtue of these additional complaints, the former property system (but not the latter) requires revision in order to be all-things-considered justified. Hence, the inclusion of property within the means principle itself informs and shapes our rights to control parts of the world.

I contend that a moral system which includes a property-inclusive means principle would be objectionable in (at least) two important respects, relative to a system governed by a property-exclusive means principle.

First, such a system would involve an additional and objectionable degree of *unilateralism*. The basic idea is that under a property-inclusive means principle, our property acquisitions would impose a particular kind of externality or cost on others. The appeal to externalities is common in debates about the justification and limits of property rights. As mentioned above, any system which contains strong rights of acquisition threatens to set back the interests of those who are, to use Waldron's phrase, "acquisitively handicapped."⁴³ But, in addition, a system of property rights may be objectionable in virtue of its purely *normative* externalities, independent of its effects on others' material interests. For example, under a moral system that includes property rights, each property owner is enabled to unilaterally change the normative situation of others at will. Most obviously, by acquiring a previously unowned object, an individual thereby imposes stringent duties on other persons (without their consent) not to use that object.⁴⁴

42 See Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988), pp. 265–277. Quong takes a similar view: our rights to control parts of the world are limited by a duty to rescue others at reasonable cost. *MDF*, p.185.

43 Waldron, *The Right to Private Property*, p.277.

44 On this issue, see Bas van der Vossen, 'Imposing Duties and Original Appropriation,' *The Journal of Political Philosophy* 23, No.1 (2015): 64–85; Hugh Breakey, 'Without Consent: Principles of Justified Acquisition and Duty-Imposing Powers,' *The Philosophical Quarterly* 59, No.207 (2009): 618–640. See Lisa Hecht's contribution to this symposium for an application of this worry to Quong's account of the duty to rescue.

Of course, we might wonder how morally troubling these sorts of externalities really are. After all, by purchasing a bar of chocolate, I thereby unilaterally alter the normative situation of every person on Earth. But it is not obvious that this generates any serious complaints. My claim, however, is that a property-inclusive means principle introduces an additional and distinctive normative externality into a property system. The key idea is that a moral system governed by a property-inclusive means principle gives individuals an objectionable degree of influence over others' moral protections.⁴⁵ This type of externality is most clearly illustrated by the *Trolley Tool* and *Three-Track Trolley* examples discussed earlier. Consider *Three-Track Trolley*. Under a system where property falls within the scope of the means principle, Barry's acquisition of an item of property (his tool) makes it the case that the killing of three innocent persons is morally justified (or even required) as the lesser evil, rather than the killing of one person (Barry). Under such a system, property acquisitions serve to increase the property-holder's moral protection against harm, but correspondingly decrease the comparative moral protection enjoyed by others (one's property acquisitions significantly affect the permissibility of third parties harming others *rather than* oneself).⁴⁶ I contend that a moral system governed by a property-inclusive means principle would be subject to legitimate complaints for this reason. Note that this objection need not be grounded in a concern for what would actually *happen* to individuals (in terms of their likelihood of being harmed or saved from harm) under a property-inclusive means principle, relative to a property-exclusive means principle. Rather, the guiding thought is a concern for the moral status that we would enjoy under the two systems. As non-consequentialists such as Frances Kamm, Thomas Nagel, and Warren Quinn have argued, we care not only about what is done to us, but what it is *permissible* to do to us (i.e. the nature of the moral constraints on doing things to us).⁴⁷ In the same vein, my suggestion is that we have a similar non-instrumental interest in the range of factors to which the constraints on

45 On this point, see Thomas Nagel, 'Personal Rights and Public Space,' *Philosophy and Public Affairs* 24, No.2 (1995), 83–107; Frances Kamm, 'Non-Consequentialism, the Person as an End in Itself, and the Significance of Status,' *Philosophy and Public Affairs* 21, No.4 (1992), 354–389.

46 Walen also appeals to the idea of moral externalities in constructing his 'restricting claims principle,' though with a different purpose to mine. See Walen 'The Restricting Claims Principle Revisited,' p.215.

47 Thomas Nagel, 'Personal Rights and Public Space,' *Philosophy and Public Affairs* 24, No.2 (1995), 83–107; Frances Kamm, 'Non-Consequentialism, the Person as an End in Itself, and the Significance of Status,' *Philosophy and Public Affairs* 21, No.4 (1992), 354–389; Warren Quinn, 'Actions, Intentions and Consequences: The Doctrine of Doing and Allowing,' *The Philosophical Review* 98, No.3 (1989): 287–312.

harming us are sensitive. To the extent that others are able to control the shape of the constraints on harming us (and saving us), our moral status is less secure than under a moral system where others lack this ability.

This kind of externality is particularly striking on Quong's account of the normative upshots of our property rights. In articulating his rationale for the means principle, Quong writes:

Assume that some part of the world, P, rightfully belongs to B according to the correct principles of distributive justice. To make use of P without B's consent is to appropriate some of B's fair share of control over the world, and is wrong for that reason. *The fact that P would be useful to achieve some goal, G, simply cannot serve as a reason to use P without B's consent. The very purpose of having rights to control a fair share of the world is to block this fact from serving as a reason.* To allow P's usefulness to serve as a reason to use P without B's consent is to give up on the idea that each person has a sphere of independence where her decisions are sovereign.⁴⁸

On Quong's view, then, our legitimate property acquisitions have impressive moral power. An acquisition not only renders it impermissible to achieve morally important goals (such as saving many lives), but *extinguishes* the reason-giving force of those goals. The fact that *my* property acquisitions have the normative upshot that saving *your* life fails to be reason-giving (in certain circumstances) strikes me as a non-trivial externality, which should be taken into consideration when justifying a property system that makes this externality possible. This externality seems particularly objectionable on a view, such as Quong's, which gives a central role to the ideal of persons as fundamentally independent.

The second objection to a moral system governed by a property-inclusive means principle builds on the first. It holds that the ability to influence others' moral protections is additionally morally objectionable if that system also permits some degree of distributive inequality (as most plausible theories of distributive justice do). Put simply, it is one thing if persons have equal opportunities to unilaterally increase their moral protections relative to others via property acquisitions, but quite another if some persons have this ability while others do not (or not to the same degree). More specifically, a moral system containing a property-inclusive means principle would, under conditions of

48 Quong, *MDF*, p.184. My emphasis.

distributive inequality, introduce an additional form of hierarchy among persons, whereby (i) more-proprieted individuals would enjoy stronger comparative moral protections against harm than less-proprieted individuals, and (ii) the moral protections enjoyed by the less-proprieted would be (however unintentionally) at the mercy of the wills of the more-proprieted.⁴⁹ On this picture, World B would be subject to a *sui generis* egalitarian complaint, absent in World A, despite both worlds containing identical distributions of property.

This complaint is distinct from the diverse range of objections to inequality identified in the egalitarian literature.⁵⁰ Given that the problem with World B lies in its hierarchical structure, it is natural to think of the complaint as tracking a 'relational' conception of equality's value. On this view, very roughly, the value of equality is grounded in the value of living together as equals, in which none are treated as 'above' or 'below' any other, and where all can publicly 'look one another in the eye' without shame or servility.⁵¹ But the specific form of hierarchy present in World B differs from typical relational egalitarian concerns with social equality in two important respects. First, relational equality is typically treated as separate from questions of distributive equality. By contrast, the form of hierarchy present in World B is inseparable from distributive concerns; the relational inequality that infects World B *supervenes* on the allocation of property. Second, for relational egalitarians, the enemies of social equality are social facts. Social inequality is ultimately a matter of how people behave and the social norms and expectations that shape their interactions.⁵² By contrast, the objectionable hierarchy present in World B is purely *normative*. What offends us about World B is that the decisions of the economically advantaged have a particular moral upshot: they non-causally influence the comparative moral protections from harm enjoyed by others. This objectionable feature does not inhere in any social interactions between members of World B, nor need it

49 Waldron, *The Right to Private Property*, p.275.

50 On the diversity of objections to inequality, see Thomas Scanlon, *Why Does Inequality Matter?* (Oxford: Oxford University Press, 2018).

51 See, e.g. Elizabeth Anderson, 'What's the Point of Equality?,' *Ethics* 109, No.2 (1999): 287–337; Jonathan Wolff, 'Fairness, Respect, and the Egalitarian Ethos,' *Philosophy and Public Affairs* 27, No. 2 (1998): 97–122; Samuel Scheffler, 'What Is Egalitarianism?,' *Philosophy and Public Affairs* 31, No.1 (2003): 5–39; Martin O'Neill, (2008). 'What Should Egalitarians Believe?' *Philosophy & Public Affairs* 36, No. 2 (2008): 119–156. The 'eyeball test' is from Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012), p.84.

52 On the role of norms in social hierarchies, see Han van Wietmarschen, 'What is Social Hierarchy?,' *Nous* (2021) <https://doi.org/10.1111/nous.12387>.

influence any such interactions.⁵³ Hence, while the distinctive egalitarian complaint present in World B is relational in structure, it is also tightly connected to distributive concerns, as well as the ideal of basic equality (that all persons possess the same fundamental moral worth).

With the unilateralism and inequality objections in hand, we are now in a position to explain how the scope of the means principle may itself inform and shape our rights to control parts of the world. As Quong himself puts it, "The scope of these rights is sensitive to the total costs these rights can impose on others."⁵⁴ What the unilateralism and inequality objections reveal is that the costs of an otherwise-identical allocation of property rights differ depending on whether a property-inclusive (World B) or property-exclusive (World A) version of the means principle is in operation. Given the different costs of each system, we should expect that the justificatory conditions for each system will also differ. So there will be *some* distribution of property rights that is morally justified in World A but not in World B.

How might the justificatory conditions differ between the two worlds? Here are two possibilities. First, it seems plausible that World B will be subject to additional constraints on property inequalities, given that an additional egalitarian complaint would apply in this world. There would be some level of property inequality which would not be morally legitimate in World B, but which would be legitimate in World A. Second, the two worlds may differ in terms of the *content* of property rights, rather than the legitimate *distribution* of property. More specifically, the justification of property rights in World B may require that property rights be weaker than those that would be justified in World A. Most obviously, the right to exclusive use might be more qualified in World B, in light of the fact that a less qualified right would give rise to the unilateralism and inequality objections outlined above. For example, it might require that property owners do not have a right to exclusive use in circumstances that are structured like *Three-Track Trolley*, in which a stronger right would most obviously give rise to the unilateralism and inequality objections.

These are just two very brief suggestions, designed to illustrate how the application of a property-inclusive version of the means principle might impose additional constraints on an acceptable theory of property rights and distributive justice. To argue for the more general point, all that needs to be shown is that it is plausible to think that a moral system governed by a property-inclusive version of the means principle would be subject to *some* additional

53 Though I speculate that in a community where this normative hierarchy were known, forms of social hierarchy would follow.

54 Quong, *MDF*, p.185.

objection(s) to *some* distributions of property rights, compared to a system governed by a property-exclusive version of the means principle.

If this is correct, then this shows that the relationship between the morality of defensive force and distributive justice is more complex than Quong's picture allows. We cannot simply plug in an independent theory of distributive justice, which specifies our fair shares of control over the world, and then read-off an account of the scope of the means principle. Instead, the justification of our distributive entitlements is itself partly determined by the scope of the means principle. This demonstrates how, *contra* Quong, the principles of distributive justice and of permissible harm are not only parts of a single unified moral domain, but also mutually inform one another.

Let me close with one final observation. Given the objections I have raised against a world governed by a property-inclusive means principle, one might think that I am assuming (*contra* Quong) that there is some fundamental moral difference between our bodily and property rights.⁵⁵ Those objections arose from the fact that property holdings are (i) partly a matter of the exercise of individuals' wills and (ii) unequally distributed. These features are not present in the case of our bodies: we are all roughly equally embodied, and we have relatively little control over the extent of our 'bodily holdings.' So those objections do not apply to a moral system in which the means principle is restricted to the use of our bodies.

However, crucially, these differences between our bodies and property are contingent. It is possible to imagine a world in which a property-exclusive means principle would be subject to the same objections. Imagine, for example, a world in which persons have the ability to increase the size of their bodies and that doing so is beneficial in various ways, though typically not necessary to meet their basic needs (imagine that, like property, increasing the size of one's body increases one's opportunities and social prestige). Imagine, further, that increasing the size of one's body is costly, such that the rich have bodies that are many times larger than those of the poor. I contend that, in this hypothetical world, a moral system in which the means principle prohibited the harmful use of our bodies *would* be objectionable, compared to a world (like our own) in which our bodily holdings are insensitive to our wills and roughly equally distributed. In the former world, individuals would have an objectionable degree of control over others' moral protections, which would be doubly objectionable if the ability to exercise this control tracks economic inequality. In light of these objections, the justification of this moral system

55 Ibid., pp.195–196.

may require making adjustments to our conception of bodily rights. These could include imposing limits on the extent of our bodily-ownership, or (most modestly) restricting the scope of the means principle such that it would no longer cover *every* harmful use of our bodies.⁵⁶

I believe that this continuity between our bodies and our property provides additional support for the bi-directional view of the means principle and distributive justice that I have argued for. For it shows again that we cannot appeal to an entirely independent account of our rights over a certain part of the world in order to determine the scope of the constraint on harmful use. Even our rights over our bodies are partly informed by thinking about the implications of a moral system in which the use of our bodies falls within the scope of the means principle.⁵⁷

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56 For further discussion of the idea that our bodily rights would be very different if our bodies were very different, see Wenar, 'Original Appropriation' and Kasper Lippert-Rasmussen, 'Against Self-Ownership: Why There Are No Fact-Insensitive Ownership Rights Over One's Body,' *Philosophy and Public Affairs* 36, No.1 (2008): 86–118.

57 My view here is continuous with (though does not depend upon) the more general position that our rights over our bodily resources are sensitive to the claims of others, in the same way that our property rights are so qualified. See, e.g. Cecile Fabre, *Whose Body is it Anyway: Justice and the Integrity of the Person?* (Oxford: Oxford University Press, 2006); Eric Rakowski, *Equal Justice* (Oxford: Oxford University Press, 1993).