

IS CONTRASTIVE CONSENT NECESSARY FOR SECONDARY PERMISSIBILITY?

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IN NONCONSEQUENTIALIST ETHICS there is a phenomenon of secondary permissibility whereby an otherwise morally impermissible option is rendered permissible by the presence of another option. There is some controversy, however, about what the deontic mechanics of this moral phenomenon are. In this paper, I critique a recent approach, that of Theron Pummer, to the deontic mechanics of secondary permissibility.

The phenomenon of secondary permissibility is evident by way of a comparison of the moral data in three cases:

Turn: A trolley is about to kill five innocent strangers. You can turn the trolley onto me, thereby saving the five and killing me.

Hurl: A trolley is about to kill five innocent strangers. You can hurl me at the trolley, thereby stopping the trolley and saving the five, but also paralyzing me.

TurnHurl: A trolley is about to kill five innocent strangers. You can turn the trolley onto me, saving the five and killing me. You can instead hurl me at the trolley, saving the five and paralyzing me.

Intuitively, it is permissible for you to turn the trolley onto me in Turn but impermissible for you to hurl me at the trolley in Hurl. And this is so, even though being paralyzed is less of a harm to me than is being killed. Interestingly—and here is where the phenomenon of secondary permissibility enters—intuitively, it is permissible for you to hurl me at the trolley and impermissible for you to turn it onto me in TurnHurl. Kamm, who introduced us to this phenomenon and dubbed it “secondary permissibility,” would say that in TurnHurl, your hurling me at the trolley is “secondarily permissible.”¹

1 Kamm, *Morality, Mortality and Intricate Ethics*.

Pummer argues that the correct explanation of the secondary permissibility data in TurnHurl must make appeal to a notion of contrastive consent.² According to Pummer, for it to be permissible for you to hurl me in TurnHurl, I must give you my contrastive consent to being hurled by saying to you something like, “You may hurl me at the trolley rather than turn it onto me.” Absent such an avowal on my part, he claims, it would not be permissible for you to hurl me in TurnHurl.

Crucially for Pummer, in giving my contrastive consent to being hurled rather than having the trolley turned onto me, I need not give any ordinary noncontrastive consent either to being hurled or to having the trolley turned onto me. It is consistent with my giving you my contrastive consent to being hurled rather than having the trolley turned onto me, according to Pummer, for me to also say, “You may not hurl me at the trolley, nor may you even turn it onto me.” Essential to contrastive consent is that “rather” construction—“you may hurl me at the trolley *rather* than turn it onto me.”

The details of Pummer’s account of how contrastive consent supposedly explains the moral data in TurnHurl are not important for my purposes. My question is simply: is my avowing anything like that which Pummer says constitutes the giving of contrastive consent necessary for it to be permissible for you to hurl me (and impermissible for you to turn the trolley onto me) in TurnHurl? It seems not. I need not utter (or even think) anything like “you may hurl me at the trolley rather than turn it onto me” for it to be permissible for you to hurl me in TurnHurl. Rather, it seems that it just *is* permissible for you to hurl me in TurnHurl (and that it just *is* impermissible for you to turn the trolley onto me in that case).³

As a matter of fact, people do not ordinarily say such strange things as “You may not *X* and you may not *Y*, but you may *X* rather than *Y*.” Though people do often say things like “You may *X*,” thereby giving plain old consent to *X*-ing,

2 Pummer, “Contrastive Consent.”

3 Pummer claims that it would be odd for me to refuse contrastive consent to being hurled rather than having the trolley turned onto me in TurnHurl (Pummer, “Contrastive Consent,” 683–84). But even if it would be odd for me to refuse contrastive consent in such circumstances—i.e., even if it would be odd, after having been both introduced to the concept of contrastive consent and given the explanation of why such consent is needed for your hurling me to be permissible—for me to reply no to the query “Do you contrastively consent to being hurled rather than having the trolley turned onto you?”—that is neither here nor there. Were I neither introduced to the concept of contrastive consent nor explicitly asked the question, it just would not even occur to me to say the kind of thing Pummer thinks is necessary for me to say to make it permissible for you to hurl me in TurnHurl. As I go on to note in the text, Pummer’s contrastive consent is a weird bird; it is not anything we see in common parlance at all.

and they do also sometimes say “You may *X* if *Y*,” thereby giving conditional consent to *X*-ing given *Y*, they simply do not ever say things like that which, according to Pummer, is the giving of contrastive consent.

Here, however, is something we might well imagine me saying in TurnHurl:

Do not hurl me at the trolley! And do not turn the trolley onto me! But *if* you are going to harm me to save those five people, then hurl me at the trolley rather than turn it onto me!

But in this case, it seems, I am not so much giving contrastive consent to being hurled rather than having the trolley turned onto me (after refusing to noncontrastively consent to either) as *commanding* you to hurl me rather than turn the trolley onto me if you are going to do one of them (after commanding you to do neither). So, if there is anything contrastive in the vicinity of what people plausibly might actually say in cases like TurnHurl, it is the issuance of contrastive commands rather than the giving of contrastive consent.

But is my issuing a contrastive command like that above even necessary for it to be permissible for you to hurl me in TurnHurl? Again, it seems not. Imagine for instance that I did not issue any such contrastive command but that you knew of me that, though I most preferred not being harmed in any way, I did prefer being hurled and thus paralyzed to having the trolley turned onto me and thus killed. (Though I am skeptical that there is any such thing as contrastive consent, preferences most certainly are contrastive, and essentially so.) I cannot see how it would be impermissible for you to hurl me in such a case. In fact, it does not even seem necessary for me to have a preference for being hurled for it to be permissible for you to hurl me in TurnHurl. For if I had no preferences between your hurling me and your turning the trolley onto me—if I were just indifferent between your hurling me, thereby paralyzing me, and your turning the trolley onto me, thereby killing me—then surely, in that case, it would be permissible for you to hurl me—thereby saving the five and causing me less harm.

At most, it seems, when it comes to preferences, what is necessary for it to be permissible for you to hurl me is that I *not* have a preference for having the trolley lethally turned onto me rather than being paralyzingly hurled at it. One might think that it would be wrong of you to hurl me at the trolley in TurnHurl if I actively preferred having it lethally turned onto me to my being paralyzingly hurled at it. But if I have no preference between the two, surely it would be permissible for you to take the option which harms me less to achieve the good of saving the five.

Pummer would disagree with all of this. He would say that the foregoing fails to take seriously the fact that harming me *as a means* to achieving the good of

saving the five is morally worse than harming me *as a side effect* of achieving it. It is more *pro tanto* morally wrong to harm someone as a means than it is to harm them as a side effect, and it is that greater *pro tanto* moral wrongness that makes my issuing some sort of contrastive consent (or contrastive command) required for it to be permissible for you to hurl me in TurnHurl.⁴ Now, whether harming someone as a means to some good is more *pro tanto* morally wrong than is harming them as a side effect of achieving that good, as I say, it just does not seem true that my saying any such thing is necessary for your hurling me to be permissible in TurnHurl. But put that to one side. Is harming someone as a means more *pro tanto* morally wrong than harming them as a side effect? No. It is not.

If I am a morally conscientious person (one who prefers acting less [*pro tanto*] morally wrongly to acting more [*pro tanto*] morally wrongly), will I be more concerned not to harm people as a means to achieving my ends than I will be not to harm them as a side effect of achieving them? I do not think so. Imagine that a trolley is about to hit a single person to whom it would cause a broken toe if allowed to strike them. Now suppose I can press one of two buttons, either of which will save the one from having his toe broken by the trolley. Pressing the first will do so by redirecting the trolley onto a separate track where it will kill another innocent person, *A*. Pressing the second will do so by hurling a different innocent person, *B*, into the trolley, thereby killing him. Pressing either button would be impermissible, of course. But would I as a morally conscientious agent be *more* inclined to press the first button than the second just because pressing the second would cause the harm to *B* as a means, whereas pressing the first would cause the harm to *A* as a side effect? I cannot see that I would. As a matter of fact, if pressing the second button would not kill *B* but merely paralyze him, I am sure, as a morally conscientious person, I would prefer pressing the second button to pressing the first (though, as a morally conscientious person I would of course also prefer not pressing either button to pressing either of them).⁵

- 4 The thought that means-harming is morally worse (i.e., more *pro tanto* morally wrong) than side-effect-harming does indeed seem to be Pummer's ground for thinking that something like contrastive consent is necessary for the permissibility of your hurling me in TurnHurl. He writes: "In TurnHurl, in the absence of contrastive consent, the barrier against being hurled (harmed as a means) is stronger than the barrier against being turned onto (harmed as a side effect). . . . My contrastive consent makes it the case that the barrier against being hurled is weaker than the barrier against being turned onto" (Pummer, "Contrastive Consent," 682). This talk of barriers, I believe, is just another way of talking about *pro tanto* moral wrongness; the higher the barrier against performing a certain action, the more *pro tanto* morally wrong is that action.
- 5 Here, and throughout, I am presupposing for the sake of argument that whether an action counts as harming as a means or harming as a side effect is solely a function of the causal

Or suppose that pressing either of the two buttons has a 100 percent chance of preventing the broken toe but only has a very small chance, n percent, of either killing A as a side effect (by pressing the first button) or paralyzing B as a means (by pressing the second button). (Suppose pressing each button has a $100-n$ percent chance of causing the trolley to just stop, and whereas pressing the first button has an n percent chance of lethally turning the trolley onto A , pressing the second has an n percent chance of paralyzingly hurling B at the trolley, thereby causing it to stop.) Surely, if I were a morally conscientious person, I would prefer pressing the second button to pressing the first. (And I would most certainly have that preference if the chance that pressing the second button has of paralyzing B as a means is even the tiniest bit less than the chance that pressing the first button has of killing A as a side effect.)

What is more, if harming someone as a means were more *pro tanto* morally wrong than harming them as a side effect, it could only be subjectively permissible to press the first button. (Were it more *pro tanto* morally wrong to means-paralyze B than to side-effect-kill A , the expected wrongness of pressing the first button should be lower than that of pressing the second.) But that is simply implausible. There is no chance, n percent, such that pressing the first button with an n percent chance of killing A as a side effect of preventing the broken toe would be subjectively permissible while pressing the second button with an n percent chance of paralyzing B as a means to preventing it is subjectively impermissible. (It is clear that there must be some minuscule chances of causing someone else to die [or be paralyzed], whether as a means or as a side effect, that it is subjectively permissible to take in order to prevent a broken toe. We routinely subjectively permissibly subject others to minuscule chances of death [and paralyzation] in order to alleviate harms less severe than a broken toe, as when we drive to the pharmacy, thereby risking killing [paralyzing] others with our car, to purchase headache medicine.) So, harming someone as a means to some good just is not more *pro tanto* morally wrong than is harming them as a side effect of achieving it.

In response to these arguments, Pummer might contend that the greater *pro tanto* moral wrongness of means-harming as opposed to side-effect-harming only holds when the side-effect-harming is relevantly proportionate.⁶ (The

relations between the action, the harm caused, and the good achieved, and *not* a function of the intentions or mental states of the agent. Views according to which whether an action counts as means-harming or as side-effect-harming, and thus potentially the permissibility of that action, is a function of the intentions or mental states of the agent are notoriously fraught. Even were it allowed that whether an action counts as means-harming or as side-effect-harming depends on the intentions or mental states of the agent, my arguments could be suitably modified to reach the very same conclusions for which I argue in the text.

6 I am grateful to an anonymous referee for this suggestion on Pummer's behalf.

side-effect harming's being relevantly proportionate just means that it would ordinarily be permissible, given the good it would bring about, were it the only option, other than doing nothing, that one had.) This maneuver might accommodate the datum that it is not more *pro tanto* morally wrong to paralyzingly hurl *B* at the trolley to prevent the broken toe than it is to lethally turn the trolley onto *A* to prevent it. And that is because lethally turning the trolley would not be relevantly proportionate when the good that would be achieved by doing so is just the prevention of a broken toe.

This maneuver will not work. Not only does it seem *ad hoc*, but the view that means-harming is, in general, morally worse than proportionate side-effect-harming is mistaken. To see this, just note that it is not more *pro tanto* morally wrong to proportionately means-paralyze someone to bring about a good than it is to proportionately side-effect-kill someone to bring about that good. Consider:

Three Option Trolley: A trolley is about to kill n strangers. There are two ways one can save them: one can either divert the trolley onto a side track, thereby killing *A*, or one can hurl *B* at the trolley, thereby paralyzing him and stopping the trolley.

If it would be permissible to hurl *B* were the turning option not available (that is, were n such that hurling *B* would be proportionate in Three Option Trolley), then surely not only would hurling *B* be permissible (and turning the trolley onto *A* impermissible) in Three Option Trolley, it would most certainly be less *pro tanto* morally wrong than turning the trolley onto *A* would be. So, means-paralyzing is *not*, in general, morally worse than proportionate side-effect-killing.

Now perhaps Pummer might suggest that it is only disproportionate means-paralyzing that is morally worse than proportionate side-effect-killing. Again, this too seems to be an *ad hoc* maneuver. But, even despite that, it as well seems to be a mistaken view. By stipulation, means-paralyzing someone to save five people from death is disproportionate, whereas side-effect-killing someone to save five people from death is proportionate. But if one could press a button (button 1) that has a 100 percent chance of saving the five and a minuscule chance, n percent, of saving them by lethally turning the trolley onto *A*, or press another button (button 2) that has a 100 percent chance of saving the five and the same minuscule chance, n percent, of saving them by paralyzingly hurling *B* into the trolley, surely it would only be subjectively permissible to press button 2 (assuming, that is, that n is small enough that in a version of the case in which pressing button 2 was the only option one had, aside from doing nothing, pressing it would be subjectively permissible). (Suppose pressing each button

has a $100-n$ percent chance of causing the trolley to just stop, and whereas pressing the first button has an n percent chance of lethally turning the trolley onto *A*, pressing the second button has an n percent chance of paralyzingly hurling *B* at the trolley, thereby causing it to stop.) This shows that it is not more *pro tanto* morally wrong to means-paralyze *B* than it is to side-effect-kill *A*. (Were it more *pro tanto* morally wrong to means-paralyze *B* than to side-effect-kill *A*, the expected wrongness of pressing button 1 should be lower than that of pressing button 2; but, as it is intuitive that only pressing button 2 would be subjectively permissible in such a case, it seems that the expected wrongness of pressing button 2 must, in fact, be lower than that of pressing button 1. And if that is right, then it must be that means-paralyzing *B* to save the five is less, not more, *pro tanto* morally wrong than is side-effect-killing *A* to save them.) And that is true even though side-effect-killing someone to save five from death is proportionate, whereas means-paralyzing someone to save five from death is not. So, it does not save the proposal that means-harming is morally worse than side-effect-harming to restrict the claim to disproportionate means-harmings and proportionate side-effect-harmings. Harming someone as a means to some good just is not more *pro tanto* morally wrong than is harming them as a side effect of achieving it.

Now you might think that the moral data in Turn and Hurl show that harming someone as a means is more *pro tanto* morally wrong than is harming someone as a side effect. That fact, you might think, is what explains why it is permissible for you to lethally turn the trolley onto me in Turn but impermissible for you to paralyzingly hurl me at the trolley in Hurl. Whereas the good of saving five people is enough to outweigh the *pro tanto* moral wrongness of killing me as a side effect in Turn, it is not enough to outweigh the greater *pro tanto* moral wrongness of paralyzing me as a means in Hurl. But that overly simple explanation, according to which the good of saving the five is in some way *weighed against* the *pro tanto* moral wrongness of paralyzing as a means and killing as a side effect, need not be the correct explanation of the moral data in Turn and Hurl. Rather, it might just be that harming people in the course of saving others is permissible via certain causal mechanisms but not via others. That fact, however, need not be cashed out in terms of some greater *pro tanto* moral wrongness of harming as a means rather than harming as a side effect.⁷ As a matter of fact, as my arguments above have shown, it should not be so cashed out.

So where does that leave us? It does not seem that my issuing anything like contrastive consent to being hurled rather than having the trolley turned onto

7 For instance, the solution to the trolley problem offered in Kamm, *Intricate Ethics*, makes no mention of a greater *pro tanto* moral wrongness of harming as a means as opposed to harming as a side effect.

me is necessary for its being permissible for you to hurl me in TurnHurl. And the thought that such an utterance is necessary because harming someone as a means is more *pro tanto* morally wrong than is harming them as a side effect is simply mistaken. At most, what is necessary for its being permissible for you to hurl me at the trolley in TurnHurl is that I *not* have a preference for having the trolley lethally turned onto me rather than my being paralyzingly hurled at it. (Even here, though, the moral power of my preferences is not absolute: if hurling me would only break my arm, instead of paralyzing me, my preference for having the trolley lethally turned onto me rather than having my arm broken by being hurled at it would not make it permissible for you to lethally turn the trolley onto me. In such a case, of turning the trolley onto me and hurling me, only hurling me would be permissible.)

If nothing like contrastive consent is necessary for the permissibility of your hurling me in TurnHurl, and only my lacking a preference for having the trolley turned onto me rather than my being hurled at it is, then we need an account of secondary permissibility that is not sensitive to facts about contrastive consent but is sensitive to the preferences of the potential victim.⁸

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8 In Graham, "‘Secondary Permissibility’ and the Ethics of Harming," I offer an account of secondary permissibility which is not sensitive to facts about contrastive consent. Though that account is not sensitive to the preferences of the potential victim, I think it could be easily amended so that an active preference of the potential victim for having the trolley lethally turned onto her rather than her being paralyzingly hurled at it can act as a defeater for the permissibility of hurling her (and the impermissibility of turning the trolley onto her) in TurnHurl.

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