F. M. Kamm

Intricate Ethics

Rights, Responsibilities, and Permissible Harm

INTRICATE
ETHICS

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In memory of my dearest parents,
Mala Schlussel Kamm and Solomon Kamm,
loving souls, gifted people

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INTRODUCTION

This book is about nonconsequentialist ethical theory—its methods and content as I see them—and some alternatives to it, either substantive or methodological. Many of the chapters are based on essays of mine on normative theory published since 1996.[1] However, even these chapters significantly revise and expand the substance of the articles on which they are based.

Section I, "Nonconsequentialism and the Trolley problem," consists of chapters that first provide a general introduction to my past work and then present more detailed discussion of particular aspects of nonconsequentialist theory pertaining to harming persons. The section begins with "Nonconsequentialism" (chapter 1), which is, to a large extent, a summary of two of my previous books and to some degree an introduction to new discussions that follow in later chapters. The first seven parts of chapter 1 include summaries of my *Morality, Mortality*, volume 2, on the topics of prerogatives, constraints, inviolability, and the significance of status, also adding some new points. The last part includes summaries of chapters 5–12 of my *Morality, Mortality*, volume 1, on a nonconsequentialist theory of aggregation and the distribution of scarce goods, also adding some new points.[2] It provides those who have not read these books with a background to my thinking and a sense of the project I am trying to carry forward in this book. Hence, while chapter 1 introduces problems and views, the more detailed discussion of many of these occurs in later chapters. There follows a chapter that reexamines the question of whether the numbers of people who would be saved or killed makes a difference to what we

should do. As later chapters will assume that there is reason to do what saves a greater number of people, it is appropriate that this question should be dealt with first. I contrast two subcategories of a method known as pairwise comparison—confrontation and substitution—by which conflicts might be resolved in a nonconsequentialist theory. I argue that substitution is permissible. Chapter 3, "Intention, Harm, and the Possibility of a Unified Theory," examines how another philosopher, Warren Quinn, dealt with some of the issues I discuss in "Nonconsequentialism." While critical of the significance for permissibility of the intention/foresight distinction, it also presents my attempt to see how far we can offer a unified account of the moral foundations of the harming/not-aiding and the intention/foresight distinctions.

The next three chapters make use of the Trolley Problem (to which the reader was introduced in chapter 1) for the purpose of unearthing principles of permissible harm. Chapter 4, "The Doctrines of Double and Triple Effect and Why a Rational Agent Need Not Intend the Means to His End" is concerned with the Doctrine of Double Effect and an addition to it that I call the Doctrine of Triple Effect. The chapter introduces and explains a second distinction, besides intending versus foreseeing; this is the distinction between acting because of an effect that one's act will have and acting in order to produce the effect. This distinction supports my claim that very common notions of what it is to intend an effect are wrong. The chapter also focuses on the bearing that the "because of" relation has on a theory of instrumental rationality. The question is asked: Must a rational agent, insofar as he is rational, intend what he believes is the means to his end? I argue that the possibility of acting because of an effect we will produce without intending to produce the effect helps to show that a rational agent, insofar as he is rational, need not intend the means to his end. In conclusion, I consider some practical implications of these points.

The next chapter, "Toward the Essence of Nonconsequentialist Constraints on Harming: Modality, Productive Purity, and the Greater Good Working Itself Out," briefly reviews several proposals that have been made to account for when it is permissible to harm innocent bystanders, including the Doctrine of Triple Effect. Problems that seem to arise for each of these proposals are considered, and then two new proposals—the Doctrine of Initial Justification and the Doctrine of Productive Purity—are introduced. Having argued for substitution rather than confrontation of persons in chapter 2, in this chapter I argue for substitution rather than subordination of persons as a way of dealing with conflicts between people. In addition, I draw connections between what we learn from considering the Trolley Problem and what are known as innocent threat cases, I consider when a principle of permissible harm may be overridden, and finally draw a practical implication from my discussion.

This chapter, more than others, makes clear that I believe that finding a principle of permissible harm (if there is one) is, in part, like a rigorous scientific or technical enterprise. It involves *very* intricate ethics. Thomas Nagel, in discussing his views about a principle of permissible harm (based on the Doctrine of Double Effect) says: "I won't try to draw the exact boundaries of the principle. Though I

say it with trepidation, I believe that for my purposes they don't matter too much, and I suspect they can't be drawn more than roughly: my deontological intuitions, at least, begin to fail above a certain level of complexity."[3] My approach to finding a principle of permissible harm (as well as my views about what the principle is) is very different. I think that the principle can be drawn more than roughly, and that in doing this, we should, if we can, rely on intuitions even at great levels of complexity.

In general, the approach to deriving moral principles that I adopt may be described as follows: Consider as many case-based judgments of yours as prove necessary. Do not ignore some case-based judgments, assuming they are errors, just because they conflict with simple or intuitively plausible principles that account for some subset of your case-based judgments. Work on the assumption that a different principle can account for all of the judgments. Be prepared to be surprised at what this principle is. Remember that this principle can be simple, even though it is discovered by considering many complex cases. (If the principle is complex, this would not undermine the claim that people have intuitive judgments in accord with it, since people need not be conscious of the principle to have case-based intuitive judgments.) Then, consider the principle on its own, to see if it expresses some plausible value or conception of the person or relations between persons. This is necessary to justify it as a *correct* principle, one that has normative weight, not merely one that makes all of the case judgments cohere. (In this book, I spend less time on this last step than on the earlier ones.) Since the principle that is justifiable may be surprising, be prepared to be surprised at what the point of non-consequentialism turns out to be. This is only a working method, and it remains possible that some case judgments are simply errors. (However, more caution in drawing this conclusion is involved with the method I employ than seems to be common when others use other variants of the method known as *reflective equilibrium*.) I say, consider your case-based judgments, rather than do a survey of everyone's judgments. This is because I believe that much more is accomplished when one person considers her judgments and then tries to analyze and justify their grounds than if we do mere surveys.[4]

The last chapter in this section, "Harming People in Peter Unger's *Living High and Letting Die*," examines Peter Unger's views on the permissibility of harming innocent bystanders and the duty to harm ourselves in order to aid others. It also considers his views on the method of using intuitive judgments about cases in order to discuss moral principles. (In section IV, in a chapter titled "Peter Singer's Ethical Theory," I argue that Singer underestimates how extreme the implications of his consequentialist views are and that, in fact, they imply something like Unger's principles of permissible harm. Hence, my criticism of Unger implicitly begins a criticism of Singer's views that continues at several other places throughout these chapters.) Since Unger makes heavy use of the Trolley Problem in discussing these issues, it is appropriate for this chapter to follow on my detailed discussion of that problem.

Section II, "Rights," begins with "Moral Status," a basic discussion of different forms of moral significance that entities may have, culminating in being the

subject of a right. The next chapter, "Rights beyond Interests," includes an overview of theories of rights and an attempt to show how certain other elements of nonconsequentialist theory (already discussed in section I) may help us to better understand the foundation and content of rights. Some ideas discussed in earlier chapters—for example, inviolability, the distinction between harming and not-aiding, and distinctions among ways of harming people—appear again. But now the purpose is to see how they function in the new context of rights theory. An important thesis of this chapter is that we should not think of rights as only protecting and promoting interests, but also as reflecting someone's status and worth simply as a person. I try to show that this thesis may help explain why the very same interest is protected in some ways and not in others. The next chapter, "Conflicts of Rights: A Typology," adds more detail to the discussion of conflicts of rights in "Rights beyond Interests." It also shows how questions about aggregation that arose in section 8 of chapter 1 and in chapter 2 appear in a new guise as part of the theory of rights.

Section III, "Responsibilities," discusses issues that, I believe, are newer to recent nonconsequentialist theory: responsibility and collaboration, and new ways in which physical distance might bear on our duty to aid. The discussion of collaboration in "Responsibility and Collaboration" grows directly out of reconsidering one of the most famous cases in the literature of modern ethics, Jim and the Indians, used by Bernard Williams to criticize consequentialism. This case would require someone to kill, in a way ordinarily thought to be impermissible, a person who would otherwise soon die anyway. It is appropriate to consider it after our earlier discussion in section I of a principle of permissible harm that would ordinarily rule out killing in such a way. This chapter also revisits another issue introduced by Williams, namely, "agent regret."

Both consequentialists and nonconsequentialists have a hard time believing that mere physical distance between people could affect the strength of our duty to aid, even though it seems to play a role in intuitive judgments, at least at first blush. The first chapter on the topic, "Does Distance Matter Morally to the Duty to Rescue?" harks back to the methodological issues discussed in chapter 1 in connection with determining whether killing is morally equivalent to letting die. So it applies what was said there about determining whether a set of contrasting factors is a morally relevant distinction to the issue of whether physically near versus far is a morally relevant distinction. This chapter also includes detailed discussions of Peter Singer's and Peter Unger's arguments concerning our duty to aid and its independence from distance. The second chapter on the topic, "The New Problem of Distance in Morality,"[5] argues in detail that, whether or not distance is morally significant, the problem of distance in morality has been misunderstood. It offers a reconception of the problem and tries to answer some of the new questions to which this revised problem gives rise.

Section IV, "Others' Ethics," is devoted to the views of others within the consequentialist and nonconsequentialist camps. The section begins with "Peter Singer's Ethical Theory," an examination of the ethical theory to which Singer subscribes, on topics other than harming some to aid others and the significance

of distance. (His views [and views to which, I believe, he is committed] on the latter issues were discussed in previous chapters.) As a follow-up to Singer's (and Unger's) criticism of the use of intuitive judgments about cases, the next chapter, "Moral Intuitions, Cognitive Psychology, and the Harming/Not-Aiding Distinction," considers empirical work by Daniel Kahneman and Amos Tversky on the use of intuitive judgments and framing effects. Their work precedes but is similar in spirit to Peter Unger's, I believe, and could be useful in supporting consequentialism. My main claim in this chapter is that the harming/not-aiding distinction is neither captured by the loss/no-gain distinction that is employed by these psychologists nor is it undermined by the same framing effects. (The primary argument for this is that *losses* can come about by not-aiding and so can also be distinct from harming.) A brief discussion of the moral theory of Bernard Gert, "Harms, Losses, and Evils in Gert's Moral Theory," which follows is pertinent given the discussion of Kahneman and Tversky, for I argue that Gert is a nonconsequentialist who does not distinguish the role that a harming/not-aiding distinction rather than a loss/no-gain distinction plays in his own theory.

Contractualism (also known as contractarianism)[6] is a metatheory that is theoretically compatible with consequentialism as the favored normative principle of contractors. However, in Thomas Scanlon's theory, contractualism is proposed as a foundation for nonconsequentialist principles. The first half of the next chapter, "Owing, Justifying, and Rejecting," which is my discussion of parts of his book *What We Owe to Each Other*, is concerned with Scanlon's account of wrongness and his view of the value of human life. I argue that Scanlon's theory is best understood not as an account of "wrongness" (as he claims) but as an account of "wronging" and that, in this regard, it has connections with the theory of rights (discussed in chapter 8). The second half of the chapter begins by comparing Scanlon's contractualism with the type of method used in this book and then examines the particular reasons that might be given by contractors in rejecting or accepting proposed moral principles, such as the probability of harm, giving priority to the worst off, and aggregating harms and benefits.

One might summarize a good deal of the plot line of this book as follows: Nonconsequentialists argue for the moral importance of many distinctions in how we bring about states of affairs. I try to present and consider the elements of some of these distinctions. A good deal of section I focuses on providing a replacement for a simple harming/not-aiding distinction and revising and even jettisoning the significance for permissibility of conduct of the intention/foresight distinction.[7] A good deal of section III is concerned with examining the possible moral significance of other distinctions (collaboration versus independent action; near versus far). Some moral philosophers (such as Singer and Unger) think that many nonconsequentialist distinctions have no moral importance, and other philosophers (such as Gert) employ distinctions other than harming/not-aiding and intending/foreseeing. The work of yet others (Kahneman) could be used to argue that the distinctions that some nonconsequentialists emphasize are reducible to distinctions (loss/no-gain) that are suspect. Some of the chapters examine these alternative views. Finally, some philosophers hold foundational theories, like contractualism,

that could be used to derive and justify the nonconsequentialist distinctions by an alternative method from the heavily case-based ones I employ. I examine this alternative foundational approach and defend a case-based approach.

NOTES

1. I hope that a companion volume will be based on my articles since 1996 on practical ethical issues.

2. These books were published in 1996 and 1993, respectively, by Oxford University Press.

3. Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986), pp. 179–80. For more on my method of working, see the introductions to Kamm, Creation and Abortion, and *Morality, Mortality*, vols. 1 and 2 (New York: Oxford University Press, 1992, 1993 and 1996). In those introductions, I suggested that people who have responses to cases are a natural source of data from which we can isolate the reasons and principles underlying their responses. The idea was that the responses come from and reveal some underlying psychologically real structure, a structure that was always (unconsciously) part of the thought processes of some people. Such people embody the reasoning and principles (which may be thought of as an internal program) that generates these responses. The point is to make the reasons and principles explicit. (Unlike the deep structure of the grammar of a language, at least one level of the deep structure of moral intuitions about cases seems to be accessible upon reflection by those who have the intuitive judgements. An alternative model is that the responses commit people to principles that, however, were not in fact really psychologically present and generating their judgements.) If the same "deep structure" is present in all persons—and there is growing psychological evidence that this is true (as in the work of Professor Marc Hauser)—this would be another reason why considering the intuitive judgements of one person would be sufficient, for each person would give the same response.

5. Originally I called it the "Problem of Moral Distance," but it now seems to me that "moral distance" suggests something other than the moral relevance of mere physical distance.

6. I am reminded of Thomas Scanlon's Berlinesque quip about the use of these slightly different terms by different people to refer to the same thing: "Let's call the whole thing off."

7. Much more attention is paid to this latter distinction in this book than in *Morality, Mortality*, vol. 2.

SECTION I

Nonconsequentialism and the Trolley Problem

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NONCONSEQUENTIALISM

I. INTRODUCTION: DEFINITION AND ROOTS

Nonconsequentialism is a type of normative ethical theory that denies that the rightness or wrongness of our conduct is determined *solely* by the goodness or badness of the consequences of our acts or of the rules to which those acts conform. Nonconsequentialism does not deny that consequences can be a factor in determining the rightness of an act. It does insist that even when the consequences of two acts or act-types are the same, one might be wrong and the other right. Hence, nonconsequentialism denies the truth of both act and rule consequentialism, which are understood as holding that the right act or system of rules is the one that maximizes the balance of good consequences over bad ones as determined by an impartial calculation of goods and bads.[1] (Henceforth, I shall refer to this as "maximizing the good.") This sort of consequentialist calculation requires that we have a theory of what is good and bad; it may be an extremely liberal theory, holding that killings are bad or that autonomy is good, but we are still required to maximize the good.[2]

Despite the name "consequentialism," some consequentialists think that certain actions have value or disvalue in themselves. Some also think that acts and consequences can have different moral significance depending on their historical context. These theorists would think that we always ought to maximize the goodness of states of affairs where this could include the act itself, its consequences

and the historical context of these. Strictly, this would make them also be nonconsequentialists. But in addition to denying pure consequentialism, typical nonconsequentialists also deny that we always ought to maximize the goodness of states of affairs. Because of the possibility of this alternative contrast, instead of speaking of consequentialism versus nonconsequentialism, we could contrast teleology, in which we decide what to do solely by considering what state of affairs we will bring about, with deontology, in which what we do is not determined solely by what we will bring about. I shall henceforth use ''nonconsequentialism'' to mean a theory that denies that the rightness or wrongness of our conduct (or rules governing our conduct) is determined solely by the goodness or badness of the state of affairs we would bring about.

Contemporary nonconsequentialism finds its spiritual roots in the work of Immanuel Kant and W. D. Ross. Some nonconsequentialists are especially drawn to Kant's second formulation of the Categorical Imperative, which specifies that we should always treat rational humanity in oneself and in others as an end-in-itself and never merely as a means, and to his distinction between perfect and imperfect duties. Persons are said to have a special kind of unconditional value—value independent of serving anyone's (even their own) ends and independent of their being in a particular context—that makes them worthy of respect. Merely counting each person's interests in a consequentialist calculation of overall good, while it seems to literally distinguish persons from mechanical tools, is not enough to ensure that we treat someone as an end-in-itself in the Kantian sense. Rather, it is thought, if I am an end-in-myself then this fact can constrain even conduct that would maximize overall good.

Furthermore, suppose that for my sake someone does or would (counterfactually) constrain his behavior toward me in a given context in some way even if this is contrary to his interests or to maximizing the good (e.g., he will not kill me to save his own life). This does not ensure that when he still uses me against my interests in that context (e.g., cuts off my leg) without my consent, when I do not deserve such treatment nor am liable to it in virtue of what I have done, but only because this is instrumentally useful to him, that he is not treating me as a mere means. Hence, I think that it can be appropriate to say that someone is treating me as a mere means in the absence of any knowledge about whether he does or would constrain himself in some way for my sake. I do not have to have such knowledge before I can conclude that he is treating me merely as a means.[3]

On this view, how I *treat* you—as a mere means or not—is not determined by and should not be identified with something else, namely, my overall attitude toward you or belief about you. My overall attitude toward you may be that you are not a mere means and so I would not treat you in all ways as a mere means in a particular circumstance even if this is useful to me. That does not, according to the interpretation I am presenting, make it conceptually impossible for me to treat you as a mere means in this particular circumstance. (Possibly, one might say that insofar as I cut off your leg when this only serves my interests, I treat you as a mere means. However, insofar as I restrain myself from doing even worse things to you, for your sake and against my own interests, I do not treat you as a mere means.)[4]

Perhaps the following principle is roughly true: If someone's behavior toward you and the reasons for it could be used as *evidence* for the claim that she has the overall attitude toward you that you are a mere means, then even if this evidence is not proof of the particular *attitude* (because in this or other circumstances she would have constrained her behavior for your sake), then this behavior constitutes *an instance of treatment as a mere means.*[5]

Some nonconsequentialists suggest that we divide this Categorical Imperative into two components: (a) Treat persons as ends-in-themselves, and (b) do not treat them as mere means.[6] If we treat people as mere means, then we fail to treat them as ends-in-themselves. Nonetheless, we might fail to treat people as ends-in-themselves, even though we do not treat them as mere means, such as when we act without their consent in a way that does not involve (or even evaluate) them as causally efficacious tools but that is merely foreseen to harm them against their interests (when this act had no chance of being in their interests). An example is when we decide not to stop ourselves from running over someone because our doing so would interfere with our rushing sick people to the hospital.

Despite the importance of Kantian-theory to nonconsequentialists, some question whether an act is impermissible just because the agent treats someone as a mere means or not as an end-in-himself in doing the act. For suppose I do an act that is justified by its great good consequences despite some foreseen side effect harm to a few people. However, I do the act not for its good consequences, but only in order to produce the harm to the people as an end in itself (and I would not in any other way constrain myself for their sakes). Presumably, this still does not make my doing the act impermissible.[7]

The second element of Kant's legacy that appeals to some contemporary nonconsequentialists is his distinction between perfect and imperfect duties. The perfect duties describe specifically what we must do and they take precedence over the imperfect duties, which give us leeway in how or when we fulfill them. Thus, in Kant's view, I may not kill one person in order to fulfill a duty to save others. Contemporary nonconsequentialists, however, often diverge from Kant's absolutist conception of perfect duties (i.e., that such duties always take precedence over imperfect duties), and some claim merely that the class of negative duties (e.g., not to harm) is more stringent than the class of positive duties (e.g., to aid). Some contemporary interpreters of Kant have argued that his theory is not absolutist and does not imply, for example, that lying to someone in order to stop him from committing a murder is wrong.[8] (It is not clear, however, that this interpretation, which seems to rely on the view that people's bad acts can lead to their forfeiting a right not to be lied to, can also yield the truth that it is permissible to lie to *an innocent bystander*, if this is necessary to stop a murderer.)

W. D. Ross is another major inspiration for contemporary nonconsequentialism. Although Ross thought that there was a prima facie duty of beneficence, he also thought that there are numerous other prima facie duties, for example, a duty not to harm, a duty of gratitude, and a duty to do justice. If these prima facie duties conflict, as he thought they might, we have no single scale on which to weigh them or rule by which to order them so as to determine what our actual duty is. In this

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