The Trolley Problem as a Problem for Libertarians

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Many political libertarians argue, or assume, that negative moral duties (duties not to harm others) prevail over positive moral duties (duties to aid others), and that the legal system ought to reflect such pre-eminence. I call into question this strategy for defending a libertarian order. I start by arguing that a successful account of the well-known case of a runaway trolley that is about to kill five innocents unless a passer-by diverts it onto one innocent, killing him, should point to (i) the ex ante advantage to all six of being subject to a policy of redirection of runaway trolleys, and (ii) the causal structure of killing vs. letting-die choices. I then argue that this account of the trolley case entails that legal systems reflecting the relative stringency of negative and positive moral duties should uphold redistributive measures at odds with libertarianism. The assumption that the legal system ought to reflect, through non-causal routes, moral principles and their relative weights leads to either an ideal-theory (in Rawls's sense) assessment of libertarianism or a symbolic account of the relationships between morality and law. Libertarians should undermine this assumption if they hope to offer an all-things-considered case for free markets.

I. INTRODUCTION

Libertarian political theories assert strong legal (i.e. state-enforced) property rights to one's own person and all those external things that one has acquired through voluntary transactions. Libertarians are therefore committed to free markets. Writers in this tradition argue that negative moral duties (duties not to harm others) prevail over positive moral duties (duties to aid others), and that the legal system ought to reflect such pre-eminence. In this article, I call into question this strategy for defending a libertarian order.

Robert Nozick's 'minimal state' enforces 'natural' (i.e. moral) rights that correlate with duties not to actively affect other persons and their control of their legitimate 'holdings'. In Nozick's system there are no positive legal (as opposed to contractual) duties other than the duty to pay taxes for the defence of everyone's rights. The minimal state imposes no legal duty to aid others.[1] Nozick makes room, however, for principles commonly viewed as non-libertarian, such as John Rawls's difference principle, according to which inequalities should be removed unless they benefit the least well-off.[2] Nozick speculates that the difference principle may serve as a rule of thumb for the rectification

[1] See Robert Nozick, *Anarchy, State, and Utopia* (New York, 1974).
[2] See John Rawls, *A Theory of Justice* (Cambridge, Mass., 1971), pp. 75–83.

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of massive rights violations – i.e. transgressions of the principles of justice in acquisition and transfer laid down by his 'entitlement theory'.[3] It is unclear, however, what kind of 'nonideal theory', to use Rawls's term,[4] an entitlement theorist is committed to; that is, what principles an entitlement theorist must endorse in situations in which the entitlement principles, *including* the principle of rectification, are massively violated. Nozick's *ideal* theory, that is, the theory applicable to situations in which entitlement principles are generally observed (as in the minimal state) recognizes largely negative *legal* duties: duties not to *actively* affect persons and those holdings acquired in conformity with entitlement principles. This usual, ideal-theory understanding of libertarianism is the one that concerns me in this article.

F. M. Kamm observes that supporters of the thesis that harming and not aiding are *morally* equivalent

> could see it playing a part in moving us beyond Robert Nozick's minimal state, in which people have strong negative rights (rights not to be harmed) but weak or nonexistent positive rights (rights to be aided). If it is as wrong to refuse to aid as it is to harm, per se, then if people have rights not to be harmed, they may well also have rights to be aided (positive rights), and it may be a state's duty to provide that aid when it is needed.[5]

(In Kamm's context, positive and negative rights entail, respectively, positive and negative duties.) Indeed, the thesis that there are no moral duties to aid except those stemming from contractual or family relationships, or at any rate that such duties never outweigh negative moral duties, is not unique to ideal-theory[6] libertarians pertaining to the Lockean, rights-based tradition, such as Nozick.[7] Thus, in his defence of free markets, premised on an evolutionary theory of social norms, Friedrich von Hayek advocates legal systems that enforce widely accepted 'rules of just conduct', and makes much of the fact that such rules impose negative duties only.[8] Nor is the denial of strong

[3] Nozick, *Anarchy, State, and Utopia*, pp. 230–1.

[4] See John Rawls, *A Theory of Justice, Revised Edition* (Cambridge, Mass., 1999), p. 216.

[5] See Frances Myrna Kamm, *Morality, Mortality*, vol. 2: *Rights, Duties, and Status* (New York, 1996), pp. 121–2.

[6] Henceforth, the 'ideal-theory' qualification will be implicit in references to libertarianism or a libertarian regime.

[7] Locke's characterization of the state of nature as a pre-political situation in which 'no one ought to harm another in his life, health, liberty, or possessions' is in *The Second Treatise of Civil Government* (1690), ch. II.

[8] Hayek takes great pains to defend the common law on the grounds that it enforces widely accepted 'rules of just conduct'; *Law, Legislation, and Liberty*, vol. 1: *Rules and Order* (Chicago, 1973), pp. 94–123. He also observes that such rules 'are negative in the sense that they normally impose no positive duties on any one, unless he has incurred such duties by his own actions' (*Law, Legislation, and Liberty*, vol. 2: *The Mirage of Social Justice* (Chicago, 1976), p. 36). Other examples of libertarian theories that proclaim the

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moral duties to aid others unique to *right*-libertarians such as Nozick and Hayek. Thus, Michael Otsuka has recently offered a *left*-libertarian theory grounded on Lockean natural rights, which he construes as entailing no duty to aid others.[9]

I will argue that, if legal rules ought to mirror the relative stringency of positive and negative moral duties, then a libertarian legal system is morally objectionable. Contrary to the line of libertarian thought expounded in the previous two paragraphs, the priority of negative over positive *moral* duties is much weaker than the priority that a libertarian society confers on negative over positive *legal* duties. The relative stringency required by the libertarian argument that concerns me here is conveyed by what I will call *the Libertarian Priority Principle* (LPP). This principle asserts that the difference in strength between the negative and positive legal duties upheld by a libertarian legal system mirrors the difference in strength between negative and positive moral duties. I shall presently indicate what 'mirrors' means in this formulation if it is to convey a recognizably libertarian position. I will argue, then, that the LPP is untenable. If I am right, the virtual absence of positive legal duties in a libertarian regime cannot rest on the LPP. It is beyond my goal to explore whether libertarian institutions might be vindicated on other grounds.

The fact that, as we will see, the negative moral duty not to take an innocent's life is sometimes outweighed suggests that negative moral duties protecting arguably less valuable things (e.g. the duties that correlate with libertarian rights in external things) are even more frequently outweighed. So I will focus my critique of the LPP on the moral duty to refrain from killing.[10] I will explore the extent to which

supremacy of negative moral duties, although quite different in other respects from Nozick's and Hayek's, are Loren Lomasky, *Persons, Rights, and the Moral Community* (New York, 1987), pp. 94–100; Jan Narveson, *The Libertarian Idea* (Philadelphia, 1988), pp. 22–31 and 57–61; and Horacio Spector, *Autonomy and Rights* (Oxford, 1992), pp. 101–51.

[9] Michael Otsuka, *Libertarianism without Inequality* (Oxford, 2003), pp. 3–4. See also nn. 10 and 15. Both right and left libertarians uphold free markets, but differ on how people originally acquire property titles to external things. While right libertarians view external things as initially unowned and thus up for grabs, left libertarians view them as belonging to everyone in some egalitarian sense and thus allow private appropriation only if due compensation is paid to the other members of society. See Peter Vallentyne, 'Libertarianism', *The Stanford Encyclopedia of Philosophy (Fall 2004 Edition)*, ed. Edward N. Zalta, URL = <http://plato.stanford.edu/archives/fall2004/entries/libertarianism/>.

[10] Otsuka argues that libertarians committed to full self-ownership rights must confront the fact that 'some incursions upon one's body (without one's consent) that result in serious harm' seem permissible (*Libertarianism without Inequality*, p. 13). Otsuka believes that any plausible version of libertarianism must jettison a 'full' right of self-ownership. He consequently endorses a formulation of the self-ownership principle that permits the harmful incursions upon one's body condoned by the doctrine of the

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exceptions to this duty prevent us from regarding the libertarian legal system as reflecting the relative stringency of negative moral duties. Even if we assume, as I will, that a libertarian legal system admits self-defense, necessity, duress and the other defenses allowed by ordinary criminal law, the best account of the exceptions to the moral duty to refrain from killing undermines the LPP. Or so I will try to show.

To understand the sense in which the LPP requires that the force of legal duties should 'mirror' the force of moral duties, we should bear in mind that libertarians reject the position sometimes called 'legal moralism', which holds that legal duties ought to be proportionate in strength to moral duties.[11] Indeed, hardly anyone is willing to criminalize, however mildly, rudeness, or all forms of sexual depravity along with rape. As the above passage of Kamm's suggests, libertarians and non-libertarians alike seem to believe that the moral standing of libertarian institutions is tied to the stringency of moral duties *to aid* relative to the stringency of moral duties *not to harm*. This is the strand of argument that concerns me in this article. Accordingly, the libertarian position that I am going to scrutinize need not endorse legal moralism. It is only committed to what I shall call *the mirroring view*, according to which a legal system ought to mirror morality *only* in that aspect that concerns the stringency of duties to aid and duties not to harm. For present purposes, suffice it to stipulate that a legal rule L mirrors a moral judgement M if and only if enacting L is a salient way of complying with M. Suppose, for example, that we have a moral duty to aid persons even if this requires inflicting a lesser harm on others. I will say, then, that a rent-control law that confers on tenants benefits that offset the harm inflicted on landlords mirrors such a duty, on the natural assumption that enacting the law is a salient way of complying with it. Whether enacting L harms still other people in non-salient ways (e.g. by reducing the supply of houses for rent) does not prevent L from mirroring M in the sense stipulated here. Of course, libertarians of all stripes reject rent-control laws. The general point is that libertarians who endorse the mirroring view must show, *at a minimum*, that morality does not condone salient harms to some people even to save a greater number from *similarly serious and salient* harm. I shall say more about the mirroring relation in section V.

double effect (pp. 15, 69–70 and 76–8). I will criticize this doctrine in sect. IV. In any event, I do not see how relaxing the conditions under which killing is permissible may help libertarians resist the less dramatic redistributive measures that I will discuss in sects. III and IV.

[11] See Joel Feinberg, *The Moral Limits of the Criminal Law*, vol. 1: *Harm to Others* (New York, 1984), p. 12, and Joel Feinberg, *The Moral Limits of the Criminal Law*, vol. 2: *Offense to Others* (New York, 1988), pp. 3–38.

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The article is organized as follows. Section II will discuss an apparent counterexample to the thesis that negative moral duties prevail over positive moral duties: the well-known case of a runaway trolley that is about to kill five innocents unless a passer-by diverts it onto one innocent, killing him. I will argue that a successful account of the trolley case should point to (i) the ex ante advantage to all six of being subject to a policy of redirection of runaway trolleys, and (ii) the causal structure of killing vs. letting die choices. Although I will not offer a full-fledged account of the trolley case, I hope that my account will be definite enough to show in section III that the ex ante advantage requirement seriously undermines the LPP. In section IV, I will argue that plausible causal constraints on killing are far from entailing the supremacy of negative moral duties implied by the LPP. I conclude in Section V with some thoughts about the relationships between law, morality and libertarianism, with an eye to clarifying further the mirroring view and bringing out its likely motivations.

II. THE TROLLEY PROBLEM: EXPECTED SURVIVAL AND CAUSAL STRUCTURES

We saw that libertarians committed to the mirroring view must defend the LPP. They may appeal to the following case, imagined by Judith Jarvis Thomson:

Transplant. David is a great transplant surgeon. Five of his patients need new parts – one needs a heart, the others need, respectively, liver, stomach, spleen, and spinal cord – but all are of the same, relatively rare, blood-type. By chance, David learns of a healthy specimen with that very blood-type. David can take the healthy specimen's parts, killing him, and install them in his patients, saving them. Or he can refrain from taking the healthy specimen's parts, letting his patients die.

This case suggests that negative duties are very stringent. To use Thomson's words, 'if David may not even choose to cut up one where *five* will thereby be saved, surely what people who say "Killing is worse than letting die" mean by it must be right!' (Thomson's emphasis).[12] Thomson observes, however, that this conclusion should be qualified to accommodate the following case:

Trolley. An out-of-control trolley is hurtling down a track. Straight ahead of it on the track are five men who will be killed if the trolley reaches them. Bloggs is a passerby, who happens at the moment to be standing by the track next to

[12] Judith Jarvis Thomson, 'Killing, Letting Die, and The Trolley Problem', *Ethics: Problems and Principles*, ed. John Martin Fischer and Mark Ravizza (Forth Worth, 1992), p. 70, reprinted from *The Monist* 59 (1976), pp. 204–17. Imaginary cases are quoted from the cited works unless otherwise indicated.

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the switch; he can throw the switch, thereby turning the trolley onto a spur of track on the right. There is one man on that spur of track on the right; that man will be killed if Bloggs turns the trolley.[13]

If, as many of us believe, it is morally permissible for Bloggs to turn the trolley, then *Trolley* seems to undermine the LPP.

Thomson uses the pair of cases '*Trolley*-*Transplant*' to formulate what she calls 'the Trolley Problem': why is it permissible to save the five in *Trolley*, but not in *Transplant*?[14] Otsuka observes that libertarians must address the Trolley Problem.[15] Along similar lines, I want to suggest that libertarians who insist that institutions must reflect the supremacy of negative moral duties over positive moral duties must show that political settings are relevantly akin to *Transplant*. Since, as I announced, I will not offer a full-fledged account of *Trolley*, I will not offer a full-fledged solution to the Trolley Problem either. I will nevertheless indicate the kinds of considerations that bear on solving it. This will suffice, I think, to bring out the difficulty that the Trolley Problem poses to defences of libertarianism based on the mirroring view.

Thomson's account of *Trolley* is as follows. She argues that there was an earlier time at which it was 'to the advantage' of all six to consent to a policy allowing bystanders to minimize deaths by redirecting runaway trolleys. For this reason, it is permissible now for the passer-by to redirect the trolley. According to Thomson, (a) if the existence of a policy increases one's life expectancy, then there is a presumption that the policy is to one's advantage, but (b) there are factors (e.g. an especial aversion to die cut into pieces by surgeons) capable of overturning this presumption.[16]

Thomson's proposal would be circular unless she offered an independent account of the (b)-considerations against killing. In support of the claim that (b) *is* satisfied in *Transplant*, Thomson says that

[13] Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass., 1990), p. 176. Philippa Foot had presented a variant of this case in 'The Problem of Abortion and the Doctrine of the Double Effect', *Virtues and Vices and Other Essays in Moral Philosophy*, ed. Philippa Foot (Oxford, 1978), p. 23.

[14] Thomson's original statement of the Trolley Problem is in 'The Trolley Problem', *The Yale Law Journal* 94 (1985), pp. 1395–6. See also her formulation of the problem in *The Realm of Rights*, pp. 177–8.

[15] See Michael Otsuka, 'Self-Ownership and Equality: A Lockean Reconciliation', *Philosophy and Public Affairs* 27 (1998), p. 69. Otsuka's remark does not apply, however, to libertarians who do not endorse the mirroring view. To the best of my knowledge, Spector, *Autonomy and Rights*, ch. 4, is the first defence of libertarianism that employs a discussion of imaginary cases where the agent faces a choice between killing and letting die. See sect. V for a discussion of the mirroring view.

[16] *The Realm of Rights*, pp. 181–7.

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dying of organ failure after a long illness, which gives time to bring one's affairs to some meaningful conclusion, is one thing; dying in consequence of being suddenly grabbed off the street, or out of a doctor's examining room, and having one's body organs removed for use to save others, is quite another, and markedly worse.[17]

This suggests that our considered judgements about various ways of dying determine whether (b) is satisfied. For Thomson, ex ante hypothetical consent of all six is neither necessary nor sufficient for the permissibility of saving the five by killing the one. Thus, she writes:

It might be true of a man that he would consent to your slitting his throat in that he has the mad idea that he killed Cock Robin, and deserves throat slitting for it; the fact that he would consent does not make it permissible for you to proceed. So hypothetical consent is not sufficient for permissibility.[18]

To show why hypothetical consent is not necessary either, she imagines the following case:[19]

Crushed Leg. Suppose a tree fell on David; his leg is crushed under the tree and he is unconscious. You are a doctor, and you can see that David will live if and only if you cut his leg off straightway.[20]

Thomson writes:

But it might be that if you *were* able to shake him [i.e. David] awake, he would be too confused, or too distraught, or in too much pain to think clearly about your request for consent to proceed, and would refuse it. Suppose this counterfactual is true of him. We can hardly conclude from it that you may not proceed. So hypothetical consent is not only not sufficient for permissibility, it is not necessary for it either.

In short, appealing to hypothetical consent here is appealing to an epiphenomenon – one that need not even be present.[21]

For Thomson, then, an appropriate account of *Trolley* can do without reference to hypothetical consent. She concludes that the passer-by may save the one because there was an earlier time at which it was 'to the advantage' of all six that the trolley would be turned at a later time should a *Trolley*-like situation arise.

To explicate the notion of 'advantage' that is at work here, Thomson invites us to consider a variant of *Crushed Leg* in which David is a Christian Scientist. She points out that it would be impermissible to cut off David's leg if David's religious objections to amputation were morally weightier than the fact that he will live if and only

[17] *The Realm of Rights*, p. 184.
[18] *The Realm of Rights*, p. 188.
[19] The case's title is mine.
[20] *The Realm of Rights*, p. 187.
[21] *The Realm of Rights*, p. 188.

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if he has his leg cut off.[22] Notice, however, that our belief that we must not cut off David's leg if he is a Christian Scientist does not commit us to believing that his religious beliefs are plausible. Rather, we must not do so because certain deeply held convictions (religious beliefs among them) ought to be respected, and this may sometimes require us to let believers die. But then, a circularity worry emerges. If Thomson's claim that it is not to the Christian Scientist's advantage to have his life saved by means of an operation pointed to facts that we can establish independently of the permissibility issue, then her (b)-considerations against killing would not render her account circular. Yet, we have just seen that Thomson's claim *presupposes* that it is morally impermissible to operate on Christian Scientists. Thomson's notion of 'being to someone's advantage' turns out to be moral in character.

Circularity would be less of a worry if Thomson's account allowed us to say that my action *A* is to *X*'s advantage whenever *X* would welcome *A* if extraordinary circumstances that bar consent (e.g. being unconscious) ceased to exist. But Thomson's rejection of hypothetical consent rules out, as we saw, this interpretation of her notion of 'advantage'.[23] Accordingly, when we ask, in the context of Thomson's theory, whether the Christian Scientist's religious beliefs bear on what is to his advantage, we are inquiring about the *permissibility of our deferring to* such beliefs as a way to determine whether we may save his life by means of an operation. This is different from wondering if the Christian Scientist would have consented to being so saved. The former question is moral in character, whereas the latter is a (counter)factual question whose relevance, as we saw, Thomson denies. Her (b)-considerations refer us, then, to our considered moral judgments. They fail to furnish us with independent criteria of permissibility. It follows that Thomson's theory is circular.[24]

I submit that the charge of circularity can be avoided by interpreting condition (b) as pointing to the *causal structure* of the situation, rather

[22] *The Realm of Rights*, pp. 187–9.

[23] In *The Realm of Rights*, p. 189, Thomson points out that she understands the notion of 'good for a person', which she uses interchangeably with that of 'advantageous for a person', as an objective notion, i.e. independent of the person's preferences or desires.

[24] Can the difference between the Christian-Scientist and the putative-Cock-Robin cases be explained by distinguishing between hypothetical consent and lack of (genuine) consent, respectively? Not in the context of Thomson's account, which uses a notion of 'consent' that is thin enough to allow her to describe the putative Cock Robin as someone who 'would *consent* to your slitting his throat' (emphasis mine). But even if we distinguished the two cases as displaying different types of consent (e.g. genuine vs. vitiated consent), or as involving consent and the absence thereof, my circularity objection would persist, for we could not draw the requisite distinction without criteria about the *permissibility* of deferring to a person's views (whether they are indicative of genuine consent or not).

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than to *morally relevant* objections to sacrificing persons. In her earlier work, Kamm put forward some ideas about causal structure that might be thought to flesh out appropriately Thomson's (b)-considerations against killing.[25] Although, as we shall see, she later modified her views somewhat, a brief discussion of those earlier thoughts will help us to see what is wrong with an initially plausible strategy that the libertarian may adopt. Kamm argued that a 'Principle of Impermissible Harm' ('PI/PH') can accommodate our moral intuitions in cases in which we can save some only if we kill others. The PI/PH asserts that

> it is permissible to cause harm to some in the course of achieving the greater good of saving a greater number of others from comparable harm, if events that produce the greater good are not more intimately causally related to the production of harm or to other intrusion onto the person or what is his which leads to such harm, than they are to the production of the greater good (or its structurally equivalent component).[26]

The PI/PH's guiding idea is that the causal chain between the action and the harm must not be shorter than the causal chain between the action and the greater good. Kamm claimed that the PI/PH appropriately reconstructs the rationale behind our intuition that it is wrong to bring about good *by harming* others.[27]

Kamm points out that the PI/PH accommodates *Trolley*: the causal chain 'trolley turned – one killed' is not shorter than the causal chain 'trolley turned – five saved'.[28] It arguably accommodates *Transplant* as well: the causal chain 'one cut up – one killed' is shorter than the causal chain 'one cut up – one killed – five saved'. Unfortunately, however, the PI/PH has two flaws. First, it cannot accommodate all of our considered judgements. Philippa Foot imagines in another context the following case:[29]

> *Deadly Gas.* There are five patients in a hospital whose lives could be saved by the manufacture of a certain gas, but this inevitably releases lethal fumes into the room of another patient [John] whom for some reason we are unable to move.[30]

[25] Frances Myrna Kamm, 'Harming Some to Save Others', *Philosophical Studies* 57 (1989), pp. 227–60.

[26] *Morality, Mortality*, vol. II, p. 201n. Kamm indicates that she had offered a 'somewhat' different formulation of the principle in 'Harming Some to Save Others'.

[27] 'Harming Some to Save Others', p. 232. The PI/PH may be viewed, then, as a way of spelling out the doctrine of the double effect, which I briefly discuss at the end of this section.

[28] 'Harming Some to Save Others', p. 233.

[29] The name of the case is mine.

[30] Foot, 'The Problem of Abortion and the Doctrine of the Double Effect', p. 29. Text slightly altered.

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Many of us would find counterintuitive the PI/PH's verdict on this case, namely, that it is permissible to manufacture the gas – by construction, the chain 'the gas manufactured – one killed' is not shorter than the chain 'the gas manufactured – five saved'.[31] Second, it is unclear how we are to measure the lengths of causal chains. In what sense is diverting the trolley in *Trolley* just one causal link away both from killing the one and from saving the five? Does it make sense to count causal links between *diverting* a threat and the threatened persons being *saved*? Indeed, measurement problems creep in even when all the alternatives involve *killing* others. Imagine a variant of *Trolley* in which the driver is the only person who can decide which of the two tracks to take. Imagine, further, that the trolley would hit each of the five across an extra layer of cloth. Shall we say that going through one layer of cloth constitutes a causal link, and so that the driver must direct the trolley onto the five?[32] This question suggests that fine-grained accounts of causal links are morally insignificant in the context of the PI/PH, but the PI/PH provides no clues as to why or to what extent this is so. There might be plausible characterizations of causal links under which the PI/PH can accommodate all imaginable cases, including *Deadly Gas*. However, it seems reasonable to require the proponent of the PI/PH to *defend* the theories of causality required by such accounts. He will have to show, on pain of circularity, that the requisite causal links can be individuated without appealing to the moral differences he wants to accommodate.

As I said, more recently Kamm put forward somewhat modified views. She now proposes a 'Principle of Permissible Harm' ('PPH'). Roughly put, this principle lays down as a *sufficient* condition for the permissibility of killing an innocent that the greater good should cause the lesser harm, the non-fulfilment of this condition being prima facie impermissible.[33] Unlike the PI/PH, the PPH yields in *Deadly Gas* a result that most of us would accept, namely, that it is prima facie impermissible to manufacture the gas. In addition, the PPH avoids questions about the relative lengths of *distinct* causal chains – it only requires that a causal chain (however its links are individuated) be *part of* another causal chain.

Kamm correctly observes, however, that we should refine the formulation of the PPH to neutralize some counterexamples. In *Trolley*, for instance, it is not the case that the greater good causes the lesser harm. Kamm offers the following case to help us see the direction that the requisite reformulation should take:

[31] Jeff McMahan makes this point in 'Killing, Letting Die, and Withdrawing Aid', *Ethics* 103 (1993), pp. 250–79, at p. 276n.

[32] Eric Rakowski discusses this variant in 'Taking and Saving Lives', *Columbia Law Review* 93 (1993), pp. 1063–1156, at pp. 1088–9.

[33] *Morality, Mortality*, p. 174.

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Grenade Case. A runaway trolley will kill five people unless we explode a grenade that (we foresee) will kill an innocent bystander as a side effect.[34]

It seems impermissible for us to save the five here. Kamm writes that

> when a good event (e.g. five saved) is an *effect* (i.e. a separate caused event) of the grenade going off, rather than the *flip side* of an event such as the trolley being turned in the original Trolley Case, . . . then the lesser harm is associated with the in-itself neutral event of a grenade explosion. The lesser harm is not seen as the effect of the greater good (or of what is non-causally related to it) as in the Trolley Case.[35]

So Kamm refines the formulation of the PPH to accommodate cases in which it is permissible to save five by killing an innocent despite the fact that, contrary to the above rough formulation, the greater good is not a cause of the lesser harm. In such cases, the greater good is, she says, a *flip side* of the act that saves the five.[36]

The PPH helps us accommodate our moral discriminations between cases for which Thomson's condition (b) (i.e. lack of objections to certain ways of saving the greater group) provides, as we saw, no guidance. Consider the following variant of *Deadly Gas*, imagined by Kamm:

> *Healing Breath*. Successful surgery on five will cause them to breathe normally and this, in turn, will change air currents so that germs closeted up to now will kill one person.[37]

Kamm observes that the PPH accounts for the moral discrimination that most of us would make between *Deadly Gas* and *Healing Breath* – only in the latter case it seems permissible to save the five.[38] An ex ante maximizing policy such as that allowed by Thomson's condition (a) may well equate the two cases. On the other hand, as we saw, it is unclear how her condition (b) would ground the requisite discrimination. The PPH may be viewed as specifying Thomson's condition (b) to require that the greater good cause the lesser harm. Call this formulation '(b*)'. I suggest, then, that rescuing the five is permissible if and only if it instantiates a policy that ex ante increased, through causal routes sanctioned by the PPH, each of the six's life expectancy. Conditions (a) and (b*) are individually necessary and jointly sufficient for it being permissible to save five by killing one.

We can now accommodate all of our considered judgements on situations in which the agent harms some to save others. *Trolley* fulfils

[34] *Morality, Mortality*, p. 151.
[35] *Morality, Mortality*, p. 174 (Kamm's emphasis).
[36] Alternatively, it may be, as she also says, an *aspect* of the act that saves the five. See sect. IV.
[37] *Morality, Mortality*, p. 174. The case's title is mine.
[38] *Morality, Mortality*, p. 174.

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(a) and (b*). *Transplant* fails to fulfil (b*). A variant of *Transplant* (call it *Transplant**) in which everyone's ex ante probability of survival would increase if surgeons were to proceed in *Transplant*-like situations also meets (a), but not (b*).[39] Thomson observes that there was no time at which it would have been *to the advantage* of all six that the surgeon proceed in *Transplant*∗, because persons would still object to certain ways of dying.[40] As I argued, this reference to legitimate objections to certain ways of dying is circular. On my proposal, saving the five in *Transplant*∗ involves (as saving the five in *Transplant* does) a causal structure that (b*) condemns. Finally, a variant of *Trolley* in which the positions on the tracks are not determined at random (for instance, because a railway company contractually assigned each of the six workers to each of the two tracks) would satisfy (b*) but not (a). In this variant, it would be impermissible to save the five because there was no earlier time at which all six would have increased their probabilities of survival should the passer-by save the five as a flip side of an action that brings about the death of the one.

The view I am proposing (henceforth, *the causal view*) can therefore be formulated in this way: when killing and letting die are the only options and other things are equal, the agent may follow a policy that maximizes ex ante expected survival, provided that the death of the lesser number is either the causal consequence of the fact that the greater number was saved or this latter fact is the flip side of the act (e.g. throwing the switch in *Trolley*) that causes the death of the lesser number.[41] As I pointed out, I do not offer this account as a full-fledged solution to the Trolley Problem. Plainly, the natures of the relevant causal relationships and flip sides need elaboration. Nor shall I endeavour to elucidate what exactly counts as expected benefit besides expected survival – something required by formulations intended to apply to alternatives other than *killing* and *letting die*. I do think, however, that the causal view brings to light the kinds of considerations that a full-fledged solution to the Trolley Problem should contain, and it does so in a way that will help us see in sections III and IV why

[39] Thomson points out that *Transplant* fails to fulfil (a) because 'how one lives affects one's health', and to that extent it differs from *Trolley*, in which the six are assumed to be randomly distributed between the two tracks. See *The Realm of Rights*, pp. 183–7.

[40] *The Realm of Rights*, pp. 185–6.

[41] Since the causal view appeals to maximization of probabilities of survival, it arguably generates a *duty* to save the five in *Trolley*-like situations, rather than to its being merely permissible. On similar grounds, Eric Rakowski argues that Thomson's theory entails a duty to save the five ('Taking and Saving Lives', pp. 1103–4 and 1145–6). Thomson argues that the passer-by may, but is not morally required to, turn the trolley, and suggests that this follows from her rejection of utilitarianism. See *The Realm of Rights*, p. 196. A duty to save the five, rather than the mere permissibility of saving them, would be especially troublesome to libertarians committed to the mirroring view.

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the Trolley Problem makes trouble for libertarians who rely on the mirroring view.[42]

III. DOES EXPECTED BENEFIT RULE OUT POLITICAL REDISTRIBUTION?

Let us assume that the causal structures licensed by the causal view obtain, and so focus on expected benefit. A suitably generalized version of the causal view would then require agents to aid others well beyond the scope tolerable by the LPP. This is so because most of us are members of groups of persons whose expected benefits would increase if a non-member followed a redistributive policy. In such cases, the causal view entails that it is permissible to benefit some members by harming other members. A political interpretation of the causal view would then sanction significant redistribution. Let us look more closely into this idea.

Under a political interpretation of expected benefit, the state can be seen as a bystander who may benefit certain persons by harming others if and only if at some earlier time everyone's expected gains would have been higher had such policies been adopted. The state may be viewed as the analogue of the passer-by in *Trolley*, i.e. as a third party in a position to redistribute burdens and benefits by taxation, public expenditure and various kinds of regulation. Indeed, the analogy can go quite far. For example, the state can 'redirect' a recession from the potential unemployed to individuals whose extra tax burden will be more than offset by unemployment benefits, given diminishing marginal utility of money.[43] Notice that these analogies cannot be easily dismissed on the grounds that states are not really third parties *vis-à-vis* citizens, but rather agents of the citizenry. Our question is whether a state's redistributive policies can be seen as enforcing antecedent moral duties to aid, over and above other reasons for or against such policies. As I said, the libertarian argument that I explore in this article denies that such policies can be seen in that way.

The upshot of this approach is gloomy for the LPP. Most likely, each of us belongs to many sets of persons (henceforth, *mutual aid groups*) whose members would have increased their expected gains by consenting at an earlier time to certain redistributive policies. Many of the usual redistributive arrangements for the unemployed, the sick, the aged, etc., could arguably be defended along these lines. Given that the causal view led us to exonerate the passer-by who *kills* someone

[42] I will offer a slightly refined formulation of the causal view in sect. III, again with no intent to offer a full-fledged solution to the Trolley Problem.

[43] I am indebted to Horacio Spector for this example.

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in *Trolley* by throwing a trolley onto him, why not then authorize the state to impose *some* level of taxation on the rich in order to rescue some people from *abject* poverty? Such policies increase the expected gains of the members of the relevant mutual aid group, including those who turn out to be taxpayers. *The sort of libertarian I am criticizing* (i.e. the supporter of free markets on the grounds that we may not harm persons even to aid others) has to show what is special about political redistribution *vis-à-vis Trolley*. She cannot resort to strategies (such as independent theories of consent-based legitimacy, property rights or general welfare) that may be available to other libertarians.

Have I not overplayed the analogy between *Trolley* and political redistribution? The libertarian might adduce that, unlike saving the five in *Trolley*, political redistribution *benefits* some members of mutual aid groups *at the expense of* other members. To turn the trolley is to worsen the one's situation without improving the five's situations – it is not to provide the five with anything they lacked before the threat arose. By contrast, redistributive taxation worsens some persons *and* benefits other persons. But surely, so this libertarian contends, we may not benefit some persons at the expense of others. Libertarians who endorse the mirroring view might think that this manoeuvre blocks the route from *Trolley* to the redistributive state.

Different interpretations of this objection arise as we consider different baselines against which improvement and worsening occur. When the baseline is the fate that would await each of the six in *Trolley* in the event that the passer-by failed to intervene, diverting the trolley obviously improves the five's situations and worsens the one's situation. But the same can be said about redistributions within mutual aid groups: by definition, redistribution makes some people better off and others worse off compared to the situation they would face in the absence of redistribution. To distinguish *Trolley*-like redistribution from political redistribution, the baseline required by the objection must be people's situations *until* the passer-by/government decides what to do. Against this baseline, turning the trolley does not make the five better off. Rather, it preserves something they already have – i.e. their lives. On the other hand, it makes the one worse off, since it deprives him of something he already has, i.e. his life. By contrast, redistributive policies make some members of a mutual aid group better off against this baseline, for such policies provide those individuals with something they lacked beforehand, e.g. an unemployment subsidy. On the other hand, such policies deprive taxpayers of money they owned, thereby worsening their situations. Libertarians may invoke this difference between saving the five in *Trolley*-like cases and political redistribution. They may say that negative duties give in only in those situations, like *Trolley*, in which the agent minimizes evil without

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benefiting, against the 'until redistribution' baseline, anyone.[44] So construed, the objection hopes to resist political extensions of the causal view.

No discernible moral principle, however, supports this version of the improvement/worsening criterion. It leads to the more libertarian conclusion but it does not justify it – it is *ad hoc*. It does not tell us what is so important about the 'until redirection/redistribution' baseline that renders it permissible to *kill* one person in *Trolley* while rendering it impermissible to *tax* a mutual aid group's member. What is more, this version of the improvement/worsening criterion fails to accommodate all of our considered judgements, as shown by the following case:

Electric Cable. An electric cable accidentally falls into a swimming pool, causing five swimmers intense pain. It will take any of them thirty seconds to swim to the border of the swimming pool and turn off the current by pressing a switch. A passer-by could take the cable out of the swimming pool with a wooden stick at hand. She notices that she will have to handle the cable in such a way that parts of it will sink for thirty seconds into an adjacent swimming pool, thereby causing John, the only swimmer there, an equally intense pain.

It seems at least permissible for the passer-by to take the cable out of the swimming pool, thereby ending the five's pains and inflicting a similar pain on John. However, the present version of the improvement/worsening criterion prohibits the passer-by to do so: if she does, she worsens, with regard to the 'until redirection' baseline, John's situation and improves the five's.

I conclude, then, that, given the mirroring view, the improvement/worsening criterion cannot be given an interpretation under which saving the five in *Trolley* and political redistribution within mutual aid groups are morally different.

IV. DO CAUSAL STRUCTURES RULE OUT POLITICAL REDISTRIBUTION?

In section II, I rejected the PI/PH, according to which the causal chain between the action and the lesser harm must not be shorter than

[44] Notice that this argument may fail to help the libertarian in some cases of 'redirecting' recessions or other social misfortunes. If, to minimize losses, government were to redirect a recession or a passer-by were to redirect a runaway trolley, the taxpayers or the lesser group on the tracks, respectively, would be deprived of something they would have had (their money or their lives) should the threat have followed its original course. On the other hand, such a 'redistribution' would leave both the potential unemployed and the five, respectively, unharmed. (I am grateful to Marcelo Ferrante for this point.) Perhaps libertarians can resist this analogy between the recession case and *Trolley* by requiring that threats be redirected in a non-metaphorical sense, that is, in a sense in which trolleys, but not recessions, can literally be redirected. Be that as it may, libertarians can resort to the 'until redistribution' baseline to oppose many usual redistributive policies that arguably benefit some *non-threatened* people.

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the causal chain between the action and the greater good. I assumed, however, that the PI/PH accommodates both *Trolley* and *Transplant*.[45] Moreover, the PI/PH, like the causal view, focuses on causal structures. If the libertarian who endorses the mirroring view could show that the PI/PH distinguishes between political redistribution and *Trolley*, she might then hope that a little tinkering with the PI/PH would rescue it from the objections raised in section II. To see the plausibility of this strategy, consider the fact that the causal chain 'enactment of a tax law – decrease in taxpayers' wealth' is shorter than the causal chain 'enactment of a tax law – decrease in taxpayers' wealth – transfer to welfare recipients'. It follows that a political version of the PI/PH prohibits transfer spending financed through taxes.

However, some (actual) redistributive policies do conform to the PI/PH.[46] Redistributive taxation is not the only way of redistributing wealth. Governments sometimes print money for redistributive purposes. When they do so, the causal chain leading to a group's being worsened is *longer* than the causal chain leading to another group's being benefited. The causal chain 'printing money – some citizens subsidized – other citizens having their purchasing power lowered' is longer than (indeed, it contains) the causal chain 'printing money – some citizens subsidized'. Such measures conform, then, to a political version of the PI/PH. Similarly, governments sometimes subsidize certain groups with money borrowed at the expense of *future* taxpayers. Moreover, unlike the killing/letting die cases discussed so far, redistribution financed through taxes or through borrowing may confer *individual* benefits that are higher than the individual burdens they impose. This is arguably so because, given diminishing marginal utility of money, each taxpayer's loss is – within wide ranges of numbers and wealth of taxpayers and beneficiaries – more than offset by each beneficiary's benefit.[47] Moreover, we can imagine that this is true of situations in which, by analogy with *Trolley*, the number of taxpayers is smaller than the number of beneficiaries. One would expect in these latter situations the PI/PH-based case for redistribution to be at least as strong as the PI/PH-based case for the claim that in *Trolley* it is permissible to *save a greater number of lives* by *killing*.

Consider now the PPH. Recall that the PPH states that it is permissible to save the greater number whenever the death of the lesser number is either the causal consequence of the fact that the

[45] The ensuing discussion assumes what I take to be common-sense views about causal lengths.

[46] Kamm does not deal with applications of the PI/PH beyond choices between killing and letting die.

[47] This cannot be conclusive, though, since standard economics disallows interpersonal comparisons of utility.

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greater number was saved or this latter fact is the flip side of the act that causes the death of the lesser number. As we saw, the causal view endorses the PPH as a causal constraint on policies that maximize life expectancy. I now want to argue that a political interpretation of the PPH fails to yield the priority of negative moral duties needed by the mirroring view. Consider again subsidies to the poor financed through taxes, and assume that benefits exceed costs by whatever amount is necessary to make the subsidy policy ex ante beneficial to both taxpayers and beneficiaries. If the subsidies could be seen as the flip side of (the enactment of) redistributive measures, a political version of the PPH would authorize such measures. Viewing the subsidies as flip sides is all the more plausible under legal systems that make it *constitutionally mandatory* (for example, by virtue of constitutional provisions regarding deficit financing and fairness of the tax system) for the legislature to finance the subsidies through, say, progressive taxes. The fact that a subsidy law makes it constitutionally mandatory for legislators who grant a subsidy to tax the rich mirrors here the fact that turning the trolley in *Trolley* makes it causally necessary to kill the one.

Perhaps the libertarian can resist this political extension of the PPH by arguing either that taxing the rich is not really a causal consequence of enacting the redistributive measures, or that the subsidies are not really flip sides of such measures. The libertarian might argue, that is, that law, being normative, does not involve causal necessities or flip sides. But a refined formulation of the PPH defuses this objection. To see the direction that such a refinement should take, consider that some laws *redefine* property rights, and so make some people better off and some others worse off by virtue of a single legislative act. By a 'redefinition' of property rights I mean a change in the bundle of rights regarding use and transfer of things. A rent control law, for example, redefines property rights to the extent that it deprives the landlord of the right to charge tenants above the legally stipulated rent.[48] Let us assume that the benefit conferred to tenants is here the greater good. Borrowing from Kamm's terminology, we can then say that this benefit is an 'aspect' of a redefinition of property rights that worsens the landlords. To illustrate this notion of 'aspect' Kamm uses the following variant of *Trolley*:

Lazy Susan. The five are seated on a Lazy Susan Device toward which the trolley is headed. We push the Lazy Susan as the means of getting them away

[48] For an analysis of the 'legal incidents' or bundle of rights involved in the 'full' or 'liberal' conception of ownership, see Tony Honoré, 'Ownership', *Oxford Essays in Jurisprudence*, ed. G. A. Guest (Oxford, 1961), pp. 107–47.

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from a trolley which cannot itself be redirected; this causes the Lazy Susan to ram into a bystander, killing him.[49]

I take it that most people would agree with Kamm's judgement that *Lazy Susan* is morally on a par with *Trolley*. She argues that in *Lazy Susan* it is permissible to save the five because their being saved is an aspect of the turning of the lazy Susan. The general point is that harms that are caused by actions whose flip sides *or aspects* are greater benefits are permissible.[50]

I am not sure how to explicate the notion of 'aspect' that Kamm has in mind here, or how to distinguish between aspects and flip sides. Kamm writes:

> In the Lazy Susan Case, the greater good seems to be an *aspect* of the turning of the Lazy Susan, since the five sit on it. The Lazy Susan does not remove a threat to the five, it removes the five from the threat. This good which is the turning Lazy Susan eventually rams into Joe [i.e. the bystander]. This is permissible.[51]

Apparently, saying that something is an aspect or a flip side is logically entailed by propositions to the effect that a certain action interrupts a threatening causal process. Aspects and flip sides presuppose causal notions, yet they are logically, rather than causally, connected with the relevant actions. Thus, in *Lazy Susan* the turning of the lazy Susan *is*, given certain geometrical and physical assumptions, to save the five. Kamm's passage also suggests that aspects are entailed by something done to the people being rescued, rather than to the threat from which they are rescued; flip sides, instead, are entailed by something that we do to a threat, such as diverting a trolley. Both kinds of rescue contrast with those performed by doing something *to the one*, such as performing blood transfusion from an involuntary donor, thereby killing her, into five patients to save their lives. Such transfusions are clearly impermissible.[52] Moreover, actions having *both* a greater good *and* a lesser harm as their aspects seem to be permissible. We can see this by considering a variant of *Lazy Susan* (*Lazy Susan**) in which all six are attached to the lazy Susan in such a way that turning it will save the five if and only if it will place the one within the range of the threat. It seems natural to assume that whatever makes five saved an aspect of the turning of the lazy Susan in the original case should make

[49] *Morality, Mortality*, p. 154.
[50] *Morality, Mortality*, p. 173.
[51] *Morality, Mortality*, p. 173.
[52] We might also say that the PPH forbids starting a continuous causal process from the one to the five. This would explain the moral difference between *Healing Breath* and the transfusion cases imagined in the text. Thanks to Fred D. Miller Jr. for suggesting me to compare *Healing Breath* with forcible-transfusion cases.

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both five saved *and* one killed aspects of the turning of the lazy Susan in *Lazy Susan**. One killed does not seem to be here 'more intimately causally related' to the turning of the lazy Susan than five saved is.

My promised refinement of the causal view should then go along the following lines: agents may maximize ex ante expected survival, provided that the survival of the greater number causes the death of the lesser number, or is an aspect, or a flip side, of the act that has as its causal consequence, or aspect, the death of the lesser number.[53] This formulation allows us to see legal redefinitions of property rights as analogous to the lazy Susan's movement: when conjoined with contextual information, both events logically entail benefits and losses to different groups. Rent control laws can thus be vindicated on the grounds that both the tenants' gains (by assumption, the greater good) and the landlords' losses (the lesser harm) are aspects of the enactment of the laws. In redefining property rights, a rent control law logically entails (legal) benefits and losses to different people, in much the same way as turning the lazy Susan in *Lazy Susan** logically entails benefits and losses to different people (i.e. their new positions relative to the threat).

Let us finally consider the thought that political redistribution is objectionable because a wealthier group is *treated as a means* to benefit a less wealthy group. On this view, we should inquire about the agent's plans, rather than about causal structures. To be sure, an important tradition in moral philosophy embraces the Kantian injunction that persons not be treated merely as means to benefit other persons. Careful assessment of this idea would call for an explication of the notions of 'treating merely as means' and 'benefiting others' – something that I cannot pursue here. In any event, I do not believe that a prohibition against using persons merely as means, on any tolerably intelligible understanding of it, might help us solve the Trolley Problem, let alone solving it to the satisfaction of the libertarian who adopts the mirroring view. Consider the following case:

Prevented Return. Just like *Trolley*, except that the slope of the land is such that, were it not for the fact that the diverted trolley will jam into the one, thereby killing him, it would go back and kill the five.

In this case, saving the five requires that the trolley jam into the one. There is, then, a natural sense in which the one would be treated as a means to save the five. Nonetheless, the moral standing of diverting

[53] I ignore actions that have both good and bad *flip sides*. The possibilities discussed in the text will sufficiently display, I think, the inadequacy of the libertarian strategy based on the mirroring view.

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the trolley does not seem here different from the moral standing of diverting the trolley in *Trolley*.[54]

Indeed, it is difficult to see how a prohibition against using others could be formulated in a way that withstands well-known objections to the doctrine of the double effect. This doctrine holds that although it is impermissible to bring about a greater good by intentionally using as a means a lesser evil, it is (at least sometimes) permissible to bring about a greater good even if the agent foresees that a lesser evil will take place as an unintended side effect of her behaviour. The doctrine of the double effect leads to the counterintuitive result that diverting the trolley is impermissible in *Prevented Return*: in order for the passer-by to save the five, it is necessary that the trolley jam into the one. The doctrine also has trouble accommodating *Deadly Gas* (section II). If we manufacture the gas, then John's death is not a means of saving the five; rather, it is a side effect of the means of saving them, namely, manufacturing the gas. Even so, most of us would find it impermissible to save the five in this way. It seems reasonable to conclude, then, that libertarians who rely on the LPP and the mirroring view cannot appeal to a prohibition to treat others as mere means.[55]

V. LAW, MORALITY AND LIBERTARIANISM

I have argued that morality is non-libertarian, in the sense that the legal duties imposed by market institutions do not mirror the scope and strength of our moral duties to aid others. Of course, this is not to say that market institutions lack all-things-considered justification. David Schmidtz, for example, argues that, when combined with plausible assumptions about people's information and incentives, a version of rule-utilitarianism yields both our judgements in *Trolley* and *Transplant*, and a justification of free markets.[56] Notice, however, that such arguments rest precisely on the kinds of considerations (e.g. the agent's informational shortcomings) excluded by the other-things-equal clause assumed in discussions of the Trolley Problem. I have tried to debunk an argument for market institutions that depicts legislation as reflecting here and now, as it were, the force of people's negative

[54] I follow here Kamm, 'Harming Some to Save Others', p. 230. The wording of *Prevented Return* is mine, except the case's title, which belongs to Kamm. In 'The Trolley Problem', pp. 1401–3, Thomson discusses and rejects the criterion based on the idea of 'needing' or 'treating as a means', and presents a case similar to *Prevented Return*.

[55] For further difficulties in the doctrine of the double effect, see Spector's excellent discussion in *Autonomy and Rights*, pp. 101–13.

[56] See David Schmidtz, *The Elements of Justice* (Cambridge, 2006). For a critique of utilitarian, deontological and virtue-based approaches to the Trolley Problem, premised on agents' epistemic and motivational shortcomings, see James Griffin, *Value Judgement: Improving Our Ethical Beliefs* (Oxford, 1996), pp. 98–122.

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moral duties *vis-à-vis* their positive moral duties; we can ascertain such force only by considering situations in which things other than negative and positive moral duties are equal. When other things vary, market institutions may turn out to be justified: mirroring the relative stringency of negative and positive moral duties is not the only thing that matters in political decision-making. The rationale for the case method that I have been using is the need to isolate such stringency from other factors – this is why I assumed throughout that other things are equal.[57] This assumption rules out the kinds of reasons that may play a role in a successful defence of a libertarian regime. As I said in section I, the mirroring relation obtains only when the morally relevant features of a political decision are salient. For example, I assumed that the alternatives faced by the agent, even in such political cases as that of a 'redirection' of a recession (section III), were equalized as to *additional*, less salient, effects, including long-term effects on production and distribution. Such effects may figure in an all-things-considered defence of free markets. Of course, the opposite may be the case as well: even if the LPP provided an adequate account of the relative stringency of our positive and negative moral duties, free markets might lack all-things-considered justification.

One may naturally wonder, then, why some writers, libertarian or otherwise, assume that libertarians are committed to the LPP and the mirroring view.[58] I think that one major, though usually implicit, motivation behind the mirroring view is the belief that legal/institutional proposals are immune to the charge that they overlook the causal consequences of the law. The idea is that law ought to mirror morality, not because law will thereby realize morality's independent aims but as a matter of moral obligation itself. The justificatory structure that emerges from this picture is protected from causal challenge, and in that sense is non-consequentialist. On this view, morality requires that its own precepts be institutionally implemented through the certainty of the mirroring connection rather than through the vagaries of causal relationships.[59] Indeed, this is a view that critics of libertarianism frequently share: they feel pressure towards showing that various forms of state interference with the market 'reflect', 'enforce', etc. the relative stringency of, say, moral duties to help the needy. Sometimes, those proposals are avowedly

[57] For a defence of this method, see Heidi Malm, 'In Defense of the Contrast Strategy', *Ethics: Problems and Principles*, ed. Fischer and Ravizza, pp. 271–7.

[58] See examples in nn. 1, 5, 8 and 15.

[59] Merging moral with legal considerations (e.g. a moral duty to help the needy and a specific welfare programme, respectively) is indeed common in contemporary political philosophy. See Guido Pincione and Fernando R. Tesón, 'Rational Ignorance and Political Morality', *Philosophy and Phenomenological Research* 72 (2006), pp. 71–96.

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confined to ideal theory, leaving it undefined which institutions will best help the needy under realistic assumptions about compliance. Thus, Rawls takes the fact that the welfare state 'may allow . . . large disparities of income that violate the difference principle' to warrant more radical departures from a free-market economy, namely, a 'property-owning democracy' or a 'liberal socialist regime', leaving open the question of which of these two arrangements best realizes the difference principle.[60] Rawls points out that this latter question must 'be settled by historical conditions and the traditions, institutions, and social forces of each country'.[61] By contrast, his rejection of libertarianism (and the welfare state) is not empirically motivated: it is a rejection of the 'ideal institutional description' of the libertarian and welfare-state regimes, namely, 'the description of how [the regime] works when it is working well, that is, in accordance with its public aims and principles of design'.[62] This suggests that Rawls would prefer property-owning democracy rather than libertarian institutions even if, in realistic situations, the former were less generous to the least advantaged. The claim that property-owning democracy or liberal socialism (i.e. legal/institutional regimes) realizes the difference principle (i.e. a principle of political morality) rests on the assumption that the political authorities of such regimes effectively fulfil their role descriptions. Their policies provide the greatest benefit to the least advantaged because that is the task officially assigned to them. Those authorities possess the relevant knowledge and do not take bribes or yield to other perverse incentives created by the institutional framework itself.

Other writers seem to endorse a version of the mirroring view that requires institutional proposals to *express* or *symbolize* the relative weights of various moral principles, as something different from effectively promoting (either in a full-compliance world or in the actual world) the outcomes recommended by those principles (for example, an egalitarian distribution, or improvements in the lot of the poor). It goes without saying that the symbolic function of law need not go hand in hand with the causal efficacy of law. Indeed, symbolic behaviour may be counterproductive in terms of the symbolized values or principles.[63]

This is not the occasion to discuss consequence-insensitive theories about the relationships between law and morality. I just mentioned the ideal-theory and the expressive interpretations of the mirroring

[60] Rawls, *A Theory of Justice, Revised Edition*, pp. xv–xvi.
[61] Rawls, *A Theory of Justice, Revised Edition*, p. xvi.
[62] John Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass., 2001), p. 137.
[63] For a critique of expressive models of counterproductive political discourse, see Guido Pincione and Fernando R. Tesón, 'Self-Defeating Symbolism in Politics', *The Journal of Philosophy* 98 (2001), pp. 636–52.

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view as a word of caution about the scope of my own argument. The Trolley Problem is a problem for the project of deriving libertarian institutions from the LPP along with the mirroring view. The causal view, which accommodates our moral intuitions in killing/letting die cases, hardly furthers that project. Under the causal view, too many and strong redistributive measures would be permissible. Nothing follows, however, as to the moral standing of libertarian institutions, *all things considered*, including the (properly theorized) relationships between law and morality.[64]

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