MORAL RIGHTS AND CAUSAL CASUISTRY

1. INTRODUCTION

The primary goal of this essay is to examine the character of and problems within the translation of a particular type of moral doctrine into the sort of particular moral judgments we all must make as professional moralists and even as human beings. In particular, I shall be examining the translation or application of certain of the moral dictates of the type of individualistic moral rights theory which is now commonly designated as 'libertarian'. However, I shall approach this issue of the application of moral dictates to concrete cases within the context of medical ethics and, more specifically, within the context of life-and-death medical decisions. This means that I shall not be concerned with the application to concrete cases of the whole panoply of libertarian rights, e.g., rights to this or that economic good. I will only be concerned with instances in which the relevant right is the right to life and the relevant question is whether a physician's (or nurse's, etc.) action violates this right to life. I believe that the main claim which I wish to make about the application of this right to life to concrete medical cases applies very broadly to the application to specific cases of libertarian-type rights at large. That main claim is that the identification of the rights involved in particular cases, i.e., the identification of what the relevant parties have rights to, only provides half of what is needed to reach a judgment about the moral permissibility or impermissibility of a particular action. The other half of what is needed is knowledge of whether the action under consideration would violate the identified right(s).

Consider Dr. Alice and potential patient Alyosha. Let us allow that Alyosha possesses a right to life. Were Alice to sneak up behind Alyosha and slit his throat, she would be violating this right — absent some surprising story about Alice's being engaged in preemptive defense or just retribution. But it can also easily be true that there be some action on Alice's part such that, if Alice performs that action Alyosha will die, whereas if Alice acts in some other way Alyosha will not die, and yet it is not true that if Alice performs the first action (and, as predicted, Alyosha dies) she violates Alyosha's right to
life. For instance, the following might be the situation: Alice is in Delhi getting ready for a dinner party. Alyosha is in Bombay dying for lack of the services of a surgeon with Alice’s skills. If Alice goes to her dinner party, Alyosha will die, whereas he will live if she rushes to his aid. Nevertheless, Alice’s going to the dinner party in Delhi does not violate Alyosha’s right to life—or so, at least, I maintain.

If I am correct, what this case illustrates is that one cannot move immediately from an identification of the relevant right to a determination of the permissibility or impermissibility of an action touching on that right. The interesting task for the translation of a rights doctrine into judgments about concrete cases is the specification of how one agent’s action must be connected with another agent’s loss of some rightfully held object or condition (e.g., the second agent’s life) for the first agent’s action to count as a violation of that second agent’s right.

Alice’s action (or inaction) will constitute a violation of Alyosha’s right to R only if her action (or inaction), in a sufficiently robust sense, causes Alyosha’s loss of R. One’s theory of the violation of rights will, then, be the product of one’s causal casuistry. Causal casuistry especially focuses on actions which satisfy the following condition: Had the agent not performed the action in question or had the agent not failed to act (but, instead, acted in some other specific way), the second party would not have lost R. For the satisfaction of this condition is at least necessary for the agent’s robustly causing the second party’s loss of R and, hence, being a violation of the second party’s right to R. Causal casuistry as such seeks to determine whether any further causal condition has to be satisfied (whether any further feature of the causal structure must obtain) before the primary causal responsibility for the loss of R can be reasonably assigned to that agent. A restrictive causal casuistry of the sort I shall be pursuing seeks to identify ways in which an action (or inaction) can satisfy this precondition—as Dr. Alice’s trip to the dinner party does—and yet not be a violation of rights.

It should be useful to see the place of causal casuistry within the broad context of the clash between consequentialist and deontological moral theories. Consequentialism is, of course, the view that actions are right insofar as they produce (tend to produce, contribute to the coordinated production of) that possible set of upshots which is ranked most highly by the upshotist’s favorite gauge for ranking sets of upshots and are wrong insofar as they diverge from the production of the best upshots. Deontologists deny this strict determination of rightness and wrongness in actions on the basis of the ranking of the possible sets of upshots of actions.

A certain type of Kantian deontologist might proceed by bluntly rejecting the relevance of the value or disvalue of an action’s upshots to its evaluation as right or wrong. Upshots count for nothing. Rightness and wrongness is entirely a matter of the state of the agent’s will, his subjectivity, what maxim he is acting under, etc. But most deontologists want to say that actions can be right in virtue of the values they create and can be wrong in virtue of the evils they produce (or the values they destroy). This requires, to concentrate on the side of wrongs, evils and values destroyed, that for certain actions not all the upshots of that action—more pointedly, not all the upshots which the particular deontologist himself recognizes as evils—be allowed to count towards that action’s negative evaluation.

Moralists with a deontological orientation have been especially fond of one or another of two principles which effectively discount the significance of some of an action’s upshots for the moral assessment of that action. And both of these principles appear prominently in the literature on medical ethics. One principle—let us call it the Causing versus Allowing Principle (CA)—asserts that there is a morally significant difference between causing a death and allowing a death. The difference is such that it may be morally impermissible for a physician to cause the death of a patient while, in an otherwise perfectly parallel case, it would be morally permissible for a physician to allow a patient to die. For instance, though it may be permissible for Dr. Alice to attend that party and thereby let Alyosha die, it would not be permissible for her to rush to Bombay and slit his throat (even if the latter would engender a less painful death). The other principle—the Principle of Double Effect (DE)—asserts that there is a significant moral distinction between causing a foreseen death and causing a death with the intention of doing so. The difference is such that it may be morally permissible for a physician to act in a way which she knows will result in a patient’s death while, in an otherwise perfectly parallel case, it would not be morally permissible for a physician intentionally to cause a patient’s death. For instance, it may be permissible for Dr. Alice to administer a drug to relieve a patient’s great pain, even though she knows that this will shorten the patient’s life, while it would not be permissible (everything else being equal) to administer a drug with the intention of (for the sake of) hastening that patient’s death.

It is crucial to note that CA does not assert that causing death is always wrong or that allowing death is always permissible. Causing death in accordance with a patient’s request may well be permissible while allowing death contrary to a patient’s instructions may well be impermissible (see (1)).
Similarly, no one would maintain that it is permissible to bring about death as long as one does not intend that death. And few would maintain that all intentional causings of requested deaths are impermissible. But CA and DE are each commonly thought to play an important role in defining the initial boundaries between actions which violate rights and those which do not, even though some party suffers a loss of a rightful condition. Special voluntary relationships, including the contractual and quasi-contractual relationships between physicians (nurses, etc.) and their patients, can redraw these initial boundaries. Had Alice agreed to be in Bombay to treat Alyoshia, then of course her going to the dinner party instead would be impermissible - a violation of Alyoshia’s contractual right to her medical services.

CA allows for a non-upshotist application of a theory of value which itself could well be shared by the upshotist. Thus, we have the familiar cases of choice between allowing five people in need of organ transplants to live while allowing a healthy potential donor of the needed organs to pass out of our clutches, and preventing the death of those five by fatally dismembering the healthy donor. The shared theory of value can say that each life at stake is of equal commensurable value so that a world in which the five live and the one dies ranks more highly on the value scale than a world in which the five die and the one lives. But the advocate of CA maintains that refraining from saving the five is less wrong (along the crucial moral dimension) than the killing of the one. For only by refraining does one avoid causing death. Similarly, the advocate of DE may also share the doctrine of the equal commensurable value of each life at stake while arguing in favor of inaction - the upshot of which ranks lower than the upshot of organ redistribution. For, in saving the five through organ redistribution, the death of that person is intended as one’s means - one’s course of action would be built upon the use of the one as one’s means - while no one’s death is intended, as a means or as an end, when the five are allowed to die.

Now CA is much more obviously a principle of causal casuistry than is DE. The former is not a moral dictate. It asserts that allowing is not a species of causing. And, while not itself a moral dictate, it provides a bridge for moving from moral claims about rights (e.g., Alyoshia’s right to life) to judgments in concrete cases about whether a given action or omission (Alyoshia’s not traveling to Bombay) is a violation of rights. Fortunately, however, I will not have to discuss the senses in which DE is, or is not, a principle of causal casuistry. For I shall be proposing a substitute for DE. I shall be proposing, as its replacement, the Principle of Antecedent Peril (AP). And this principle will better fit the profile of a principle of causal casuistry.

Whereas I shall only briefly discuss CA, I shall spend more time discussing the relative merits of DE and AP and the reasons for preferring the latter.

II. TITLE-BASED VS. ACTION-BASED RIGHTS

Unfortunately, before discussing these principles which hook up with ascriptions of rights and allow us to arrive at particular judgments regarding the violation of rights, something must be said about the structure of those rights ascriptions themselves. These remarks about the structure of the rights ascriptions themselves clarify the need to supplement the judgments of rights if one is to arrive at judgments about the permissibility or impermissibility of specific actions. Theories of non-contractual rights proceeding along libertarian lines can be classified as either ‘action-based’ theories or ‘title-based’ theories (see [10]). The action-based theories seek to specify, as the most basic ascription of rights, what sorts of actions persons have rights to perform or (more commonly) what sorts of actions persons have rights against. So someone arguing that the most basic right is a right to liberty, i.e., a right against liberty-denying, coercive, actions by others, would fall into the ‘action-based’ camp. In contrast, someone maintaining that a person’s most basic rights were rights over his own body, person and/or life, would fall into the title-based camp.

The action-based program of specifying those actions against which (or to which) persons have rights seems to avoid the need for a separate enterprise of causal casuistry. (This is why I had to use the idioms of title-based theory when I introduced the distinction between one’s theory of rights and one’s theory of their violation.) For it seems that, from the very statement of Alyoshia’s action-based rights against Alice, along with a list of the actions performed (or not performed) by Alice, one could determine whether Alice has violated some right of Alyoshia. But on two levels we should anticipate the rights theorist being driven back to the title-based approach and to the need for an associated causal casuistry. On the most abstract level, it appears that the action-based approach is parasitic upon the title-based approach in that the crucial notions employed in the former must, it seems, be defined on the basis of the latter. Thus, for instance, the advocate of a fundamental right against liberty-denying actions must specify what counts as liberty-denying in terms of some more basic theory of title-based rights. A necessary pre-condition of an action counting as liberty-denying for Alyoshia is that but for the action Alyoshia would still possess or enjoy some R to which he had a
right. But not every action which is such that, but for it, Alyoshia would still possess or enjoy $R$ violates Alyoshia’s rights. Hence the need for causal casuistry.

On a less abstract level, consider the action-based strategy of speaking of a right against being killed rather than of a right to life. The common claim is that the ‘right against being killed’ does not suggest, as the ‘right to life’ does, that refraining from, e.g., the saving of the five in need of transplants violates the rights of those five. But opting for ‘the right not to be killed’ over ‘the right to life’ avoids suggesting that refraining violates rights only so long as a particular bit of causal casuistry is implicitly assumed. In particular what has to be implicitly assumed is precisely that such a refraining is not a killing; that such a refraining is not simply another way of causing death on a causal par with poisoning or throat-slitting. But as soon as this assumption is challenged – as it has been all over the philosophical literature in recent years – the only way to maintain that the refraining does not violate the rights of the five is to argue explicitly for the contrary proposition within causal casuistry, viz., that the refraining does not violate the rights of the five because it does not (even non-robustly) cause their loss of life. But if one does accept this proposition of restrictive causal casuistry, i.e., if one does accept CA, then there is no need to speak of the relevant right as the action-based right not to be killed. That right is the title-based right to life, and it is not violated (says the advocate of CA) by the non-prevention of the loss of life.

Clearly a major issue within causal casuistry is whether inactions or omissions or refrainings cause those evils (or those goods!) which would not have existed had the relevant agents acted in certain specific ways instead of not acting, omitting, or refraining. What I call Jewish causal casuistry, i.e., the impulse to hold people responsible for as many evils as possible, affirms negative causation. Through Jewish causal casuistry, a libertarian-like theory of rights to the effect that individuals have rights to their (respective) bodies and lives yields the conclusion that every (knowing) failure to prevent bodily injury or death violates rights. Since every action which prevents harms precludes other actions which would prevent other harms, such an expansive causal casuistry pictures us as inescapably and constantly having to judge how much harm we shall do (by action or inaction). The best one can ever hope to do is to minimize the harm one does. Given such an expansive causal casuistry, our moral lives could consist only in a ceaseless effort to avoid unnecessary and inefficient inflictions of injury and death.

III. THE CAUSING VS. ALLOWING PRINCIPLE

I have argued at length elsewhere against doctrines of negative causation, against the doctrine that to fail to prevent an untoward upshot is to engage in an alternative method of causing that upshot (81). Here I will try to state briefly some of the core reasons against the belief in causation through inaction. Consider again the case of Dr. Alice in Delhi and Alyoshia in Bombay. To say that Alice can prevent Alyoshia’s death is to say that she can intervene into some current, ongoing train of events which otherwise will cause Alyoshia’s death. That chain of events is causally sufficient for Alyoshia’s death. Those events do not have to be re-enforced or enhanced by Alice’s non-intervention in order for them to eventuate in Alyoshia’s death. This is made clear by recognizing that, had Alice never existed and, hence, had the possibility of her non-intervention never arisen, that chain of events would threaten Alyoshia’s life in precisely the same way. Alice’s presence in the world with the capacity to intervene in no way alters the causal sufficiency of that independently existing train of events for bringing about Alyoshia’s death. Thus, when that chain of events does bring about Alyoshia’s death, it is that chain of events, not that chain plus Alice’s omission which causes that death.

To say that Alice can avert Alyoshia’s death is to say that she can (and knows she can) intervene against certain of the conditions which otherwise will jointly cause Alyoshia’s death. If the total set of conditions, some of which she can nullify, were not causally sufficient for Alyoshia’s death, we would not say that she can avert that death. It is, therefore, inconsistent to say both that Alice can avert Alyoshia’s death and that, if she does not do so, her omission joins those other causal conditions making for Alyoshia’s death without which they would not have been causally sufficient. Our very conception of averting upshots builds on the picture that sometimes causal processes are at work in the world and we can either remain outside of those processes or intervene to disrupt or nullify them. When Alice does not intervene, she does (or does not do) just that. Hence, she remains outside of those causal processes which eventuate in Alyoshia’s death. Perhaps she can be morally criticized for not intervening, for letting those causal processes bring about what they were causally sufficient to bring about, for not undercutting their causal sufficiency for Alyoshia’s death. Her non-intervention may show a moral callousness. And, of course, if she was positively obligated to go to Alyoshia’s aid (by, e.g., having agreed to perform the needed surgery), then her failure to aid would violate Alyoshia’s positive right
to her medical aid. But in the case of simple non-intervention (where no positive duty has been created), it is an error to ascribe causal responsibility for Alyosha’s death to Alice. To possess the unexercised capacity to prevent untoward events is not to be causally responsible for those untoward events. Alyosha and his unhappy fate to the contrary notwithstanding, (causally-based) guilt for evils requires more than presence in the world with a capacity to avert those evils. It is because of CA that, although had Alice acted differently Alyosha would not have lost a rightful condition (viz., his life), Alice does not violate Alyosha’s rights. It is through CA that we can arrive at a specific judgment about Alice’s conduct which we could not arrive at merely on the basis of recognizing Alyosha’s right to life.

IV. THE PRINCIPLE OF DOUBLE EFFECT

I turn now to the pursuit of a second principle of causal casuistry – the Principle of Antecedent Peril. In this section I work toward this principle by considering the merits and demerits of the more commonly discussed Principle of Double Effect. I place emphasis on and vindicate the significance of DE’s central distinction between intended and merely foreseen effects. But I also point to certain implications of DE which may not seem plausible. In the next section I present and defend an alternative principle AP, which: (a) provides an explanation for the significance of the intended vs. foreseen distinction; (b) fits the profile of a principle of causal casuistry; and (c) avoids the most problematic of DE’s implications.

To begin the discussion of DE, consider two cases in each of which you act with the ultimate goal of saving the lives of New Yorkers. Both are, in a sense, public health cases. In the first case, a swarm of mosquitoes is approaching New York City from the North. If allowed to arrive in New York, they will transmit a fatal disease to all New Yorkers. Unfortunately, there is only one way to prevent this catastrophe. The swarm can be sprayed as it crosses central Massachusetts. But it is foreseen that this spraying will not destroy the entire swarm. A remnant will be deflected on to Worcester, MA, infecting and causing the death of all Worcester’s population. Nevertheless, you proceed with the spraying.4 In the second case, the entire population of New York has already been infected with a disease which will be fatal unless they are treated with a medication which can only be made out of the vital organs of the inhabitants of Worcester. The Worcesterians can be dismembered and processed painlessly and without anxiety-producing warning. You proceed to produce the vitally needed medication.

DE, on reflection quite correctly, draws a bright moral line between these two actions. It allows the first in which the Worcesterian deaths are foreseen but are in no way aimed at or employed as your means. But it disallows the second in which the deadly processing of the Worcesterians is aimed at, is employed as your means. The plausibility of DE and its implications in these cases is connected with the idea that what one is doing (or what one is characterized as doing for the purpose of moral evaluation) is crucially determined by what one’s intention is. In dismembering the citizens of Worcester one would be bringing about the deaths of innocent bystanders in a way in which one would not be were one to spray that swarm or otherwise deflect it on to Worcester. The two instances of causally contributing to the deaths of innocents would be different in kind because their intended effects would be different in kind. An intended effect of an action is not what the agent happens to envisage at the moment of action. Rather, it is a goal – albeit, perhaps, only an intermediate goal employed for some further end – which calls forth and contours the agent’s action. Thus, it is characterized as a ‘direct’ effect of the action: it is that toward which the act is directed. In contrast, a ‘second’ effect is incidental to the action, in that it plays no role in calling it forth or guiding its structure. The agent would be acting in precisely the same way even if that second effect were not an upshot of his activity. Incidental as it is to the action and its structure, an unintended effect is merely an ‘indirect’ effect of that action.

For instance, your spraying that mosquito swarm is not in any way done in response to the existence of Worcesterians. But quite the contrary is true vis-a-vis the Worcesterians if you choose to save the New Yorkers by utilizing the Worcesterians’ bodies. In the first case, you act precisely as you would had there been no Worcesterians. In the second case, your plan of action is directed at those unfortunates. You do what you do in order to get hold of them and process their internal organs. Were they to become aware of your plans and attempt to flee, you would have to change your plans in order to capture them. Although dismembering the Worcesterians is not something you would be pursuing as an ultimate end, this dismemberment would be sought by you as your chosen means to the end of saving the New Yorkers. If you save the New Yorkers through pursuit of the Worcesterians, you must, in some sense, take it to be a good thing that the Worcesterians are there to be used as your means. In contrast, choosing to save the New Yorkers by spraying the mosquito swarm (and deflecting its remnants) in no way involves your taking the presence of the ill-fated Worcesterians to be a good
thing.

DE has been subject to a number of well-known criticisms. One crucial family of criticisms focuses on the question of how morally significant is the difference between acting such that a death foreseen by you ensues and acting such that a death intended by you ensues. After all – despite what has just been said in the way of distinguishing the two cases of saving New Yorkers – in both cases, were you to choose to act, you would be willing (under the circumstances) to have the Worcestersians die, while in neither case would you be happy about these deaths. It is sometimes suggested that our inclination to differentiate morally between cases such as these is not due to any morally significant difference between intended and (merely) foreseen untoward upshots. Rather, it is suggested that this inclination to differentiate merely reflects different degrees of causal proximity between the actions under consideration and their respective fatal upshots, and that such differences in causal proximity are not morally significant.

Consider, however, a minor variant of the mosquito threat to New York. Suppose that you spray such a swarm and, in the process, divert its remnants to Worcester for the sake of causing the deaths of the Worcestersians. You act with the intention of causing those deaths and make use of the swarm and the deflecting effect of your spraying devices to bring about those deaths. The deaths of the Worcestersians is what you are aiming at, is that toward which you are directing your action. It is the purpose which calls forth and contours your action (though it need not be your ultimate purpose). In the sense of causal distance employed in the objection to the significance of the intended vs. foreseen distinction, the causal distance between each of your deflecting acts and its upshot for the Worcestersians is the same. But this equality of causal distance does not eliminate the sense that there is a significant moral difference between the actions such that the first of these acts is permissible while the second of these acts is impermissible – a difference which it is reasonable to continue to believe is linked to the foreseen vs. intended distinction.

So far so good for DE. But it has long been noted, even by philosophers prepared to be sympathetic with DE, that DE seems to allow other savings of lives which are accompanied by foreseen (but not intended deaths) which should not be allowed. Consider the following case: Bob and Barbie are critically ill roommates in a hospital. You can save them only by the release into their room of a gas which is fatal to anyone not suffering from their particular disease. Unfortunately, Beau is the third roommate. He has recently returned to health and is about to be discharged. But the gas must be released immediately, before Beau can leave the room, if it is to save Bob and Barbie. You release that fatal (to Beau) gas. Now, if any evil effect is foreseen but not intended, in the general spirit of DE, it is the death of Beau in this example. DE seems to allow your so causing the death of Beau. But I take it that your causing this death is not permissible. But how can one maintain that this causing of death is impermissible, while spraying/deflecting the mosquito swarm on the way to New York is permissible?

It is, of course, true in this gassing, as in the disembemberment of the Worcestersians, that you would be causing death and not merely failing to prevent death. An advocate of CA may claim that this is why these two acts are impermissible in contrast to the permissibility of Dr. Alice’s failing to save Alyosha. But this point cannot be too comforting to the advocate of DE who, after all, sets out to argue that sometimes it is permissible to contribute causally to an innocent bystander’s death – e.g., to the foreseen but unintended deaths of the Worcestersians. In fact, a principle like DE can be seen as modifying the stringency of CA. For CA, combined with an assignment of serious (i.e., at least fairly absolute) rights to life, seems to rule out any causal contribution to the death of innocent bystanders, while a principle such as DE maintains that certain types of contribution to such deaths may not be impermissible. Indeed, perhaps the most famous (notorious?) use of DE in a medical context has been to argue to a special group of exceptions to a general moral ban on killing fetuses. It is argued that, while in general it is wrong to kill fetuses because this is causing or intentionally causing the death of innocent persons, it is permissible to administer medical treatment to a seriously ill pregnant woman even if it is known that the medical treatment will result in the death of the fetus. (The key, of course, for the advocate of DE is that the medical treatment be precisely, or at least essentially, what would have been administered to the woman even had she not been pregnant.) Since DE and principles like it have the function of modifying CA, CA can hardly be invoked to limit (modify) the implications of DE.

So we have a dual problem with the implications of DE. First, DE properly allows certain actions which causally contribute to deaths of innocent bystanders and thus requires exceptions to a moral drawn from CA that one must refrain from foreseen causal contribution to the deaths of innocent bystanders. But since it is at least dubious that DE is a principle of causal casuistry, it is hard to see how an exception based upon DE can link up with and modify the moral drawn from CA. Far better if we had a principle which identified the acts properly allowed by DE as causally insignificant contributions to losses of rights. For then we could see how such acts would not
violate the moral rule against (robustly) causally contributing to the deaths of innocent bystanders. Second, DE improperly allows certain other actions which causally contribute to the deaths of innocents, e.g., Beau. What is needed, therefore, is an alternative principle which discriminates between the acts properly and improperly allowed by DE.

V. THE PRINCIPLE OF ANTECEDENT PERIL

I turn now to the alternative to DE, the Principle of Antecedent Peril (AP). I want to show how AP provides a causally causistic account of the moral line between the two cases of unfortunate Worcestersians. And, at the same time, AP does not yield the permissibility of your indirectly gassing poor Beau. In their *Causation in the Law* [7], Hart and Honoré discuss what types of intermediate events between the occurrence of an earlier event X and a later event Y ‘negatives’ the causal connection between X and Y. It is clear that, even when such negating obtains, X may remain a necessary causal condition of Y. It is the status of antecedent cause X as the primary or substantial cause of Y that is negated. If such a negating of causal connection does not occur, then primary causal responsibility for Y continues to go back to X and not merely to some event (or action) which mediates the causal connection between X and Y.

Hart and Honoré hold that, except in special cases such as those involving inducement, intervening voluntary actions negative causal connections. One of their examples is as follows. If I put poison in Jones’ coffee and, unaware of this poison, Jones drinks the coffee and dies, then I have killed Jones. However, if Jones is aware of the poison and, nevertheless, ‘deliberately’ drinks the coffee, he is a suicide. I will not have killed Jones (absent some elaborate truth about my having preyed upon his psychological weakness and peculiarities).

The hard question is whether Jones’ being aware of the poison and, hence, his foreseeing his death should he drink the coffee suffices for his ‘deliberate’ act of drinking the poisoned coffee to break the causal chain going back to my poisoning the coffee. Or does Jones have to drink that coffee with the intention of ingesting the poison for the connection between my poisoning the coffee and Jones’ death to be negated? If intermediate intention, but not intermediate foresight, negatives causal connection, then when you deflect the swarm to Worcester with the intention of infecting its inhabitants you negative the causal link back to the swarm itself while, in contrast, when you deflect the swarm away from New York with the (merely) foresight that its remnant will infect Worcester you do not negative the causal connection back to the antecedent peril. So, if intermediate intention, but not intermediate foresight, negatives causal connection, primary causal responsibility will lie with you when you intend the infection of the Worcestersians, while, in contrast, when you deflect the swarm away from New York with the (merely) foresight of Worcesterian fatalities, primary causal responsibility lies with the antecedent peril, the swarm itself.

Unfortunately, Hart and Honoré themselves seem to hold that even intermediate foresight negatives causal connection. For they seem to hold that for Jones to take the poison ‘deliberately’, and thereby break the causal connection, it is enough that he know the poison is there in his coffee ([4], p. 12; see also [3]). On this basis one would have to say that in each swarm-deflection case primary causal responsibility goes back only to you, the intermediate agent. Thus, on their specific version of the doctrine that deliberate intermediate action negatives causal connection, one could not distinguish between your causal responsibility in these two cases. In both, in virtue of your intermediate action, the antecedent peril would be causally off the hook. But I dispute their particular interpretation of negating intervening events.

I maintain that Jones deliberately consumes the poison in a way that breaks the link between my poisoning the coffee and his death only if Jones intends to consume the poison. It is difficult, in the example as given, to imagine Jones bringing about his foreseen death by poison without the intention of doing so. So let us slightly change the case. Suppose the poison causes a painful one week illness from which the victim fully recovers. Suppose also that Jones has, prior to the poisoning, negotiated a contract with some third party to receive a $10,000 payment for drinking that coffee which sits before him. Now it is easy to imagine that Jones might knowingly consume the poison, foreseeing the painful illness, without at all intending to consume the poison or undergo the illness. He drinks coffee in order to collect the $10,000 – just as he would have, had the poison never been placed in the coffee. Although he foresees the consumption of the poison and the illness, neither prospect plays any (positive) role in guiding or explaining his action [8].

Suppose Jones does consume that unhappily poisoned coffee. He does not thereby deliberately bring about the illness through a voluntary act which negatives my causal responsibility for his subsequent suffering. I remain primarily causally responsible for his painful illness. Similarly, if I construct a chamber of horrors along the route through which someone must pass if he
is to escape a concentration camp, the causal responsibility for his injuries in that chamber is mine even when he knows full well what awaits him on that route. Only if Jones or the prisoner act with the intention of undergoing those painful episodes do their actions negative the chain of responsibility leading back to me. Intending an untoward effect, but not (merely) foreseeing it, negatives the causal link back to the antecedent perilous condition and its author. Only if Jones and the escapee are masochists am I causally off the hook.

AP and DE both employ the distinction between intended and foreseen effects. But the former, unlike the latter, is a principle of causal casuistry. AP, unlike DE, speaks to the issue of whether an agent’s action is the primary cause of some untoward upshot. Even if that untoward upshot is the loss of a rightful condition – e.g., the Worcestersians’ loss of their lives – an agent’s causal role in that loss may fall sufficiently short of being robust that the agent cannot be said to violate the rights of the unfortunate losers. Only when the causal connection back to the antecedent peril is negatived by the agent’s actions so that the primary causal responsibility only passes back to that agent, is that agent’s causal role sufficiently robust for us to say that he does violate the rights of those who have lost their lives.

The relevance of the intended vs. foreseen distinction within the doctrine of AP is that an act with the intended result of a death will undercut (negative) the causal status of the inevitably injurious setting which presented that death as a possible intended result, while an act with the (merely) foreseen result of a death will not undercut (negative) the causal status of the horrible setting. The theoretical intuition is that when people are confronted with inescapably death-dealing circumstances, responsibility for ensuing deaths can be attributed to the circumstances (or, better yet, if possible, to an author of those circumstances), and hence not to the intermediate agents, as long as the ensuing deaths are not intended by the relevant agents. When one is acting within such an imposed and inescapably death-dealing context, one’s action does not negate the situation’s primary causal responsibility for an ensuing death unless that death (or the wrongful injury or risk which produced it) is a formative goal of one’s action.¹⁰

AP, then, provides an explanation for the significance of the intended vs. foreseen distinction. Moreover, since it is a principle of causal casuistry, we can readily understand how it can modify the Causal vs. Allowing Principle. It allows us to identify certain instances of playing a causal role in bringing about the loss of a rightful condition in which the primary causal responsibility still rests with an antecedent peril so that the intermediate agent

should not be said to violate rights.

Furthermore, AP provides an explanation for why the standard (i.e., non-intentional) deflection cases are so easy, i.e., why it is easy for us to accept the permissibility of your deflecting the remnant of the swarm away from New York and of Judith Thomson’s trolley passenger’s act of turning the runaway trolley away from the track with five innocents trapped on it onto a track with one innocent trapped on it. For, in these cases, there is a clear sense in which the very dangerous condition which threatened the New Yorkers or threatened the five is what, in fact, causes the Worcestersians’ death or the death of the one. AP is an improvement over DE because it accommodates our sense that a major part of what vindicates you and the trolley passenger is your each being confronted with an inevitably deadly situation.

What, however, does AP tell us about the gassing of poor Beau who unfortunately shares that hospital room with Bob and Barbie? DE is questionable precisely because it allows the indirect gassing of Beau. But especially when one is thinking in terms of DE, it is hard to see how to allow the spraying/deflection of the mosquito swarm with foreknowledge of the deaths in Worcester and still disallow the unintended gassing of Beau. But, in light of the causal focus of AP, one can differentiate these two cases. There are two respects, in the case of Beau’s death, that the role of an independent antecedent peril is less than the role of such a peril in the deaths of the Worcestersians. First, in the case of Beau’s death, you would not be deflecting an already oncoming gas away from Bob and Barbie and (unfortunately and coincidentally) on to Beau. You would be introducing the gas. Although, but for your spraying the swarm as it moves toward New York, its remnant would not arrive in Worcester, there is still a clear sense in which the dangerous mosquitos which infect the Worcestersians are not introduced by you. (In Thomson’s language, you only play a role in distributing this pre-existing evil.¹⁰)

Second, in the case of your gassing Beau it is natural for us to suppose that you are a physician or other health professional working in association with the hospital and that, therefore, either you or others with whom you are institutionally associated are responsible for Beau’s being in that room. You cannot claim, therefore, that poor Beau just happens to be there precisely as the unfortunate Worcestersians just happen to be in the swarm’s deflection path. It is partially because of your prior actions, or those with whom you are institutionally associated, that the release of the gas is perilous for Beau. Thus, there are two respects in which your causal connection with Beau’s
VI. CONCLUSION

It is a mistake to think that, in all cases of reaching specific moral judgments about particular actions, one need only instantiate some general moral dictate. This is not true with regard to judgments about whether a particular action violates rights. One’s moral dictates will indicate whether someone’s right is at stake, whether a prospective loss would be the loss of a rightful condition. But, in order to determine whether some agent counts as violating rights, one must also determine the causal relationship (or lack thereof) between that agent’s acts or omissions and the other party’s loss. Only if the agent robustly causes the loss can it be said that he has violated the other’s rights. I have tried to illustrate this complementary structure of moral principles and causal casuistry by stating, utilizing and defending two principles of causal casuistry, the Allowing vs. Causation Principle and the Principle of Antecedent Peril. The latter principle, in particular, needs more clarification than I have provided in this essay, in which my primary goal has been to illustrate the need for some principles of causal casuistry if ascriptions of rights are going to be translated into concrete judgments about the permissibility or impermissibility of particular actions.

NOTES

1 I speak of ‘potential’ patient Alyosha to emphasize that Alice and Alyosha have not entered into my special voluntary relationship which generates a special obligation on Alice’s part to come to Alyosha’s aid. The belief that positive obligations to aid and, correlatively, positive rights to aid only arise through special voluntary relationships is, of course, a crucial component of the libertarian rights view, the application of which to concrete cases we are investigating in this essay.

2 Since the deontologist’s contention will precisely be that certain of the upshots which the consequentialist wants to count should not count as consequences of the actions being evaluated,
In his 'Moral Rights and Causal Casuistry', Professor Eric Mack articulates a theory of what he calls 'causal casuistry' that he labels 'restrictive'. One of the central principles of Mack's 'restrictive' view of causality is the 'Causing versus Allowing Principle' (hereafter, 'CA') according to which 'there is a morally significant difference between causing a death and allowing a death' ([10], p. 59). I shall argue that CA is false and that the view of causality articulated by Professor Mack disguises the richness and complexity of what we do or fail to do.

I. MACK'S DEFENSE OF THE VIEW THAT OMISSIONS ARE NOT CAUSES

As part of his support of CA Professor Mack defends the underlying theoretical claim that to fail to prevent an event by performing an alternative action is not to cause that event. If this underlying theoretical claim is false, then so is CA, since allowing a death will be one way of causing it. Professor Mack defends this crucial claim as follows:

To say that Alice can prevent Alyosha's death is to say that she can intervene into some current, ongoing train of events which otherwise will cause Alyosha's death. That chain of events is causally sufficient for Alyosha's death. Those events do not have to be re-enforced or enhanced by Alice's non-intervention in order for them to eventuate in Alyosha's death. This is made clear by recognizing that, had Alice never existed and, hence, had the possibility of her non-intervention never arisen, that chain of events would threaten Alyosha's life in precisely the same way. Alice's presence in the world with the capacity to intervene in no way alters the causal sufficiency of that independently existing train of events for bringing about Alyosha's death. Thus, when that chain of events does bring about Alyosha's death, it is that chain of events, not that chain plus Alice's omission, which causes that death ([10], p. 65).

The causal principle allegedly supported by the example – that the act of allowing a death is never a cause of that death – is open to counterexample. To show that this general causal claim is false, we will focus on the following variation of the above example (in Mack's own variation Alyosha is an adult in one city and Alice a physician in another who chooses to go to a party rather than save him). Suppose that Alyosha is a three-month-old infant who has been found by Alice in a hotel room which she has rented for the evening.