The Non-Identity Problem

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ABSTRACT

Some actions are identity affecting, they affect who will exist in the future. Explaining how identity affecting actions can be wrong has been thought to pose a problem, the Non-Identity Problem. The problem is that an identity affecting action could be wrong even though no one would be harmed if it were performed. If no one would be harmed, how can we explain why it is wrong?

The Non-Identity Problem assumes that someone is harmed by an action only if someone would be worse-off if it were performed than they would be if it were not. I defend this assumption, and I argue that harm does not figure in any way into a plausible explanation of wrong-doing in examples of the Non-Identity Problem.

Furthermore, I argue that the Non-Identity Problem is not an anomaly. There are other examples of actions that are wrong even though harm does not figure into any plausible explanation of why they are wrong. I focus on one: the wrong of increasing inequality between people who are equally deserving.

I conclude that harm does not play a role in explaining all wrong actions, nor is harm an especially important consideration that counts against an action.

Consistent with these lessons, I suggest that we think about the wrong done in examples that raise the Non-Identity Problem in the following way: we should ask what the action tells us about the agent’s character. I argue that the action reveals to us a defect in the agent’s character and an action that is the mark of a defective character is wrong. I identify the defect of character revealed by some of the most troubling examples of wrong-doing as insensitivity to suffering. Insensitivity to suffering can be exhibited to the same degree by an agent who harms someone as by an agent who harms no one.

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  2.1 Introduction 76
Introduction

The Non-Identity Problem

Some acts affect who will exist in the future, for example, procreative acts. We can call such acts *identity affecting*. An act is *identity affecting* if and only if the people who would exist if it were performed are not identical to the people who would exist if it were not performed.¹ Explaining how identity affecting acts can be morally wrong has been thought to pose a problem. The problem is that a plausible explanation of wrong-doing in terms of harm can be ruled out when an act is identity affecting. This has been called *The Non-Identity Problem.*² It is best illustrated with a pair of examples.

**Example 1**
Mary is 7 months pregnant. Mary and the fetus that she is carrying are both perfectly healthy, except for some mild acne that Mary has developed, for which there is a highly effective treatment. Unfortunately, the treatment causes birth defects, so women who are pregnant are advised not to use it. Mary disregards this advice, uses the treatment, and two months later, gives birth to Johnny, who is born with a clubfoot. His left leg is shorter than his right, and his left foot is completely turned to the side. After multiple surgeries and physical therapy, Johnny’s leg and foot are fine, and he goes on to live a happy, flourishing life.

**Example 2**
Jane wants to become pregnant. She has some mild acne, for which she has been using a highly effective treatment. Women who have been using this treatment are advised to stop and wait two months before conceiving, because even small traces of it in a pregnant woman’s bloodstream cause birth defects. Jane disregards this advice, conceives a child, and, nine months later, gives birth to Billy, who is born with a clubfoot. His left leg is shorter than his right, and his left foot is completely turned to the side. After multiple surgeries and physical therapy, Billy’s leg and foot are fine, and he goes on to live a happy, flourishing life.

¹ There are different ways than an act can be identity affecting: (1) by increasing or decreasing the number of people who would exist or (2) by affecting the identity of who will exist.

surgeries and physical therapy, Billy’s leg and foot are fine, and he goes on to live a happy, flourishing life.

In both of these examples, the mothers do something wrong. Let’s assume that no one else is negatively affected by what they do.³ A plausible explanation of what Mary, in Example 1, does wrong is that she harms her son, Johnny. If Mary had not taken the acne treatment when she did, Johnny would have been born without any health problems. Jane, in Example 2, does something wrong, too, something equally as wrong as Mary. But there is a significant difference in their acts. Mary’s act, taking an acne treatment while pregnant, is not identity affecting. Her son, Johnny, would exist whether or not she took the acne medicine. Jane, on the other hand, does something wrong by getting pregnant while taking an acne treatment. Her act is identity affecting. If Jane had stopped the treatment and waited two months to conceive, as advised, her son, Billy, wouldn’t have existed. This difference gives rise to a problem. Because Jane’s act is identity affecting, we cannot explain what she does wrong in the same way that we explain what Mary does wrong. It’s not the case that Jane harms her child, Billy. It’s not the case that if Jane had waited to conceive, Billy would have been born without any health problems. If she had waited to conceive, Billy wouldn’t have existed. How, then, can we explain what Jane does wrong?

A first response to the Non-Identity Problem says that Mary and Jane both do something wrong simply because they both intentionally give birth to a child with a club foot. But this response condemns too much. Consider another example:

³ It’s an assumption in all of the examples illustrating the Non-Identity Problem that there are no negative externalities, no one outside of the examples is harmed. It may seem like an implausible assumption, given the realities of procreating, but it is a philosophically useful assumption that helps us to isolate the possible source of wrong-doing in identity affecting acts, as such.
Example 3
Todd and Susan are in love, they are newly wed, and they want to conceive a child. Their doctor tells them that, unfortunately, if they conceive, they will give birth to a child with a club foot. They are devastated, but they want to have a child who is biologically related to each of them, so they conceive anyway. Nine months later, they give birth to a son, Teddy, who is born with a clubfoot. His left leg is shorter than his right, and his left foot is completely turned to the side. After multiple surgeries and physical therapy, Teddy’s leg and foot are fine, and he goes on to live a happy, flourishing life.4

Like Jane and Mary, Todd and Susan intentionally give birth to a child with a club foot, but, unlike Jane and Mary, they do not do anything wrong.5 It’s not always wrong to conceive a child with a birth defect who will go on to live a happy, flourishing life, particularly if the defect is correctable and when creating a child with that defect is avoidable, as it is for Todd and Susan.6 If it were wrong to intentionally conceive a child with a correctable birth defect, many, many pregnancies would be wrong, since many, many people face serious health issues, simply as a result of being born. The fact that people face serious but correctable health issues does not make it wrong to procreate.7

So Todd and Susan do nothing wrong, and we can easily explain the difference between what they do and what Mary does. Mary harms someone, and Todd and Susan do not. But if Todd and Susan do not do anything wrong because they do not harm anyone, then why does Jane do something wrong? Jane does not harm anyone, either.

4 Derek Parfit discusses an example like this one in his reply to James Woodward’s view that the Non-Identity Problem is solved by appealing to the child’s rights. See Derek Parfit, “Comments,” Ethics 96: 861.

5 Some philosophers disagree. They think that all procreation is wrong. For a notable recent example, see, David Benatar, Better Never to Have Been: The Harm of Coming into Existence (Oxford: Oxford University Press, 2006).

6 Todd and Susan could avoid conceiving a child with a birth defect by either not conceiving at all, or by conceiving with different partners. But they want a child who is biologically related to each of them.

7 I don’t even think that it’s always wrong to create a child with an uncorrectable health condition. For example, I do not think that parents who only conceive children who are irreversibly blind or deaf would do something wrong by conceiving.
We need an account of what Jane does wrong that does not condemn too much, but, in large part because her act is identity affecting, we cannot appeal to harm to do so. This is the Non-Identity Problem.

**Key Views Challenged by the Non-Identity Problem**

The Non-Identity Problem challenges two distinct views about morality, what we can call *The Harm View* and *The Claim View*.

(1) *The Harm View*

(i) Harms to individuals play an important role in explaining what makes all wrong acts wrong.

(ii) Wrong acts are especially morally important.

(2) *The Claim View*

(i) Harms to individuals play an important role in explaining why infringing a claim is wrong, when it is wrong. When an act is wrong because it infringes a claim, someone is harmed. 

(ii) Claims are especially morally important.

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8 Someone could accept a different view about claims, a view that says that they are considerations that float freely of the effects of their infringement or fulfillment on people. I am describing a different conception of claims here.

9 Judith Jarvis Thomson: “the victim of the broken promise may suffer no harm or loss at all from the breach, or only minimal harm or loss. The appropriate reaction here is surely plain relief that things turned out so well. Just as there is no compensation owing where no harm or loss is suffered, so no regret is called for in those circumstances” (Judith Jarvis Thomson, *Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 96). Arthur Applbaum: “A promise to become a contract killer is void *ab initio*” (Arthur Applbaum, *Ethics for Adversaries* (Princeton: Princeton University Press, 2000), 259). Joseph Raz: “all rights are to benefits” (Joseph Raz, “Liberating Duties,” *Law and Philosophy* 8 (1989): 11).
The first part of the Harm View can be understood in a weaker and a stronger way. The strong view would say that harming someone is necessary for an act to be wrong. But harms to individuals may play an ineliminable role in explaining why an act is wrong even if no one is actually harmed by the act. The weaker version of the Harm View says that harms to individuals must be mentioned as part of the explanation of why a wrong act is wrong. Since, if harming someone is necessary for an act to be wrong, then harms to individuals must be mentioned as part of the explanation of why it is wrong, when I refer to the Harm View, I mean the weaker view.

The Claim View says that individuals sometimes have claims against someone that some act be performed, or that some act not be performed. Some claims arise from things that we do. Promises are paradigmatic examples. Promises give rise to claims of a promisee against a promisor that they do what was promised. It may be the case that some claims do not arise from anything that we do, for example, perhaps everyone has a claim against everyone else to not be tortured.

Someone could consistently endorse one view and not other. For example, someone could reject the Harm View because they do not think that harms figure into an explanation of all wrong acts, but endorse the Claim View because they think that harms always play a role in explaining why some wrong acts, those that involve claim infringements, are wrong. Or someone could endorse the Harm View but reject the Claim View because they think that claims are not especially morally important.
In order to see how the Non-Identity Problem challenges each of these views, we must make explicit an assumption about harm. The Non-Identity Problem assumes that one is harmed by an act only if it makes one worse-off than one would have been if it hadn’t been performed. We can call this assumption the *Counterfactual Condition of Harm*.

Jane, in Example 2, does not perform an act that meets the Counterfactual Condition of Harm. She does not make her son, Billy, worse-off than he would have been if she hadn’t conceived when she did because if she hadn’t conceived when she did, Billy wouldn’t have existed, and his life is better for him than no life at all. Since the Counterfactual Condition isn’t met, Jane does not harm Billy. So harms do not appear to play a role in explaining why what she does is wrong.

Since Jane does not harm anyone, on the Claim View, she does not violate a claim that anyone has against her. However, Mary, in Example 1, plausibly, does violate a claim that her son, Johnny, has against her, a claim that she not harm him. The Non-Identity Problem challenges the Claim View because Mary and Jane do something equally wrong, though Mary, plausibly, violates a claim and Jane cannot plausibly be said to violate a claim. Hence claims do not appear to be especially morally important.

**Who Adopts the Harm View and/or the Claim View?**

Both the Harm View and the Claim View have initial intuitive appeal. When we think about examples of wrong acts, murder, theft, and rape leap to mind, and these acts all appear to be wrong because they are harmful to individuals.\(^{10}\) We also think that we should keep our

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\(^{10}\) These examples are meant to be consistent with our pre-theoretical intuitions about morality.
promises and pay our debts. If two people would benefit from our aid, Jones somewhat more
than Smith, but Smith has a claim to our aid, perhaps because we promised it to him, or we owe
it to him, then, if we can only aid one, we think that we should aid Smith and not Jones. This
suggests that claims are especially morally significant.

Importantly, both of these views are non-consequentialist. A traditional consequentialist
thinks that (1) an act is wrong if and only if it does not lead to the best possible outcome and that
(2) one outcome is better than another if and only if the amount of good that it contains minus
the amount of bad that it contains is greater than this net amount of the other outcome. Since it is
not always the case that harms to individuals explain why an outcome is not the best possible,
traditional consequentialists reject the Harm View.

To illustrate, consider the following example:

Example 4
If Abby conceives now, she will conceive Sally. Sally will be blessed with good health,
she will live a wonderful life, and she will die peacefully in her sleep when she is 100
years old. If Abby waits two months, she will conceive, not Sally, but Sam. Sam will
also be blessed with good health, he will live a wonderful life, and he will die peacefully
in his sleep, but when he is 101 years old. Sam’s life would be better than Sally’s only to
the extent that he would have one more wonderful year of life than she would have.
Abby decides to conceive now. She conceives Sally.

What’s important about this example is that traditional consequentialists would condemn Abby’s
act as wrong because it does not lead to the best possible outcome, but harms to individuals
cannot plausibly figure in any way into this evaluation of the outcomes. Abby does not harm
Sally by conceiving her. Sally is born healthy, lives a wonderful life, dies peacefully at 100, and
wouldn’t have existed if Abby had waited two months to conceive. Abby does not harm Sam by
conceiving Sally, either. If Sam is not conceived, then he will never exist, and someone who will
never exist cannot be harmed. No one is harmed by not being brought into existence.\textsuperscript{11}

Traditional consequentialists condemn Abby’s act because conceiving Sam would produce a better outcome than conceiving Sally. It’s a better outcome because it would contain a year’s worth more of what is good than the outcome produced by conceiving Sally, and not because of any harm done to anyone. So traditional consequentialists reject the Harm View.

Traditional consequentialists also reject the Claim View. Someone who adopts the Claim View thinks that if an act would infringe a claim, then it could be wrong even if, in satisfying the claim, the outcome would be worse in the traditional consequentialist’s sense. Consider again the example discussed just a short while ago. If two people would benefit from our aid, Jones somewhat more than Smith, but Smith has a claim to our aid, perhaps because we promised it to him, or we owe it to him, then, if we can only aid one, and claims are especially morally important, as the Claim View says, then we should aid Smith and not Jones. So, the Harm View and the Claim View are not endorsed by traditional consequentialists.\textsuperscript{12}

Of course, not everyone is a consequentialist. One finds the Harm View and/or the Claim View in a wide range of non-consequentialist traditions in moral philosophy. Next, I give examples of non-consequentialist traditions where one finds the Harm View. Then I give examples of where one finds the Claim View.

\textsuperscript{11} Someone could argue that you can harm people by not bringing them into existence, on the assumption that people exist who are not yet born, but this will create space for moral pressure to procreate, and I think that it’s not wrong to not procreate.

\textsuperscript{12} Some consequentialists might argue that they can account for the importance of infringing claims by weighting them and incorporating those weights into their assessment of outcomes. This move blurs the line between consequentialist and non-consequentialist theories by blurring the line between acts and outcomes. I do not have this more amorphous kind of consequentialism in mind here.
The Harm View

First, the Harm View is part of a fairly widely held conception of morality as a system of constraints on the pursuit of an individual’s self-interest, constraints that are thought to be needed only because of the harm that the unconstrained pursuit of self-interest would do to everybody. On this conception of morality, what’s distinctive about morality is that its constraints are aimed at “ameliorating the human predicament”\(^{13}\): we need each other, yet we get in each other’s way, and we are of limited sympathy. The tendency to conflict is an essential part of the moral life. What makes morality *morality*, and not a theory of the good life, is that it’s a system of behavior telling one how the interests of others affect what one can and can’t do in the pursuit of the good life. People who think that if there were only one person on the earth, there would be no morality, likely think that harms to others are the only effects of our actions that could warrant

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\(^{13}\) Geoffrey Warnock says, “the ‘general object’ of morality, appreciating of which may enable us to understand the basis of moral evaluation, is to contribute to betterment -- or non-deterioration--of the human predicament, primarily and essentially by seeking to counteract ‘limited sympathies and their potentially most damaging effects...if this is, as I think, in a sense the most important of the built-in tendencies of things to go wrong, the present suggestion fits well with the common idea that there is something peculiarly important about morality” (Geoffrey Warnock, *Object of Morality* (London: Methuen, 1971), 26). Louis Pojman endorses what he cites as Hobbes' view that “morality has to do with proper resolution of interpersonal conflict and the amelioration of the human predicament...If there were only one person on earth, there would be no occasion for morality, because there wouldn't be any interpersonal conflicts to resolve or others whose suffering he or she would have a duty to ameliorate” (Louis P. Pojman, “The Case Against Moral Relativism,” from *The Moral Life*, edited by Louis P. Pojman and Lewis Vaughn (Oxford: Oxford University Press, 2007).
constraints on the pursuit of the good life. On this view, wrong acts are especially important because of their detrimental effects.  

In the Non-Identity Problem there is no interpersonal conflict. In Example 2, no one’s interests are at stake but Jane’s. Her act harms no one. On a view of morality that it is about the proper resolution of interpersonal conflict, Jane’s act is outside of the scope of the moral, and not especially significant, at all. In so far as we find this to be an implausible response to her situation, we have reason to be uneasy with this conception of morality.

We may already have had reasons to be uneasy about this conception of morality. It is exceedingly narrow. But even if one thought that the scope of morality was broader than the proper resolution of interpersonal conflict, for example, if one thought that one could do something wrong by committing suicide or by failing to develop one’s talents, even when there were no negative effects on anyone else, one might still endorse the Harm View.

14 This conception of what morality is and why it is needed is probably most associated with the moral philosophy of Thomas Hobbes, but it is not tied to Hobbes. It was the conception of the Natural Lawyers (see J. B. Schneewind, “Kant and Natural Law Ethics,” *Ethics* 104 (1993): 53-74) and has influenced many contemporary moral philosophers. Joseph Raz identifies this picture of morality as unfortunately widespread, saying, “The very role of duties in practical reasoning is seen to be to subject the actions of one person to the will or the interests of another” (Joseph Raz, “Liberating Duties,” *Law and Philosophy* 8 (1989): 21). In the Twentieth Century, Geoffrey Warnock adopted this conception of morality. He said, “Morality, with the end of ameliorating the human predicament, essentially prescribes what might be called conditions within which lives are to be lived and ends to be pursued…One might live, come to that, a very poor life indeed -- unsuccessful, unhappy, incoherent, frustrated, unproductive -- without necessarily going morally astray at any point at all” (Geoffrey Warnock, *Object of Morality* (London: Methuen, 1971), 92). In the Twenty First Century, Bernard Gert also finds what he thinks to be a grain of truth in Hobbes’ moral philosophy, “Hobbes’s point is that morality is primarily concerned with the behavior of people insofar as that behavior affects others; it prohibits the kind of conduct that harms others and encourages the kind of conduct that helps them.” (Bernard Gert, *Morality: Its Nature and Justification* (Oxford: Oxford University Press, 2005), 9) In a paper trying to argue that even Utilitarians adopt the Harm View, Jan Narveson, said, “If we cannot envisage effects on certain people which would ensue from our acts, then we have no moral material to work on and we can do as we like” and “If I were to have a candy bar, this would normally have no effect on the happiness of others; hence whether I am to do it or not is entirely a question…of whether I want to or not, which is not a question about what I morally ought to do but rather one about what I like to do” (Jan Narveson, “Utilitarianism and New Generations,” *Mind* 76 (1967): 66).


16 Though Kant notably discussed duties to the self, I do not mean to allude to Kant here nor do I intend to intimate that he would endorse the Harm View. In what follows, I give Judith Jarvis Thomson as an example of someone who has a broader conception of morality but endorses the Harm View.
A second example of where we find the Harm View is in non-consequentialist theories that say that right and wrong are connected to good and bad and that good and bad is always good and bad for some individual. On the assumption that an action harms someone if and only if it’s bad for someone, we have a clear example of the Harm View.\(^\text{17}\) A well developed example of this view can be found in the work of Judith Jarvis Thomson.\(^\text{18}\) She rejects the consequentialist idea that right and wrong are determined by the goodness or badness of outcomes, or states of affairs, because, she argues, states of affairs are neither “good” nor “bad”. Rather, goodness is always “goodness in a way.”\(^\text{19}\) Additionally, Thomson thinks that “what a person ought to do is intimately connected with what would be good or bad.”\(^\text{20}\) Since “good” and “bad” is “goodness in a way”, what one ought to do is intimately connected to what is good or bad for something. Consequently, Thomson defends the following thesis:

If A’s V-ing would neither be bad for anything other than A, nor infringe anything’s rights...and A’s V-ing would be better for him than his doing any of the other things it is open to him to do instead, then it follows that A ought to V.\(^\text{21}\)

\(^{17}\) Someone might contest this assumption, arguing that while an action that harms someone is plausibly bad for someone, it might not be the case that if an action is bad for someone then it harms someone. Someone could say this, but I think that they should then explain this distinction and it would have to have some morally relevant import. I’m inclined to think that if an action is bad for someone but does not harm anyone, then the sense in which it is bad for him or her is not going to be morally important, and that would not be in the spirit of a view that says that wrong action is intimately connected to its being bad for someone.

\(^{18}\) So does John Broome. He thinks that the goodness of a state of affairs depends on whether it is good for someone. He defends in *Weighing Goods* what he calls “The Principle of Personal Good”, which says “(a) Two alternatives are equally good if they are equally good for each person. And (b) if one alternative is at least as good as another for everyone and definitely better for someone, it is better” (John Broome, *Weighing Goods: Equality, Uncertainty, and Time* (Oxford: Blackwell Press, 1991), 165).


\(^{20}\) Ibid., 45, 47.

\(^{21}\) Ibid., 47-48.
This thesis says that someone, A, would do something wrong by pursuing his own interests only if pursuing his own interests would be bad for someone other than himself or infringe someone’s rights, and that A would do something wrong if he failed to pursue his own interests when no one else’s were at stake. When is it wrong to perform an act that infringes someone’s rights?

Thomson thinks that this too depends in part on how “good or bad the act would be for those affected by it.”22 She says,

to act unjustly is to fail to do what something has a non-overridden right to one’s doing.23

The answer to the question whether an act is unjust turns in part on whether those affected by it have the relevant rights; but it also turns in part on whether those rights are overridden, and that turns in part on how good or bad the act would be for those affected by it. Goodness-for and badness-for are first-order ways of being good; whether an act is unjust cannot be settled unless it is first settled how good or bad it would be in the relevant first-order ways.24

In other words, on Thomson’s view, one couldn’t do anything wrong by pursuing one’s own interests when doing so would be bad for no one, but one could do something wrong by failing to pursue one’s own interests when doing so would be bad for no one else.25 Thomson has a wider conception of morality than that it is only about the proper resolution of interpersonal conflict, but she still accepts the Harm View. She thinks that the wrongness of an act is explained by its negative effects on individuals.

[22 Ibid., 66.]
[23 Ibid., 60.]
[24 Ibid., 66.]
[25 This is on the assumption that someone does something wrong if and only if they fail to do what they ought. This assumption is supported by the following passage: “I take ‘It would be wrong for Y to not do alpha’ and ‘Y would be acting wrongly if he or she did not do alpha’ to be equivalent to ‘Y ought to do alpha’” (Judith Jarvis Thomson, Realm of Rights (Cambridge, MA: Harvard University Press, 1990), 122).]
A more explicit example of someone who adopts the Harm View, but in the tradition of Thomson, is Elizabeth Harman. She thinks that all moral reasons against an action involve the harm that the action would cause something with moral status. She says,

Something has moral status just in case there is a reason against any action that harms it, merely in virtue of the badness of the harm for it.\(^{26}\)

If an action (or course of action) would be a harming of something with moral status then there is a reason against the action. If an action would be a harming of something without moral status, this is morally insignificant.\(^{27}\)

So, on Harman’s view, the only moral reasons against an action are the harms that it would cause someone, in particular, someone with moral status, if it were performed. If an action would not harm anyone, or would harm something that does not have moral status, then it is “morally insignificant”.

A third example of a tradition in moral philosophy where we find the Harm View is contractualism. This view has been developed notably by Thomas Scanlon.\(^{28}\) Contractualism aims to describe the part of morality that has to do with right and wrong, and contractualists think that the part that has to do with right and wrong is co-extensive with the part of morality that has to do with what we owe to each other.\(^{29}\) In order to figure out what we owe to each other, and thus which acts are wrong, contractualists start with the idea of mutual justifiability.

They think that an act is wrong if and only if it is permitted by a principle that is not justifiable to


\(^{27}\) Ibid., 41.

\(^{28}\) Henceforth, when I refer to “contractualism” in this work, I am referring to Scanlon’s contractualism, unless otherwise noted.

\(^{29}\) For example, Scanlon says, “contractualism as I describe it is not meant to characterize everything that can be called “moral” but only that part of the moral sphere that is marked out by certain specific ideas of right and wrong, or “what we owe to others”” (T. M. Scanlon, What We Owe to Each Other (Cambridge, MA & London: The Belknap University Press of Harvard University, 2000), 178).
someone, if it is a principle that someone could reasonably reject. On what basis could someone reasonably reject a principle? This is a matter of some importance for contractualists. Scanlon’s answer is that the grounds for reasonably rejecting a principle must be personal. What makes the grounds for rejecting a principle personal? Scanlon does not give a general characterization of the distinction between personal and impersonal grounds (as far as I know), but, he suggests that grounds for reasonably rejecting a principle are personal just in case they are based on the implications for someone of accepting a principle. He says that grounds for reasonably rejecting a principle are

‘generic reasons’ that any person would have in virtue of standing in one of the positions in a situation of the kind to which the principle applies. These must be reasons that such a person would have ‘on his or her own behalf.’...This...rules out, as grounds for rejecting a principle, appeals to impersonal values, such as the intrinsic value of preserving the Grand Canyon, or to aggregate benefits. What it allows are reasons arising from the way a person would be affected by following the principle, or by having others do so.

Since the only reasonable grounds for rejecting a principle are personal, and grounds are personal because they arise from the “way a person would be affected by following the principle, or by having others do so”, contractualists appear to accept the Harm View. They think that an act is wrong if and only if it is permitted by a principle that could be reasonably rejected, and it is only on the basis of the negative effects of adopting a principle on someone that one can reasonably reject a principle. Additionally, they think that wrong acts are especially important.

30 Scanlon says, “What is distinctive about my version of contractualism is that it takes the idea of justifiability to be basic in two ways: this idea provides both the normative basis of the morality of right and wrong and the most general characterization of its content. According to contractualism, when we address our minds to a question of right and wrong, what we are trying to decide is, first and foremost, whether certain principles are ones that no one, if suitably motivated could reasonably reject” (Scanlon, What We Owe to Each Other, 189).

What we owe to others takes priority over other considerations.\(^{32}\) And failures of concern for what we owe to others are more serious than failures to respond to other reasons.\(^ {33}\)

Next, I identify some places in moral philosophy where we find the Claim View.

**The Claim View**

The Claim View says that harms are involved in explaining why claim infringements are wrong, when they are wrong, and that claims are especially morally important. Who endorses the Claim View? I will give two examples of traditions where one finds the Claim View.

First, there is a long tradition of moral absolutism in non-consequentialist thinking. Moral absolutism is the idea that some acts are forbidden, no matter what. These forbidden acts are often thought to be acts that infringe claims. So someone who thinks that there are some claims that can never be trumped by non-claims would be a moral absolutist who endorses the Claim View.

For example, Judith Jarvis Thomson thinks that some claims cannot be trumped by non-claim considerations. She says in *Realm of Rights*,

No matter how large an increment of good I would produce, it is impermissible for me to kill you, and your claim against me that I not do so is maximally stringent...

\(^{32}\) Scanlon says, “to think of art or science as valuable is to think that there are good reasons for taking them seriously and incorporating the pursuit, study, and appreciation of them into our lives in certain ways. The question then is, in what ways? More specifically, does a proper understanding of the value involve recognizing reasons for pursuing them that demand priority over what we owe to other people? It seems to me clear, although I will not argue the point in detail, that it does not, and that the claim that it does involves an exaggerated and distorted view of these values” (Scanlon, *What We Owe to Each Other*, 167).

\(^ {33}\) Scanlon says, “there is a difference between a lack of concern with considerations of right and wrong and a failure to respond to reasons of other kinds, and that the former is a more serious failing” (Scanlon, *What We Owe to Each Other*, 149).
Let us say that a claim is within the range of maximally stringent claims if and only if no increment of good to be got by infringing it, however large, would make it permissible to infringe it -- if the potential claim infringer had a non-claim-infringing alternative to infringing it...\(^{34}\)

Since Thomson thinks that claim infringements, when wrong, involve harms, and that some claims are especially morally important, in that they cannot be trumped by non-claim considerations, she endorses the Claim View.

A second example of a tradition in which one finds the Claim View is amongst philosophers who think that the only human rights are negative and that there is a duty to aid that is not correlated with any claims, but which is less stringent. Jan Narveson is an example of someone who takes this view. For example, he says, in “We Don’t Owe Them a Thing”,

I hold the classical view, that our basic human rights are negative, and thus that the basic human duties--the ones that our fellows may insist on, with threats of punishment for noncompliance--are to avoid inflicting evils on people. The duty to help those in need is not like that. Nevertheless, it is reasonable to talk of a less stringent duty of mutual aid, on the ground that we are all vulnerable to assorted misfortunes, and when those do befall us, assistance from others is going to be our only recourse. But the size of the commitment this imposes is limited and variable, and the higher the cost to the agent, other things being equal, the less stringent is that duty. Distance is normally a cost factor, and so it matters. Very distant people are unlikely ever to be in a strictly reciprocal relation to us. Even so, we should all be disposed to approve of action to aid persons, however distant, even though such action is not required of us. In a world of increasing interrelation, the having of good relations with all people everywhere is a worthy general objective. Besides, it’s just plain nice.\(^{35}\)

Though Narveson uses the terminology of rights, I think that he too endorses the Claim View. In those words, Narveson thinks that the only claims that people have are claims not to be harmed


and that other duties, duties that aren’t correlated with claims, which, he thinks, include duties to aid, are less stringent. So Narveson, too, endorses the Claim View.

So the Harm View and the Claim View are widespread in non-consequentialist traditions in moral philosophy. The Non-Identity Problem challenges the Harm View and the Claim View, so it’s a far reaching problem.

**Approaches to the Non-Identity Problem**

There are three main strategies for dealing with the Non-Identity Problem:

- **Strategy 1:** Deny that any wrong has been done.
- **Strategy 2:** Argue that harms do figure into an explanation of wrong-doing.
- **Strategy 3:** Accept the implications of the Non-Identity Problem, reject the Harm View and the Claim View, and look for a new way of explaining the wrong done.

I regard Strategy 1 as a last resort.

Several philosophers have taken Strategy 2. Strategy 2 takes one of two forms. The first is to attack the Non-Identity Problem’s assumption about harm, *the Counterfactual Condition of Harm*, and defend an alternative conception of harm, arguing that it is met in the Non-Identity examples. For example, Thomson says about someone like Jane, from Example 2,

If we want to have it that the woman in such a case causes her child to be harmed, and I think we do, then a revision is called for. A number of possibilities present themselves. One is to add a clause to the effect that if X did not exist before E occurred, then E need
not make X’s condition be worse than it was before E occurred—it need only make X’s condition be bad.\textsuperscript{36}

Elizabeth Harman has developed this line of dealing with the Non-Identity Problem, as well.\textsuperscript{37} Notice this immediate problem with this strategy: we would have to say that Todd and Susan in Example 3 harm their child, too, which makes it difficult to see why they don’t do anything wrong by conceiving a child with a club foot, but Jane does.

Other philosophers argue that though no harm is actually done, harms to individuals figure into an explanation of wrong-doing, but at a more abstract level. This strategy has been pursued by contractualists, such as Rahul Kumar.\textsuperscript{38} But it fails to show that harms to individuals, at even an abstract level, figure into an explanation of wrong-doing.

This dissertation is, in part, about the limits of Strategy 2.

**My Approach**

So I recommend Strategy 3.

In Chapter 1, I argue that the Harm View should be rejected for reasons that are independent of the Non-Identity Problem. I argue that harms cannot plausibly be said to figure in any way into an explanation of why it is wrong to increase inequality between people who are moral equals. There are, I argue, harmless injustices.

In Chapter 2, I defend the Counterfactual Condition of Harm. Consequently, no one is harmed in the Non-Identity examples.

\textsuperscript{36} Thomson, *Realm of Rights*, 262.


In Chapter 3, I argue that, additionally, harms do not appear to figure into an account of wrong-doing in even an abstract way.

Not only do harms not unify wrong acts, the Non-Identity Problem teaches us that harms do not unify even an especially important consideration. This is a problem for the Claim View. If an act harms someone only if it meets the Counterfactual Condition, then acts that are wrong because they infringe a claim must meet the Counterfactual Condition, too, because acts that are wrong because they infringe a claim harm someone, says the Claim View. Acts that do not meet the Counterfactual Condition can be more morally wrong than acts that do meet the Counterfactual Condition, and which therefore might infringe a claim. So acts that do not meet the Counterfactual Condition, acts that harm no one, might be more morally wrong than acts that infringe a claim. This suggests that claims are not especially morally important.

We have said that consequentialists reject both the Harm View and the Claim View. If we take Strategy 3, must we be consequentialists? I do not think so, and there are reasons not to be. These include well discussed problems with consequentialism having to do with justice, with conflicts between morality and personal projects, with over-demandingness, and questions about aggregation. But there are other reasons not to be satisfied with a consequentialist approach to the Non-Identity Problem. First, consequentialist approaches appear to create an obligation to procreate. Second, consequentialist approaches seem to produce counterintuitive results about what are the best outcomes.

Consider what the consequentialist would say about the Non-Identity Problem. Jane, having taken the drug, can either create a child now, or not. If she does not, then she can either create a child later, or not at all. So Jane is faced with three choices:
(1) Create a child now. That child will have a club foot.

(2) Create a child, not now, but later. That child will not have a club foot.\(^{39}\)

(3) Never create a child.

Assuming that Jane’s decision will not have any negative effects on anyone else, it would appear that (2) would lead to the best possible outcome. (3) leaves the difference between the amount of good and bad in the world the same (or worse, counting the non-satisfaction of Jane’s preference to have a child). (1) increases it, assuming the child will have a life worth living. But (2) increases it the most. So the consequentialist can say that Jane does something wrong by creating a child now, but not without creating an obligation to procreate.

Of course, we have been assuming that Jane wants a child, and so a consequentialist could respond that if she did not want to have a child, then it may not be the case that (2) would lead to the best possible outcome. When we take her displeasure into account, perhaps (3) would lead to the best possible outcome. But maybe not. My confidence in the view that Jane would do nothing wrong by never procreating if she did not want to is higher than my confidence that the numbers would work out so that a consequentialist could support this conclusion.

Alternatively, a consequentialist could reformulate their theory about what makes one outcome better than another. Perhaps, for example, an outcome is better than another just in case it has a higher average utility.\(^{40}\) If we create a child, then it adds to the total good, but if the child is badly off compared to the other children that will exist, then the average utility is lowered. This would make an obligation to procreate less frequent, but is not compatible with the intuition that we do not have an obligation to procreate at all.

\(^{39}\) And so will have a better life than the life of a child created now.

\(^{40}\) This approach seems \textit{ad hoc}, raising the question, why average utility as opposed to total?
Furthermore, there is a related concern that consequentialists, in dealing with the Non-Identity Problem, get unintuitive results about what are the best possible outcomes. These are what Parfit calls “repugnant conclusions.” For example, a consequentialist would have to say that, when considering acts that are identity affecting, creating a larger population where individuals’ lives are just barely worth living could be better, if the population is big enough, than creating a smaller population where everyone’s quality of life is exceptionally high. Even an averaging consequentialist would have to say that a world where a million people lived intolerable lives was better than a world in which just one person lived a life that was just slightly more tolerable. These results are undesirable.

An adequate solution to the Non-Identity must meet at least these criteria:

• It should capture the intuition that what Jane does in Example 2 is wrong.

• It should capture the intuition that what Jane does is as wrong as what Mary does in Example 1.

• It must not condemn all procreation.

• It must not require procreation.

• It should avoid repugnant conclusions.

I offer an explanation of the wrong done in the Non-Identity Problem that appeals to facts about an agent. The agent’s action shows her to be insensitive to suffering, and her action is wrong for that reason. This approach meets the above criteria.
Chapter 1: Harmless Wrongs

1.1 Introduction

The Non-Identity Problem arises, in part, because of facts about human reproduction. Because of these facts, we can safely assume about some acts that no one would be worse-off if they were performed. On the assumption that someone is harmed by an act only if she would be worse-off if it were performed, we face a dilemma. Either we must say that these acts are not ever wrong, or we must say that they are wrong but not because of any harm. The first option, denying that these acts are wrong, is an option of last resort. What should we think about the second option?

The second option involves rejecting the Harm View. The Harm View says that harm plays a fundamental role in explaining all wrong acts. We can distinguish between weaker and stronger versions of the Harm View. On the stronger version, an act is wrong only if it harms someone. On the weaker version, harms to individuals have to be mentioned in an explanation of why an act is wrong, when it is wrong, but an act could be wrong even though no one was actually harmed by it. In what follows, I am interested in the weaker version. If it is false, then so is the stronger version. So when I refer to the Harm View, I am referring to the weaker version.

In this chapter, I discuss several possible counterexamples to the Harm View. In doing so, I have two aims. First, I aim to explain why the Harm View should not be rejected out of hand. To this end, I explain the strategies that the Harm View can take in dealing with possible counterexamples and I argue that these strategies deal plausibly with many of them. In the end,
the many examples that I introduce merit more discussion than I give them here. But that is precisely the point.

Second, and most importantly, I aim to address the view that says that since the Non-Identity Problem depends on relatively superficial facts about human reproduction, it is a curious exception to the Harm View, but not a serious threat to it. While the Harm View has the resources to deal with many challenges to it, the Non-Identity Problem is not an anomaly. Where there is smoke, there is fire.

I argue that the Harm View cannot deal plausibly with an important moral consideration, the moral importance of equality. If two individuals are moral equals, then their lives should go equally well and, as a matter of justice, we should not increase inequality between moral equals. But, an increase in inequality may not harm anyone, on any plausible view of harm. This is a serious problem for the Harm View, at least as serious as the Non-Identity Problem.

1.2 Challenges to the Harm View

In this section, I introduce several possible counterexamples to the Harm View. In the next section, I discuss strategies for dealing with them.

(i) Conventional Immoralities & Violations of Taboos

Conventional immoralities include prohibitions on certain kinds of sexual conduct, for example, homosexuality, or maybe even any sex outside of a monogamous heterosexual relationship. Taboos are actions that are strictly forbidden by a society, for example, food taboos, like the prohibition on pork for Jews and Muslims, or cannibalism. These prohibitions are
thought to have moral significance that the Harm View cannot explain. For example, most people think that harmless incest is wrong.

**Harmless Incest**

"Julie and Mark are brother and sister. They are traveling together in France on summer vacation from college. One night they are staying alone in a cabin near the beach. They decide that it would be interesting and fun if they tried making love. At very least it would be a new experience for each of them. Julie was already taking birth control pills, but Mark uses a condom too, just to be safe. They both enjoy making love, but they decide not to do it again. They keep that night as a special secret, which makes them feel even closer to each other."

(ii) **Duty to Obey a Just Law**

There may easily arise situations where breaking a just law would not harm anyone.

**Traffic Light**

You’re driving at noon in the deserted plains of Minnesota. Visibility is near perfect, you can see in every direction for miles and miles. You approach a red light, and, checking thoroughly that the roads are clear, drive straight through.

(iii) **Benefiting from Others’ Evil Doing**

Sometimes good things result from wrong acts. When this happens, the good things seem tainted, and it may be wrong to benefit from them.

**Nazi Experiments**

The Nazis killed innocent people and used their bodies for research purposes. The Nazi’s anatomical drawings were thought to be amongst the best. Their drawings were confiscated by the US Army and used to educate American medics and scientists.

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42 This example is discussed in Ronald Green, “Benefiting from ‘Evil’: an Incipient Moral Problem in Human Stem Cell Research,” *Bioethics* 16 (2002): 544-556.
(iv) **Thinking Evil or Impure Thoughts**

Some people may think that it is wrong to think evil or impure thoughts. It seems wrong to wish someone ill, or to delight in someone else’s suffering. But merely thinking impure thoughts may not harm anyone. In fact, someone who frequently performs good deeds may have a very active evil fantasy life.

**Evil Fantasy Life of Mother Theresa**
Mother Theresa devotes her life to the needs of others. Every day she wakes up and does saintly deeds. But at the end of the day, when Mother Theresa is too tired to do any more good for anyone, she fantasizes about pushing old women in front of cars, shooting down cats who are stuck in trees, and laughs to herself when she imagines throwing hot soup on the hungry and homeless. These fantasies bring amusement and delight to Mother Theresa. She revels in the thought of others’ suffering. But she does not take the fact that she would delight in the suffering of others as a reason to actually cause anyone to suffer. During the day, she fights poverty with every fiber in her being.

(v) **Freeloading**

No one likes a freeloader, someone who mooches off others, getting something for nothing.

**Wireless**

Tom’s neighbor buys wireless service. Tom, without permission, hops on his neighbor’s unprotected network. It doesn’t slow down his neighbor’s service. Tom would never buy his own wireless service.

(vi) **Rights**

Sometimes you acquire a right to something by being promised it, and sometimes, breaking a promise appears to have no negative effects on anyone. For example:
Alfred and Betty
“Suppose that Alfred would be delighted by Betty’s failure to keep her promise to him; he is a malicious gossip and can use this failure to present Betty to others in an unfavorable light. Suppose that Betty knows this and nonetheless breaks her promise.”

If the promisee is already dead, perhaps breaking the promise cannot harm the promisee.

Deathbed Promise
Phil is on his deathbed. He asks you to promise him that you will deliver flowers to his wife’s grave. You promise. Phil dies. But you never fulfill your promise.

There are other examples of rights that can be transgressed harmlessly. For example, someone could use your private property without harming you in anyway.

Trespass
While you are on summer vacation in Europe, someone, a trespasser, walks across your lawn back in the United States. She leaves no trace.

(vii) Causing Imperceptible Pains
On the assumption that pain is only harmful if it is perceptible, it may be the case that no one harms anyone because no one increases anyone’s pain in a perceptible way, but still does something wrong by coordinating with others who are increasing pain in an imperceptible way.

Harmless Torturers
A thousand torturers have a thousand victims. Each torturer has a torture instrument. Turning a switch on a torture instrument increases every victim’s pain in a way that is imperceptible. A thousand switches puts a victim in excruciating pain. Each of the

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thousand torturers turns the switch on their instrument, putting all of the victims in excruciating pain. None of the torturers makes any victim’s pain perceptibly worse.\textsuperscript{44}

\textit{(viii) Moral Corruption}

Some may think that it is wrong to morally corrupt someone else, even if no one is harmed.

\textbf{Corrupting Oliver}

Oliver is an innocent little boy who is abducted by James. James raises Oliver to be an assassin, to kill anyone who James asks him to. Oliver is totally corrupted by James. He would kill in an instant. But before he is able to kill anyone, Oliver dies of tuberculosis.

\textit{(ix) Failed Attempts at Wrong Acts}

Failed attempts to do something wrong appear to be just as wrong as successful attempts to do something wrong, even though no one may be harmed.

\textbf{Attempted Murder}

Mary points a revolver at Jones, an innocent man, and pulls the trigger in order to shoot him dead, but, because she forgot to load her gun, Jones escapes unscathed. Jones did not see Mary and so he was in no way harmed by her attempt at his life.

\textit{(x) Risky Acts with Excellent Outcomes}

With good luck, agents may do something that puts someone at risk of harm, and things may turn out well. Still, we think that they may do something wrong.

\textbf{Drunk Driving}

\textsuperscript{44} This example is from Derek Parfit, \textit{Reasons and Persons} (Oxford: Oxford University Press, 1984; Oxford University Press, 1986), 80.
Susan is a lovely person but she has had a few too many and, exercising poor judgment, she gets behind the wheel. Fortunately, no one else was on the road that evening, and she makes it home without incident.

(xii) Duties to Self

Some people think that we may do something wrong by not fulfilling duties to ourselves, but we may not harm anyone.

Couch Potato
The couch potato sits on the couch watching reality television, playing video games, reading comic books, and eating potato chips, instead of watching public broadcasting, playing chess, reading Tolstoy, and eating crudite.

(xii) Destruction of Art

Someone who destroyed a valuable work of art would do something wrong, even if no one were harmed.

Starry Night
Michael uses Van Gogh’s painting, “Starry Night”, as a doormat.45

(xiii) Destruction of the Environment

There are several ways in which humans negatively impact the environment. We destroy non-human life and landscapes, and this seems wrong to many, independent of the harm that the destruction does to humans. Here are three examples:

Destroying an Oak Tree
Someone chops down the oak tree in his yard in order to make a paved driveway for his car. 46

Mountaintop Removal
In West Virginia, coal mining companies blast 800-1000 feet off of the tops of the Appalachian Mountains in order to reach the coal that lies underneath. The rock and dirt are dumped into surrounding valleys, burying miles of streams.

Species Extinction
Panda bears are endangered, but many of them fail to be interested in mating. The pandas are not unhappy; they are just contentedly celibate. We could do something to spark some interest between them, and, if we do not, then they will become extinct. Each individual panda bear would still prosper, but, eventually, there would be no more pandas.

(xiv) Genetic Enhancement
Michael Sandel has recently argued that genetic enhancement is wrong even if it's harmless.

Star Athlete
A father wants to have a son who is a star basketball player, so he and his wife opt to genetically enhance their son to be taller than average.

(xv) Increasing Inequality
It seems unjust to increase the inequality between moral equals, and this can be done without harming anyone.

Grading
Two students in the same course, Frank and Peter, do qualitatively identical work throughout the semester and they both fail to comprehend the same material to the same extent. Neither student deserves to pass according to the reasonable standards set out on the syllabus. The professor fails Frank but passes Peter.

1.3 Strategies for Dealing with These Challenges

In the face of all of these challenges to the Harm View, why should we, dealing with the Non-Identity Problem, hesitate to reject it? We should hesitate because the Harm View has several strategies for plausibly dealing with many of these examples. The first strategy is to deny that there is really any wrong done. The second is to argue that there really is harm done, or that harms do figure crucially into an explanation of the wrong done. The third is to argue that the example falls outside of the moral realm, or outside the realm of the part of morality explained by harms. After illustrating the application of these strategies, I will, in the next section, argue that none of them can adequately deal with the importance of equality.

Strategy 1: Deny Wrong-Doing

Several of these examples can be dealt with plausibly by simply denying that they are examples of wrong-doing. When truly harmless, examples of (i)-(vi) are, plausibly, not wrong, because, for no reason objectionable.

Consider Harmless Incest. Most people think that Julie and Mark, the brother and sister in the example, do something wrong, but the example is carefully constructed so that their relationship is completely harmless. Jonathan Haidt, who constructed the case, says,

Most people who hear the above story immediately say that it was wrong for the siblings to make love, and they then set about searching for reasons (Haidt, Bjorklund, & Murphy, 2000). They point out the dangers of inbreeding, only to remember that Julie and Mark used two forms of birth control. They argue that Julie and Mark will be hurt, perhaps emotionally, even though the story makes it clear that no harm befell them. Eventually,
many people say something like “I don’t know, I can’t explain it, I just know it’s wrong.”

Since most people think that harmless incest is wrong, this would appear to be a counterexample to the Harm View. But someone who accepts the Harm View could easily deny that harmless incest is wrong. According to Haidt, people are unable to explain why they think that harmless sibling sex is wrong. This suggests, not that there is some reason other than harm that explains why it is wrong, but that there is no reason at all (that anyone can think of) why it is wrong. This example appears to force us to choose between thinking that harmless sibling sex is wrong, but for no reason at all, and thinking that it is not wrong. We must choose between the moral significance of conventional moralities and taboos and the project of grounding morality in reasons. While some moral philosophers, such as Leon Kass, think that actions can be wrong even if there is no articulable reason that they are wrong, many of us are unprepared to give up on the idea that if an action is wrong, it must be wrong for some reason. There is thus no shame in denying that harmless conventional immoralities and taboos are not, in fact, wrong.

Consider Disobeying a Just Law. Plausibly, disobeying a law when doing so would not harm anyone, even when the law is just, is not wrong. Most actions that are prohibited by law, at least in the United States, are prohibited in order to prevent harms. If the justification for the law

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48 See Leon Kass, “The Wisdom of Repugnance,” *The New Republic* 216 (1997):17-26. There, Kass says, “In crucial cases, however, repugnance is the emotional expression of deep wisdom, beyond reason’s power fully to articulate it. Can anyone really give an argument fully adequate to the horror which is father-daughter incest (even with consent), or having sex with animals, or mutilating a corpse, or eating human flesh, or even just (just!) raping or murdering another human being? Would anybody’s failure to give full rational justification for his or her revulsion at these practices make that revulsion ethically suspect? Not at all. On the contrary, we are suspicious of those who think that they can rationalize away our horror, say, by trying to explain the enormity of incest with arguments only about the genetic risks of inbreeding.” For critique of Kass’s views about the moral importance of repugnance, particularly its implications for the law, see Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004; Princeton Paperbacks, 2006).
was that it would minimize harm, and some particular act was not harmful, then the justification for the prohibition would not apply in that case. So, plausibly, breaking the law in that case would not be wrong.⁴⁹

Consider Benefiting from Evil. When harmless, benefiting from evil does not appear to be wrong. For example, it’s morally permissible to use the organs of a murder victim to save someone’s life, though murder is evil and the organs benefit someone other than the victim. So, more must be said about why benefiting from evil is wrong, if it is wrong. This would plausibly involve harms, for example, perhaps benefiting from evil would encourage more evil, and increase harm.

Consider Freeloading. The harms of freeloading are often not obvious.⁵⁰ Arguably, it is seldom harmless. But when it is harmless, it is plausibly not wrong. Since both Tom and his neighbor use the wireless service, it might be argued that his neighbor shouldn’t have to bear all of the burden of the cost. This seems unfair, and so wrong. But is it? Here are two reasons to


⁵⁰ For example, by not buying wireless service himself. Tom may be driving the price of wireless service up. Verizon would rather charge him and his neighbor $15.95/month than one of Tom or his neighbor $19.95/month. If it had more customers, Verizon may lower its price. So by not buying his own service, Tom may make things worse for his neighbor. If he does, then freeloading is wrong for that reason, but then it is not harmless. By freeloading, Tom may make things better for his neighbor, but by making things worse for Verizon. By freeloading, Tom may be driving the cost of wireless service down, because by not purchasing wireless, he leads Verizon to underestimate the demand for their product. If freeloading weren’t an option, Tom may be willing to pay even more than $19.95/month for wireless service, but Verizon will never know. This reminds us of another victim, Verizon. By freeloading wireless service, Tom essentially robs Verizon. It’s not easy to work up sympathy for a victim like Verizon, but they could be harmed by Tom’s freeloading, nonetheless. Again, if freeloading is wrong, it’s wrong because it harms someone.

We could suppose, however, that Tom would never pay for wireless service; he’d rather go without it than pay for it. His freeloading wouldn’t harm Verizon, because he isn’t a potential customer. Would he still do something wrong? In cases of theft, this excuse, “I would never pay for it”, wouldn’t get one off of the hook. Presumably, the car thief who steals a BMW from a dealer wouldn’t buy one, either. Why should it get Tom off of the hook with Verizon if it wouldn’t get the car thief off of the hook? Wireless service isn’t like a BMW. The BMW dealer can’t sell a stolen car. But Verizon can continue to sell wireless service to others while Tom freeloads. The good of wireless service can be enjoyed by many without depriving it from anyone. So, if Tom wouldn’t buy wireless service, then he isn’t causing Verizon to lose profit, since he would never be a customer. If Verizon isn’t harmed by Tom’s freeloading, then what does he do wrong?
doubt that it is wrong. First, by bearing the full burden of the cost, Tom’s neighbor receives goods besides the wireless service -- he chooses the bandwidth, he has control over when the service starts and when it ends. Tom, as a freeloader, has no say in these matters. Second, if we think that Tom should pay his neighbor for the wireless service simply because Tom enjoys using something that his neighbor pays for in full, then we should also think that Tom should contribute to his neighbor’s lawn maintenance, if he enjoys looking at his neighbor’s beautiful lawn, but Tom doesn’t do anything wrong if he doesn’t pay to take care of his neighbor’s lawn. Freeloading, when it is truly harmless, looks as innocent as enjoying the cost-free view of a neighbor’s yard.

Consider Thinking Evil Thoughts. We would be aghast to find out about Mother Theresa’s evil fantasy life, but does she do anything wrong by indulging in it? Someone who accepts the Harm View could argue that indulging in such thinking either disposes one to harm others or makes it likely that one will harm others, and thus is wrong for harm-related reasons. If one relishes in the thought of throwing hot soup at someone, then maybe one will eventually do it. Or, someone who accepts the Harm View could argue that Mother Theresa harms herself by indulging in an evil fantasy life. Maybe she does, and maybe this is why indulging evil thoughts is wrong. But these explanations would not explain whether wishing someone ill itself is wrong, irrespective of harm, and one may very well think that it is the wishing ill itself that is wrong. I think that adherents of the Harm View should simply say that, despite our reaction to it, so long as no one is harmed, neither Mother Theresa herself nor anyone else, it isn’t wrong to have, or even delight in, evil thoughts. Perhaps Mother Theresa’s acts takes on even more moral
significance once we know how much she struggled to suppress her own evil desires. It seems to be a moral triumph that, despite her proclivities, she always does the right thing. Mother Theresa’s character seems morally defective, even though she neither does anything wrong nor is she inclined to do anything wrong, but it’s difficult to say why we should think that her character is morally defective. Many people enjoy playing violent video games or find amusement in the foibles of slapstick, and we do not tend to think that this recreation is itself morally wrong, so long as it does not dispose one to do harm. Plausibly, though we may find it, like incest, distasteful, harmlessly engaging in an evil fantasy life is not wrong.

Consider Rights. Many people might think that the Harm View is “too consequentialist” and that it ignores the moral significance of rights. They think that promisees have a right that promises be kept, lessees have a right that loans be repaid, and these are moral facts that do not depend on the consequences of promise keeping or loan repaying. On this view, even if failing to keep a promise would not harm anyone, a promise ought to be kept. It is not part of this view that failing to keep a promise always has some negative effect on someone, that it always comes to someone as a harm or that it always leads to someone being harmed. The view is that a promisee has a right that a promise be kept, and this fact makes it wrong to not keep a promise, and this is a moral fact that is independent of the consequences of keeping a promise. Someone who adopts the Harm View could plausibly reply that this view of rights is not consequentialist enough. Suppose that, if I fulfill a promise that I made to you, you will lose an arm, but if I fail to keep my promise, you will keep your arm and go on just as you are now. If nothing good

51 Kant, *Groundwork*, 398.

52 Sometimes evil thoughts take outward expression, for example, someone might spit on an enemy’s grave, in private. This situation is, I think, just like the situation in which someone has an evil fantasy life, only the evil fantasy takes an outward expression. So long as it’s private, unobserved, and so harmless, someone who adopts the Harm View may simply insist that it is not wrong.
would come to you if I keep my promise, and great harm would come to you if I did, then it
seems incredible that you would have a claim against me that I keep my promise and that I
would violate your rights if I did not. Rights do not float completely freely of the effects on
individuals of their being respected. Broken promises that matter morally are always harmful at
least to the extent that they deprive the promisee of what was promised. This harm may not fully
explain why breaking the promise is wrong, but it plays an important role in explaining why
breaking a promise is wrong. If being deprived of what was promised would not harm the
promisee, if the breaking of the promise itself would not harm the promisee, then breaking the
promise would, plausibly, not be wrong. If keeping the promise would harm the promisee, then
it is plausibly not wrong to break it.

**Strategy 2: Locate Harms**

Harms plausibly figure into an explanation of wrong-doing in many of these examples, and so they are not serious challenges to the Harm View. It is difficult to say about some of the examples whether they are in fact harmless, because some of the examples simply do not provide us with enough information. Perhaps, when all of the details of the examples are filled in, we will find that someone has been harmed, or we will change our judgment about wrong-doing. Someone may actually be harmed, but in a less-than-obvious way. For example, someone may

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53 In *The Republic*, Socrates says, “Everyone would surely agree that if a sane man lends weapons to a friend and then asks for them back when he is out of his mind, the friend shouldn’t return them, and wouldn’t be acting justly if he did” (331 c-d). Socrates goes on to say, “Someone doesn’t give a lender back what he’s owed by giving him gold, if doing so would be harmful, and both he and the lender are friends” (332b). In other words, it would be wrong to return what was lent if doing so would harm the lender. He says, “friends owe it to their friends to do good for them, never harm” (332b). See Plato, *The Republic*, Translated by G. M. A. Grube (Indianapolis: Hackett Publishing Company, 1992). Christine Korsgaard suggests that even a Kantian would not think that it would be wrong to break a promise to return a gun to someone who is suicidal when she says about Plato’s example, “I will refuse to return your weapon, because you have gone mad and may hurt someone” is a good maxim. For more, see Christine Korsgaard, *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996), 108.
be harmed via an indirect causal route. Freeloading, when wrong, may harm in a less-than-obvious way, for example, by driving up the price of some good. Some of the examples may require us to understand harm in a specific way, but, once we do, we find that the acts are not harmless. Or, even when no one is actually harmed, harms may be playing a role in explaining wrong-doing at a more abstract level. The Harm View can accommodate examples of wrong acts that do not harm anyone because sometimes harms to individuals figure into an explanation of wrong-doing even when no one is actually harmed. For example, an act might be wrong because it increase the likelihood of harm, even if no one is actually harmed. Benefiting from evil, when wrong, may increase the likelihood of harm to individuals. Cultivating an evil fantasy life could be wrong because it inclines one to perform evil, harmful acts. Or, an act might be wrong because it is performed with intentions to do harm. In this section, I will apply these strategies to examples about which it is less plausible to simply deny wrong-doing, for example, breaking a deathbed promise, causing imperceptible pain, moral corruption, attempting murder, and performing risky acts that turn out, unexpectedly, to have excellent outcomes.

We just discussed Rights. We said that, plausibly, rights are connected to harms. Consider the example of breaking a deathbed promise. It is not harmful on the assumption that the deceased cannot be harmed. But if we reject this assumption, if the deceased can be harmed, then maybe someone is harmed when a deathbed promise is broken. So the Harm View could say that breaking a deathbed promise is sometimes wrong; when it is wrong, it is not harmless.

Consider Causing Imperceptible Pains. In the example of torturers who each increase an individuals' pain imperceptibly, they do not do anyone any harm only on the assumption that
causing someone an imperceptible pain does not harm them. But we could reject this assumption. Perhaps causing someone an imperceptible pain does harm them.\textsuperscript{54}

Consider Moral Corruption. What does it mean to “morally corrupt” someone, and if it is wrong, is it also harmless? It might mean that someone causes someone else to perform wrong acts. In that case, someone who accepts the Harm View could say that moral corruption is wrong because of the harm that it causes some third party. But is it wrong to corrupt someone even if no third party is harmed, even if the corrupted person never does anything wrong, as is the case in our example, Corrupting Oliver? Plausibly, corrupting Oliver is wrong because, even though no third party is harmed, Oliver is harmed by becoming someone who is inclined to perform wrong acts. Oliver is different from Mother Theresa in that Oliver is inclined to do the wrong thing, while Mother Theresa is committed to doing the right thing, and does it. Oliver is a morally worse person than Mother Theresa. While it’s a complicated matter what the relationship is between having a good life and having a particular character, it is plausible that an essential part of the good life is having a good moral character, where one has a good moral character only if one is not disposed to do the wrong thing. On the plausible assumption that being a morally good person, being someone who is inclined to do the right thing, is necessary, though not sufficient, for having a good life, the Harm View can explain why it is wrong to morally corrupt someone. Someone who accepts the Harm View might also say that harm figures into an explanation of why moral corruption is wrong at a more abstract level. Oliver dies before doing something wrong, but if he hadn’t died, then, inclined to do the wrong thing,

\textsuperscript{54} Parfit, \textit{Reasons and Persons}, 82.
he would have harmed someone. So harm to third parties figure into explaining why corrupting
Oliver is wrong, but it figures in at a more abstract level.

Consider Failed Attempts at Wrong Acts. There are several ways to go here. If harms are involved in explaining why wrong acts are wrong, and someone who attempts to do something wrong intends to do something wrong, then their intentions are bad, and harms will figure into an explanation of why their intentions are bad. The simplest thing to say is that all attempts at wrong acts are wrong, whether they are successful attempts or failed attempts, and they are wrong just because wrong acts are wrong. Since harms figure into an explanation of what makes an act wrong on the Harm View, and wrong acts explain why attempts at wrong acts are wrong, harms figure into an explanation of why failed attempts at wrong acts that are harmless are wrong, but at an abstract level.

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55 Second, someone who adopts the Harm View might bite the bullet and take strategy 1 and deny that failed attempts at wrong acts are wrong. Some philosophers distinguish between acts and actions, where acts are physical events, like pulling the trigger of an unloaded gun, and actions are acts plus intentions, or reasons for acting. Some philosophers think that only acts are capable of being right or wrong. Actions are, not right or wrong, but praise or blameworthy, or they are that in virtue of which agents are praise or blameworthy. With this distinction in hand, someone could say that someone could do the right thing, the right act, and yet be blameworthy, or do the wrong thing, the wrong act, and yet be praiseworthy. Philosophers who take this view could defend the Harm View. On their view, Mary does not do something wrong, because the act of pulling the trigger of an unloaded gun is not wrong. They can explain the impression that she does something wrong by noticing that she is blameworthy. They would then need to explain how could Mary be blameworthy if she did nothing wrong. They could say that harms explain why Mary is blameworthy even though she did not do anything wrong. She is blameworthy because she intended to harm Jones. Third, some philosophers, following Kant, think that actions, and not acts, are the appropriate objects of moral appraisal; only actions are capable of being right or wrong. On their view, whether Mary does something wrong isn’t settled by the ethics of pulling the trigger of an unloaded gun aimed at Jones. Rather, it’s settled by the ethics of Mary’s pulling the trigger of an unloaded gun aimed at Jones in order to kill him. Her intention is what makes her pulling of the trigger an attempt at murder. Failed attempts at murder, on this view, are just as wrong as successful attempts at murder. If actions are right or wrong, not acts, then Attempted Murder appears to stand as a counterexample to the Harm View: Mary’s action, attempted murder, is wrong, but no one was harmed. But, though no one is harmed by Mary’s failed attempt to murder Jones, she does do something wrong and harms play a role in explaining it. If actions, not acts, are right or wrong, harms still play a crucial role in explaining wrongness. Though no one was harmed, Mary’s action was wrong because her intention was to harm Jones. If she had pulled the trigger of an unloaded gun on stage, in a play, with harmless intentions, then she would not have done anything wrong. So, whether one takes acts or actions to be the type of objects that are capable of being right or wrong, the Harm View can meet the challenges raised by examples like Attempted Murder by emphasizing the explanatory role that harms play in an account of wrong action.
Consider Risky Acts with Excellent Outcomes. Following our account of Failed
Attempts at Wrong Acts, harms figure into an explanation of why risky acts with excellent
outcomes are wrong, though harms figure in at an abstract level. Though risky acts with
excellent outcomes do not themselves harm anyone, they can be wrong because of the harm that
could have come from them. For example, drunk driving is wrong even if no one is harmed. It
is wrong because it is risky. Of course, driving unimpaired puts others at risk of an accident.
Drunk driving is wrong because it increases the ordinary level of risk of an accident. We can’t
know whether or not there will be someone else on the road, and, since we can’t know whether
or not there will be someone else on the road, we can’t know whether or not we will harm
someone, and we have reason to believe that we are more likely to harm someone than we would
have if we were not driving impaired. So drunk driving isn’t wrong because it involves an
intention to harm. We may not intend to harm anyone when we drive home drunk. We may be
hoping that no one is on the road. But harms to someone figure into an explanation of why
drunk driving is wrong.

So, for many of the examples about which it seems plausible to say that someone has
done something wrong, it is also plausible to say that harms are involved in explaining why what
they have done is wrong. Either someone is harmed by the act, in a less-than-obvious way, or
harms figure into plausible accounts of wrong-doing, but at an abstract level. Can the strategy of
locating harms adequately deal with the examples that are left, duties to the self, destroying the
environment, destroying a work of art, genetic enhancement? The Harm View could plausibly
appeal to self-inflicted harms in explaining what one does wrong by not developing one’s talents,
but locating harms in the remaining examples is more of a challenge.
Possibly, using Van Gogh’s “Starry Night” as a doormat would harm someone because it would prevent others from seeing it. But, we could suppose that no one would have seen it ever again. Someone might say that using “Starry Night” as a doormat would harm the artist, Van Gogh. It is, we suggested earlier, possible to harm someone posthumously. But we could suppose that Van Gogh wouldn’t be harmed, even if it were possible to be harmed after one dies. Maybe Van Gogh had some very negative attitudes toward “Starry Night” and using it as a doormat would be precisely what he wanted. In any case, this strategy won’t succeed in the case of wanton destruction of the environment, assuming that oak trees and species and mountain ranges were not created by anyone.

Even if in some extended sense you thought that the oak-tree was harmed by being chopped down, it’s difficult to extend this sense to mountaintops. And though many species become extinct because of the harms to the individual members of the species, this need not be the case. An act could be very good for every individual member of a species but bad for the species as a whole. For example, panda bears are endangered, but many of them fail to be interested in mating. The pandas are not unhappy; they are just contentedly celibate. Suppose that we could do something to spark some interest between them, and, if we do not, then they will become extinct. Each individual panda bear would still prosper, but, eventually, there would be no more pandas. Would we do something immoral by not interfering if no panda (in fact, no individual) would ever be harmed by the panda’s extinction?

Someone might try to argue that destroying “Starry Night” or destroying the environment always has some negative effect on the agent him or her self and is wrong for that reason. But that seems implausible, since it asks us to assume that someone could not be constituted in such a
way as to not be affected negatively by destroying “Starry Night”. It’s always open to someone who adheres to the Harm View to try to locate some harm to someone, especially at this point in our discussion, which is prior to a thorough examination of the concept of harm. So I must rely here on what seems pre-theoretically plausible, and it seems implausible that everyone is constituted in such a way that if they destroyed a beautiful work of art or an oak tree, they would harm themselves.

So, for at least some of these examples, it’s not very plausible to think that harms to individuals figure in any way into an explanation of why they are wrong, if they are wrong.

**Strategy 3: Adjust the Boundaries of the Moral Realm**

But are they wrong? Unlike the examples about which we said it would be plausible for someone who adopts the Harm View to take Strategy 1 and simply deny wrong-doing, these remaining examples are somewhat more stubborn. Contrast destroying “Starry Night” or altering the Appalachian Mountain landscape with incest, for example. Once we realize that the incest is harmless, we grapple for reasons beyond “it disgusts me” for objecting to it. It’s not obvious what the brother and sister in the Harmless Incest example aren’t getting, what reason they aren’t comprehending for not doing what they’re doing. But the person who destroys “Starry Night” or alters the Appalachian Mountain landscape pretty clearly does not get something. They fail to appreciate some of the universe’s most valuable treasures. So what they do is, more plausibly, objectionable, not merely unpalatable.

To deal with these examples, the Harm View has one strategy left. It involves adjusting the boundaries of the moral realm. This can be done in one of two ways. One can draw a line
between the moral and the non-moral, and argue that these remaining examples belong in the non-moral realm. Someone who adopts the Harm View could then say that though these actions aren’t morally objectionable, they are objectionable, nonetheless. Or one can create boundaries within the moral realm, identify harms as unifying one aspect of the moral, and put these remaining examples in another part of morality, a part that is outside of the scope of the Harm View. Someone who adopts the Harm View could then say that though these actions aren’t strictly speaking wrong, they are still morally objectionable. Both of these approaches to this strategy come at some cost to the Harm View.

Let’s consider drawing a line between the moral and the non-moral. Many philosophers do. For example, some philosophers have a narrow conception of morality, where morality is most basically about how persons should treat one another. Morality, on this view, is not about how one should live, generally. On this view, there is a clear boundary between the moral and non-moral. One can go astray in many different ways, and going morally astray is just one of them. Any evaluation of acts that is not about how persons should treat one another is not a moral evaluation. Since morality is interpersonal, there are no moral duties to the self. There are also no moral duties to non-persons, for example, non-human animals, works of art, or mountains. On this view, it would not be immoral to indulge in the life of the couch potato, nor would it be immoral to destroy a valuable work of art or an environmental wonder. On this view, destroying a species isn’t immoral. Someone who thinks that there is a line between the moral and the non-moral could then concede that these examples raise questions about what one ought

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56 “Morality, with the end of ameliorating the human predicament, essentially prescribes what might be called conditions within which lives are to be lived and ends to be pursued...One might live, come to that, a very poor life indeed -- unsuccessful, unhappy, incoherent, frustrated, unproductive -- without necessarily going morally astray at any point at all. Geoffrey Warnock, *Object of Morality* (London: Methuen, 1971), 92.
to do, generally, but argue that they simply don’t have anything to do with morality. So these examples, once all of the stipulations have been made about not causing any harm to anyone, aren’t a problem for the Harm View.

There are several problems with this strategy, with drawing a line between moral considerations and other considerations. First, it’s not clear that there is a line dividing moral from non-moral considerations. We can draw a distinction between actions that affect someone other than the agent and actions that do not. The issue is whether this distinction runs deep enough to divide the moral from non-moral. There is something incoherent in the idea that it does. If morality sets “the conditions within which lives are to be lived and ends to be pursued”, then it necessarily involves ideas about how lives are best lived and which ends are to be pursued.57

Second, even if we could divide the moral from the non-moral, it’s unclear whether we would be making a distinction with any importance. If one ought not destroy “Starry Night”, what difference would it make if it turned out that destroying “Starry Night” wasn’t immoral? Someone who draws a line between the moral and the non-moral then owes us an argument for why the moral is especially important.

On the second approach, someone who adopts the Harm View could argue that morality is broad, it includes acts like destroying “Starry Night”, but harms unify a special class of moral

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57 For more on this, see Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 214. There, he says, “The objection is to the notion that there is such a division at a fundamental level, that one can divide one’s principles of action into those concerned with one’s own personal goals and those concerned with others, in such a way that the principles are independent of each other. The mistake is to think that one can identify, say, the rights of others, while being completely ignorant of what values make a life meaningful and satisfying and what personal goals one has in life. Conversely, it is also a mistake to think that one can understand the values which can give a meaning to life and have personal goals and ideals while remaining ignorant of one’s duties to others... There is no way of analyzing the respect due to art into two components, one representing a person’s obligations to others concerning art, the other expressing the importance art has for his own personal tastes and interests.”
considerations. What counts against including these considerations amongst the moral realm? Someone who accepts the Harm View could argue that including concerns about the environment or about works of art amongst the moral concerns would do violence to the category. Thomas Scanlon has said, “It is not clear exactly how the boundaries of ‘morality’ in the broader sense would be drawn.” 58 Granted, it would be unclear how to draw the boundaries of morality, but it is not clear that they ought to be drawn or that the Harm View draws them in the right way. Perhaps there is not anything distinctive in any deep sense about morality as a species of evaluation. Scanlon speculates, “Perhaps moral criticism in this sense is generally understood to apply to all matters of character having to do with a person’s appreciation of and response to important values...But on this understanding the category of the moral would be very wide indeed; would a failure to see the value of art count as a moral fault?” 59 Perhaps the category of the moral is very wide indeed, so wide that the failure to see the value of art would count as a moral fault.

Philosophers have tried to make a case for including environmental and aesthetic concerns within the moral. For example, Thomas Hill has argued for the moral importance of preserving the natural environment.

The moral significance of preserving natural environments is not entirely an issue of rights and social utility, for a person’s attitude toward nature may be importantly connected with virtues or human excellences. The question is, “What sort of person would destroy the natural environment—or even see its value solely in cost/benefit terms?” The answer I suggest is that willingness to do so may well reveal the absence of


traits which are a natural basis for a proper humility, self-acceptance, gratitude, and appreciation of the good in others.  

Joseph Raz has argued for the moral importance of preserving great works of art.

The reason is that to destroy it and deny the duty is to do violence to art and to show oneself blind to one of the values which give life a meaning... Everyone has a duty of respect towards the values which give meaning to human life, even to those on which one's life does not depend for its meaning.  

The risk of broadening the category of the moral is that one would stretch it so thin as to be barely visible, leaving nothing to hold it together as a distinctive category of evaluation. But maybe nothing would be lost by stretching it this thin.

If we take the second strategy and say that these examples are part of morality, then where does that leave the Harm View? If we are tempted to think that a failure to appreciate a work of art could be a moral failing, then adherents of the Harm View could claim that the Harm View was intended as a theory about only one part of morality. This raises the question, “which part”?

If the answer is the part that involves harms, then the Harm View is vacuously true. If the answer is, more generally, the part that involves actions that affect humans, then the Harm View faces more challenges, including, but not limited to, the Non-Identity Problem. It appears that there are several actions that affect humans that are wrong but not because of harms to individuals. Even if all of morality dealt only with how persons treat one another, even if there were a line between the moral life and the good life, the Harm View would face challenges. For example, Michael Sandel has argued that genetic enhancement is wrong. He thinks that it would

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be wrong to genetically design one’s child to have the physical features of a star athlete, for example, even if no one would be harmed. He says,

Even if it does not harm the child or impair its autonomy, eugenic parenting is objectionable because it expresses and entrenches a certain stance toward the world -- a stance of mastery and dominion that fails to appreciate the gifted character of human powers and achievements, and misses the part of freedom that consists in a persisting negotiation with the given.62

Genetic enhancement affects humans, but, on Sandel’s view, it is not wrong because of its negative effects on humans. It is wrong because of what it reveals about the agents, their lack of appreciation for the “gifted character of human powers and achievements.”63

The Grading Example is another example of an act that affects humans but the explanation of the act’s being wrong does not involve harms to individuals. In the next section, I argue that the Harm View cannot capture the moral importance of inequality. Undeserved inequalities are wrong. Actions that increase inequality affect human well-being, but may not harm anyone. It is not open to someone who takes the Harm View to reply that inequality doesn’t have to do with morality at all. Perhaps it could plausibly be said about the art examples or even the environmental examples that they were outside of the scope of morality, but this cannot be plausibly said about undeserved inequalities. I focus on this issue next.

It is possible that adherents of the Harm View could employ one of the other two strategies on these examples, arguing that these actions do harm someone or arguing that these actions are not wrong. But the success of these strategies appeared to be limited. On what

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63 While I don’t agree with Sandel about genetic enhancement, I do think that there is something attractive about this approach, and I will approach the Non-Identity Problem in the same way.
grounds can these actions be excluded from the moral realm? If they are included, then which part of morality is especially well explained by harm? I will argue that no especially important part of morality is explained by harm.

1.4 Harmless Injustice: the Moral Importance of Equality

I think that there are harmless injustices. An act that increases inequality between people who are moral equals is unjust and inequality between people who are moral equals can be increased without harming anyone. Consequently, even when everyone is treated as well or better than they deserve, an act may still be unjust, if it increases inequality. Since there are harmless injustices, it is false that harms form the basis of all moral considerations against an action. The Non-Identity Problem is not a curious exception to the Harm View.

What does it mean to say that “increasing inequality between people who are moral equals is unjust”?\textsuperscript{64} Two people, X and Y, are “moral equals” just in case they are alike in what they deserve.\textsuperscript{65} If X and Y are moral equals with respect to some good, then just requires that they either they each receive the good or neither receive the good. It’s difficult to explain the importance of sometimes sharing resources equally and, when they can’t be shared, distributing them according to the results of some fair procedure like a coin toss, without appealing to facts about the moral importance of equality, without appealing to the idea that some persons deserve to fare equally well. If X and Y are moral equals, then there are no differences between them that could justify treating them differently.

\textsuperscript{64} For the classical idea of moral equals, see Aristotle, who said that unjust acts are unequal, and by unequal, he meant that “either equals have and are awarded unequal shares, or unequals equal shares” (Aristotle, \textit{Nicomachean Ethics}, 112). I do not argue that it is unjust if unequals are awarded equal shares.

\textsuperscript{65} I am not saying that when two people are equally members of the moral community, their lives should go equally well.
So increasing inequality between moral equals is unjust. But inequality between moral equals can be increased without harming anyone. These two theses, taken independently from one another, seem plausible. If we accept them taken one by one, then we should expect that there is some situation in which they occur together. The Grading Example is an example where a harmless injustice occurs because inequality is increased between moral equals.  

**Grading**

Two students in the same course, Frank and Peter, do qualitatively identical work throughout the semester and they both fail to comprehend the same material to the same extent. Neither student deserves to pass according to the reasonable standards set out on the syllabus. The professor fails Frank but passes Peter.

In this example, the professor does something wrong by failing Frank and passing Peter. The professor acts unjustly by increasing the inequality between them when they are moral equals. Since they have done qualitatively identical work throughout the semester and fail to comprehend the material to the same extent, the professor should give them the same grade. But increasing the inequality between Frank and Peter does not harm anyone, so what the professor does wrong cannot be explained in terms of harm.

Larry Temkin has also argued that “justice is relevant to assessing outcomes in ways that are not fully reducible to what is good or bad for individuals.” He, too, thinks that there are harmless injustices. But Temkin’s view of what justice demands is importantly different than...
mine. Temkin advocates what he calls, *Proportional Justice*, which says, “there ought to be a proportion between doing well and faring well.” My view is fundamentally about how individuals should fare relative to one another. How individuals fare relative to one another is, I think, a central concern of justice. On Temkin’s view, justice is not fundamentally about how individuals should fare relative to one another, but about how individuals should fare relative to “how well they have done.”

One way of bringing out the difference between my view and Temkin’s is to consider a situation in which there are no saints, only sinners:

In New A, the sinners get what they deserve. In New B, the sinners fare even better than they would have deserved to, had they been saints. Many would agree that in one respect -- regarding justice -- New B is worse than New A. Since there isn’t anyone besides sinners, if there must be someone for whom New B’s injustice is bad, it must be bad for the sinners themselves. This is implausible. I think New B’s injustice is bad, but not because it is bad for the sinners to spend eternity at a saintly level, rather than at their vastly lower deserved level.

Temkin thinks that New B is unjust, though harmless. On Temkin’s view, justice requires that sinners fare worse than saints. For Temkin, this means that actual sinners should fare worse than saints would fare, if they existed, and it would be unjust if saints fared worse than sinners would have fared if they existed. Temkin’s Proportional Justice is a view of harmless injustice, but it is not my view. I agree that the sinners are not harmed by New B, but I do not think that there would be any injustice if someone chose New B over New A, precisely because the world would contain only sinners and all of the sinners would be treated better than they deserved. On my view, it could be compatible with justice to treat people better than they deserve, for example,

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when there are only sinners, and all sinners are treated equally well. I think that justice is in this way relational: how sinners should fare, according to justice, depends, in part, on how any one sinner fares.

So there are different ways of understanding the relational character of justice. On my view, it is relative to other, actual people. On Temkin’s view, justice is relational, but in an idealized sense. Justice does not necessarily involve relations between actual people, but relations between actual people to some ideal type of person. For example, actual sinners should fare worse than non-actual saints. There are different ways of cashing out the relational character of justice. My view and Temkin’s are just two. But on both views, there could be harmless injustices.

**The Grading Example: Unjust Inequality**

Why should we think that it’s the increase in inequality between Frank and Peter that explains why the professor does something wrong?

The professor would do nothing wrong by failing both Frank and Peter, even though she would make both of them worse-off than she would make them if she passed both of them. It’s not always the case that you do something wrong if you make someone worse-off than they might otherwise be. Furthermore, the professor would do nothing wrong by passing both Frank and Peter. She might, at the end of the semester, feel merciful and relax her standards. It’s not always the case that you do something wrong if you treat someone better than they deserve. So it’s not the case that the professor does something wrong simply by giving Peter a higher grade than he deserved. Since the professor wouldn’t do anything wrong by failing both and the
professor wouldn’t do anything wrong by passing both, an explanation of what the professor
does wrong is most plausibly that the professor gives the students different grades and increases
inequality between moral equals.

I assume that the professor wouldn’t do something wrong if she passed both Frank and
Peter. Someone, Temkin, for example, might contest this assumption and argue that the
professor does something wrong just because he passed Peter and Peter deserved to fail. On
Temkin’s view, justice requires giving people what they deserve, and what people deserve is
proportional to how well they have done. So Peter deserves to get a grade that is less than what
someone who did perfect work in the course would get, even if no such student exists. What’s
more, passing Peter would be wrong even if he were the only student in the course because he
was not given what he deserved. If the professor had passed both students, she’d have done two
things wrong. So the wrong done does not have anything to do with how Peter and Frank fare
relative to one another.

In response, I would first point out that it doesn’t follow from the fact that it would be
wrong to pass Peter even if Frank weren’t in the picture that there isn’t something further wrong
with passing Peter when Frank is in the picture. When Frank and Peter receive different grades,
the professor increases inequality between moral equals, and so does something unjust. I think
that there are two different questions facing the professor: whether to give Peter and Frank the
same grade and which grade they should get. Since the professor faces two different questions,
she can go wrong in two different ways. The first question, whether Frank and Peter should get
the same grade, does not arise if Frank is out of the picture. But Frank is in the picture, so it does
arise.
But, someone might insist, there aren’t really two questions facing the professor. The question, which grade should the students get, obviates the need to ask another question, whether they should get the same grade. We know what grade Peter should get. We know what grade Frank should get. If they don’t get *that* grade, then the professor does something wrong. As it happens, that grade is the same, but their receiving the same grade as each other is not a fundamental issue. It just follows from what each deserves. The failure to give each what he deserves is unjust, and the failure to give them the same grade is merely the effect of failing to give them each what they deserve. If Peter’s grade was issued first, and he had passed, the professor would have done something wrong, but he should still fail Frank when it comes time to issue Frank’s grade, because Frank deserves to fail.

In other words, someone might argue that only *Non-Comparative Justice* matters, and that *Non-Comparative Justice* is not genuinely concerned with equality. Derek Parfit describes the difference between *Comparative* and *Non-Comparative Justice* in the following way:

Whether people are unjustly treated, in this *comparative* sense, depends on whether they are treated *differently* from other people. Thus it may be unfair if, in a distribution of resources, some people are denied their share. Fairness may require that, if such goods are given to some, they should be given to all.

Another kind of justice is concerned with treating people as they deserve. This kind of justice is *non-comparative*. Whether people are unjustly treated, in this sense, depends only on facts about *them*. It is irrelevant whether others are treated differently...if we treated no one as they deserved, this treatment would be unjust in the non-comparative sense. But, if we treated everyone equally unjustly, there would be no comparative injustice...

Non-comparative justice may tell us to produce equality. Perhaps, if everyone were equally deserving, we should make everyone equally well off. But such equality would
be merely the effect of giving people what they deserved. Only comparative justice makes equality our aim.\textsuperscript{70}

Applying these concepts to the Grading Example, there is Comparative Injustice because Peter and Frank receive different grades. There is also Non-Comparative Injustice, because Peter passes but he deserves to fail and Non-Comparative Justice says that people should get what they deserve. The objection to me is that only Non-Comparative Justice matters.

I agree that Comparative Justice needs to be supplemented. It is not the case that justice is only concerned that moral equals fare equally well. If I asked you how I should treat Bloggs, and you told me to treat him the same way that I should treat Jones, that would not tell me how I should treat Bloggs, unless I already know how I should treat Jones. It matters that promises be kept, and not just that promises be unkept or kept consistently. But we should not conclude that Non-Comparative Justice obviates the need for Comparative Justice. The grading example shows us that there are situations where we need a notion of Comparative Justice.

Furthermore, someone who thinks that the professor does something wrong simply by passing Peter thinks that Peter deserves to fail and that it is wrong to treat someone better than they deserve, but I think that it may be compatible with justice to treat someone better than they deserve. I think that it may be compatible with justice for the professor to give Peter a higher grade than he deserves, for example, if Peter were the only student in the class. That is not to say that justice \textit{requires} that someone be treated better than they deserve. It would be compatible with justice for the professor to simply give Peter the failing grade that he deserves. So, it may be compatible with justice for the professor to pass both Frank and Peter, if, for example, they were the only two students in the class. But it would also be compatible with justice to fail both

Peter and Frank, since that is the grade that they deserve. Justice would not require that the professor pass each, since they each failed to meet the reasonable standards for passing set out on the syllabus. But passing Peter and failing Frank is unjust. Justice requires giving people at least what they deserve, but it also requires that moral equals fare equally well. The Grading Example helps to illustrate the importance of these two ideas.

Finally, even on the view that it would be unjust for the professor to pass Peter and Frank because they deserve to fail, it would not be the case that all wrong-doing would be explained by harms. On the view that justice requires that people get what they deserve, no more and no less, if someone deserves to be harmed and is not harmed, then an injustice has occurred that cannot be explained by harm. So even if one thinks that Peter deserves to fail, and that the professor would do something unjust if he passed Peter, there would still be harmless injustices.

I also assume that the professor wouldn’t do anything wrong by failing both Peter and Frank because they both deserve to fail. But one might object to this assumption and argue that neither Frank nor Peter deserves to fail, because they’re worse-off failing, and no one ever deserves to be harmed. On this view, the professor in the Grading Example does something wrong because he does not pass Frank.

I think that it is implausible that no one ever deserves to fail, even when failing is a burden or a harm, even when it has a negative effect on someone. The intuition that justice requires that the professor should pass both Peter and Frank because no one ever deserves to fail is, I think, unstable. It changes when a third student is involved. Consider another example:

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71 I discuss the view that says that no one ever deserves to be harmed next.
Grading 2
Alice is in the same course as Frank and Peter. Alice completes all of the work and demonstrates complete comprehension of the material. By the reasonable standards set out in the syllabus, Alice deserves an A.

It is far from obvious that justice requires the professor to give Peter and Frank the same grade as Alice. I have a stronger intuition that it would be unjust to give Alice the same grade as Peter and Frank. However, no one would be harmed by doing so. Alice would not harmed. Before Frank and Peter enrolled, no one would think that the demands of the professor for an A were harms to Alice. We can then assume that no harms come to Alice once Frank and Peter enroll and receive As. So no harms come to Alice. And if Frank and Peter would not be harmed by receiving a higher grade than they deserved, then there would be no harms to explain what the professor would have done wrong. While it may have seemed permissible to pass Frank and Peter when they were the only two students in the class, or even required, it seems problematic to do so once Alice is in the picture. It is far from obvious that justice requires the professor to give Frank and Peter the same grade as Alice. If one thinks that it would be problematic to give everyone an A, then that puts pressure on the idea that justice requires it.

If there is injustice in giving Frank, Peter, and Alice the same grade, it may be because people who are not moral equals fare equally well. Whether justice demands that people who are not moral equals should not fare equally well is a different thesis than the one that I have been defending. I have been defending the thesis that moral equals should fare equally. I offer this second grading example to simply raise doubts about the view that justice requires passing Frank and Peter. I do think that while it may have been consistent with justice to pass Frank and Peter when they were the only two students in the class, it is likely unjust to give them the same grade
as Alice. Once Alice is in the picture, it seems more obvious that Frank and Peter deserve
different grades than she does. So it’s not the case that no one ever deserves to be harmed.

Finally, denying that anyone ever deserves to be harmed sounds like a nice thing to say,
but it is a controversial view. It would make it inconsistent with justice to condemn
unpraiseworthy actions, on the assumption that most of us are hardwired in such a way as to be
harmed by condemnation and benefited by praise. If a behavior warrants condemnation, and
condemnation will cause one harm, then harm is warranted. It seems like skepticism that anyone
could deserve to suffer is connected to skepticism about desert, generally, and I don’t think that
we should give up on the idea that sometimes someone deserves praise, and sometimes someone
does not.

The Grading Example: Harmless

Why should we think that the increase in inequality between Frank and Peter was
harmless?

Peter was not harmed by getting a higher grade than he deserved. Arguably, he was
helped.

Though Frank was plausibly harmed by receiving a failing grade, that harm would not
explain what the professor does wrong because Frank deserved to fail. As discussed, the
professor would do nothing wrong by failing both Frank and Peter. If Frank’s name came up
first in the grading system, the professor would do nothing wrong by failing him, and if his
failing grade was unalterable, then when Peter is passed, Frank could no longer be benefited, so
lost nothing.
We can assume that the increase in inequality didn’t have any additional negative effects on Frank, for example, we can assume that Frank did not lose job opportunities or scholarships to Peter.\textsuperscript{72} We can additionally stipulate that the professor’s assignment of grades in this instance does not have any wider ramifications on the integrity of grading systems generally. These stipulations would not render the act of assigning grades pointless or ineffectual, and failing a course may still be worse for someone than passing.

Some might argue that the inequality itself comes to Frank as a harm. John Broome defends what he calls “individualistic egalitarianism”. Individualistic egalitarianism “treats inequality as an individual harm, and equality as an individual good.”\textsuperscript{73} Broome thinks that one’s personal good depends on how one fares relative to others, and he shows that it is perfectly possible that one’s personal good could depend on how one fares relative to others.\textsuperscript{74} But why should we think that it is in fact the case that one’s personal good depends on how one fares relative to others?

Broome’s answer is this: “a person’s good consists in how fairly she is treated; unfairness is bad for a person, whatever she may feel about it.”\textsuperscript{75} But Broome does not think that all increases in inequality are unfair. He thinks that “Claims, and not other reasons, are the object of fairness. Fairness is concerned only with mediating between the claims of different people. If there are reasons why a person should have a commodity, but she does not get it, no unfairness is

\textsuperscript{72} Even if Frank had lost job opportunities or scholarships to Peter, it’s not obvious that that would explain what the professor had done wrong, since Frank might have lost job opportunities and scholarships to Alice, who deservedly received an A for the course, and in that case, we would not think that the professor had done something wrong by giving Frank and Alice different grades.


\textsuperscript{74} Ibid., 181-182.

\textsuperscript{75} Ibid., 182.
done her unless she has a claim to it.”76 And, “By a claim to a commodity, I mean a duty owed to
the candidate herself that she should have it.”77 He says, “Unfairness…is plainly an individual
harm. There is unfairness if someone’s claim is satisfied less than in proportion to its strength.
Since a claim is a duty owed particularly to the person, the unfairness is plainly suffered by that
person.”78 “Since what is bad about inequality is its unfairness, inequality is clearly a harm
suffered by individuals.”79

On Broome’s view, when increasing inequality is unjust, it is not harmless, and it is
unjust when individuals’ equally strong claims are not satisfied equally. But since Frank does
not have a claim to a passing grade, Broome’s reason for thinking that the inequality between
him and Peter has a negative effect on Frank would not apply in this case. The increase in
inequality would not come as a harm to Frank because it’s not unfair and it’s not unfair because
Frank does not have a claim to a passing grade. In the Grading Example, no one’s claim is
satisfied less than in proportion to its strength.

But someone could think that Frank is treated unfairly when Peter is passed even though
Frank doesn’t have a claim to a passing grade, and Frank is harmed because he has an interest in
being treated fairly. How is he treated unfairly? Perhaps he is treated unfairly just because he is
worse-off than his moral equal.

There are some reasons to think that this view is not very plausible.

76 Ibid., 195.
77 Ibid., 195.
78 Ibid., 198.
79 Ibid., 199.
Does the existence of someone on Mars who is better off than you are make you worse-off than you would be if they didn’t exist? If you have an interest in there being no such person, then you are in a sense worse-off for their existence that world. But does their very presence make you worse-off such that rational self-interest would recommend a preference for her non-existence? That seems implausible. It seems implausible that you are made worse-off by the mere existence of Martians who are better off than you are. But if you have an interest in being treated fairly, and you’re treated unfairly whenever an act is performed that makes you worse-off than your moral equals, then you are made worse-off by the existence of these well-to-do Martians. In so far as this seems implausible, it’s implausible that someone is treated unfairly and so harmed just because one is worse-off than one’s moral equals.

Furthermore, if Frank had no interest in being treated fairly, if he had no interest in faring as well as his moral equals, it would still be wrong to pass Peter. The harm of not having an interest in fair treatment met is inessential. Whether or not Frank had such an interest, it would be wrong for the professor to pass Peter.

It’s not the case that all inequalities between moral equals involve harms. Consider the following example:

**Andromedans**
There are other human beings light years away in the Andromeda galaxy. Andromedans are much worse-off than we are, but they are our moral equals. Because of our limited technological capacities, we cannot help them, but we can monitor how they fare. They, however, do not have anything near our technological capacities and so do not know that there is life in another galaxy. Bloggs is an Andromedan who is considerably worse-off than Bill Gates. I give Bill Gates a new car.
When I give Bill Gates a new car, I increase the inequality between him and Bloggs, but I don’t harm Bloggs. It seems to me that it would be a stretch of any reasonable conception of harm to say that giving Bill Gates a car harms Bloggs. So inequalities between moral equals can be increased without harming anyone.

It may be argued that, in the Andromedan example, I don’t do anything wrong by increasing inequality between Bill Gates and Bloggs, either. But I am just using this example to motivate the idea that inequalities between moral equals can be increased without harming anyone. It is unjust if moral equals do not fare equally well and inequalities between moral equals can be increased without harming anyone. If both of theses are true, then we should expect to find a situation in which both apply.

Furthermore, we cannot conclude on the basis of the Andromedan example that if we cannot benefit both, then increasing inequality by benefiting one is not wrong. Recall, we could suppose that Frank’s grade was issued first, and that once grades are issued, they are unalterable. When it comes time to issue Peter’s grade, the effects on Frank are fixed. Still, it would be wrong to pass Peter, given that Frank has been failed for doing the same work. Passing Peter would have no further effect on Frank. But the fact that Frank’s grade was already issued and he was failed constrains what can be done for Peter.

Alternatively, someone could concede that Frank is harmed in no way, that there are no negative externalities, yet argue that harms to individuals do figure into an explanation of wrong-doing, but at a more abstract level. We have already seen that harms can figure into an explanation of wrong-doing even when no one is actually harmed by an act, for example, in failed attempts to murder someone. Is there a plausible account of wrong-doing that condemns
what the professor does that involves harms to individuals? A rule utilitarian, for example, could say that even though Frank isn't harmed by the professor in this instance, general compliance with a rule permitting the professor to grade in this way would be harmful. Since someone does something wrong, says the rule utilitarian, when one fails to comply with the rules general compliance with which would minimize harm, the professor does something wrong, and harms figure into an explanation of the wrong done.

My main concern about this possible explanation of wrong-doing is that it depends on the success or failure of rule utilitarianism, so may not qualify as a plausible account of wrong-doing. Either the professor's lack of compliance with this rule forbidding passing Peter and failing Frank increases the harm to individuals or it does not. If it does, then the solution denies an assumption, albeit an assumption that I have tried to defend, of the example -- Frank is not harmed and there are no negative externalities. If it does not deny this assumption, then it's difficult to see why a rule utilitarian who cares about minimizing harms to individuals would condemn what the professor does. On the assumptions that the professor (1) does not intend harm, (2) has no reason to expect harm, and (3) does no harm, it's difficult to see how harms to individuals could figure in any way into an explanation of what she does wrong. Compare the professor to an actor on a stage who points and shoots a gun at someone when he knows that the gun is unloaded. The actor does not intend harm, has no reason to expect harm, and does no harm. How can a rule utilitarian condemn what the professor does in the Grading Example, but not condemn what the actor does? The Rule Utilitarian says A: a principle that permitted this, and which was generally complied with, would result in more harms than a principle that forbade it. If "this" refers to what the actor did, A would be false. Since the actor and the professor are
similarly situated, neither intends harm, neither has reason to expect harm, neither does harm, we should think that if “this” refers to what the professor did, A would be false.

So failing both Peter and Frank would be worse for Peter and not better for anyone. Yet something would still count against passing Peter and failing Frank, and this is the fact that giving them different grades fails to respect the fact that they are in this case moral equals. So in the Grading Example, the professor does something wrong, but harms do not figure into an explanation of what he does wrong.

The Leveling Down Objection: Denying Wrongdoing

I said that no one could plausibly deny that inequality was a moral matter, meaning that whether justice requires equality between moral equals is undeniably a moral matter, but someone could deny that increasing inequality is unjust. Most notably, philosophers argue that increasing inequality isn’t unjust because if equality is important, then we would have to level down.

There are two versions of the leveling down objection. One version says that if equality were a separate value from well-being, then there would be some situation in which we ought to “level down”, harm someone at no benefit to anyone else in order to make the situation more equal. But there is no such situation. So equality isn’t a separate value.

John Broome puts this version of the objection in the following way:

It has sometimes been argued that treating the value of equality as a separate consideration from goodness will inevitably run up against a problem. Imagine some change damages the health of the best-off people in the society, and does no good to anyone; this is called a “leveling down”. The change improves the society’s degree of equality, so it must increase F. It will also decrease G. But -- the argument goes -- F and
G are independent. So there must be a possibility that, in the combined measure, the increase in F outweighs the decrease in G. Our accounting would then say the change is a good thing.80

It is never the case that one ought to damage the health of the best-off people in society if doing so will help no one, but if equality were a separate consideration from well-being, then there would be some situation in which the importance of an increase in equality would outweigh the importance of a decrease in well-being. There is no such situation, so equality must not be a separate value from well-being, or so the objection goes.

To answer this objection, Broome describes a formula where the value of equality and the value of individuals' well-being are two separate factors that combine to give value to a state of affairs, but where it is never the case that a state of affairs in which one levels down is better than a state of affairs in which one does not.

Broome’s Formula:  \( G = (w_1+w_2)-1/2|w_1-w_2| \)

G is the value of a state of affairs. Supposing that there are only two individuals, w1 is the well-being of individual 1 and w2 is the well-being of individual 2. The sum of their well-being is the “goodness” factor. Half of the absolute value of the difference in their well-being is the “equality” factor. In leveling down, we assume no change in w1 and a decrease in w2. On the assumption that well-being and equality are the only two factors that are involved in determining the value of a state of affairs, leveling down will always decrease the value of G in Broome’s Formula.

When $w_1$ is held constant and $w_2$ ranges in values above and below $w_1$, when $w_1$ and $w_2$ are not equal, $G$ decreases, so it is not the case that if equality is a separate value from well-being, then there must be some situation in which leveling down is better than not leveling down, some situation in which one ought to level down. Someone who values equality but values it less than well-being can avoid the leveling down objection and keep their values intact -- equality and well-being need not collapse into a single value in order to think that one ought not ever level down.

There is another, more serious, version of the leveling down objection, one discussed by Derek Parfit. Parfit’s version of the leveling down objection is more serious because it assumes, unlike Broome’s version, that defenders of the importance of equality are committed to something weaker than that one should sometimes level down. 81 Parfit says,

Our objection must be that, if we achieve equality by leveling down, there is nothing good about what we have done. And we must claim that, if some natural disaster makes everyone equally badly off, that is not in any way good news. 82

Parfit thinks that someone who thinks that equality has value must think, not that one should sometimes level down, but merely that something counts in favor of leveling down. But nothing counts in favor of leveling down. So equality must not have any value. Or so the objection goes.

One possible line of reply to Parfit’s version of the leveling down objection concedes that nothing counts in favor of leveling down and contests the claim that if someone values equality, then they must think that equality counts in favor of leveling down. Parfit’s objection assumes

81 One can think that inequality between moral equals counts against an action, but reasonably admit that equality is not all that matters. For example, according to John Rawls’s’s Difference Principle, some inequalities between moral equals are justified so long as they are to the advantage of the least advantaged. John Rawls, A Theory of Justice, (Cambridge, MA: Harvard University Press, 1971; Cambridge, MA: Harvard University Press, 2000), 65.

that if a factor counts in favor of an action in one situation, then it counts in favor of an action in every situation. This may not be the case. Maybe equality does not count in favor of a natural disaster that makes everyone equally badly off, but does count in favor of failing Peter in Grading. Someone who takes this line owes us an explanation of why equality does not count in favor of a natural disaster but does count favorably in other situations. I will not take this line. Instead, I reject the premise that nothing counts in favor of leveling down.

Why should we accept this premise? The strongest support derives from examples, like Parfit’s natural disaster example. Here’s another:

**Arson**

Jones starts a fire that destroys the homes of the rich and poor alike, leaving everyone homeless.

If something counts in favor of actions that increase equality, then something counts in favor of Jones starting a fire in Arson. Is it implausible that something counts in favor of Jones starting a fire?

First, it seems entirely likely that Jones’ fire in Arson was good for someone in some way. Maybe Jones’ fire brought the community closer together. But if Jones’ fire brought the community closer together, then something did count in favor of it. Parfit should not say that *nothing* ever counts in favor of leveling down. And he need not say that. We can distinguish between an action that is not good *on balance* for anyone and an action that is not good *in any way* for anyone, and rephrase Parfit’s leveling down objection in the following way: if an action is not good *in any way* for anyone, then nothing counts in favor of it. Actions that increase

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83 For a similar style of reply in another context, see Kagan on the killing/letting die distinction. Also, see Hare and Shope.
equality may not be good in any way for anyone. Then nothing counts in favor of them.

Assuming that Jones’ fire in Arson was not good in any way for anyone, then nothing counts in favor of it, but someone who values equality will think that equality counts in favor of it, so equality does not count in favor of it, or so the objection now goes.

So, henceforth, let’s say that an action “levels down” just in case it increases equality but is not good in any way for anyone. We can ask again, is it true that nothing ever counts in favor of leveling down?

It is helpful to distinguish two different ways of leveling down. An action could level down by making everyone worse-off, as it does in the Arson example. We can represent this situation in the following way:

**Leveling Down: Worse for Everyone**

<table>
<thead>
<tr>
<th>Individuals</th>
<th>X</th>
<th>Y</th>
</tr>
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<tbody>
<tr>
<td>Acts</td>
<td></td>
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</tr>
<tr>
<td>A</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>-A</td>
<td>6</td>
<td>7</td>
</tr>
</tbody>
</table>

A would be worse than -A for everyone and, we’re assuming, not in any way good for anyone.

But an action could also increase equality by making only the best-off worse-off. We can represent this situation in the following way.

**Leveling Down: Only Worse for Some**

<table>
<thead>
<tr>
<th>Individuals</th>
<th>X</th>
<th>Y</th>
</tr>
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<tbody>
<tr>
<td>Acts</td>
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<tr>
<td>A</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>-A</td>
<td>5</td>
<td>8</td>
</tr>
</tbody>
</table>
In this situation, A would only be worse for the best off, Y, and it would be neither good nor bad for others.

When leveling down is worse for everyone, as it is in Arson, it is difficult to see what could count in favor of it. But sometimes, leveling down is only worse for some. Then it does not seem absurd to think that something, particularly equality, counts in favor of leveling down. Recall the Grading Example. It is an example of leveling down that is only worse for some. In the Grading Example, failing Peter is worse for him than passing him, and not in any way good for Frank, yet, something counts in favor of giving Peter and Frank the same, failing, grade, namely that it respects the fact that they are equals in this case. So there is an important difference between the Grading Example and examples that are used to motivate the leveling down objection, like Arson.

Someone could concede that something counts in favor of leveling down when the action is only worse for some, and argue that it’s enough that nothing counts in favor of leveling down when doing so is worse for everyone to make trouble for the view that equality has value. When an action is worse for everyone, and not good in any way for anyone, then nothing counts in favor of it. Perhaps the leveling down objection works in the following way: it shows that when equality between moral equals comes at a cost to everyone, it’s not a cost that anyone is willing to pay, and this shows that equality is unimportant.

But this interpretation of the leveling down objection seems to assume that if equality is important, then it must be better for someone. Whether there are considerations that are important whether or not promoting them is better for anyone is precisely what’s at issue. Someone who values equality between moral equals thinks that there are. Furthermore, I think
that the fact that there are instances of leveling down where it is not absurd to think that
something counts in favor of leveling down, namely, when it is only worse for some, weakens
the force of the claim that nothing counts in favor of leveling down when doing so would make
everyone worse-off.

Possibly, Parfit’s version of the leveling down objection succeeds rhetorically because it
trades on the fact that we think that we ought not, all things considered, level down and make
everyone worse-off in order to increase equality. But it does not follow from the fact that we
ought not level down and make everyone worse-off that nothing ever counts in favor of leveling
down, or that we ought not ever level down, for example, when doing so is only worse for some.
When there is overwhelming reason not to do something, as there is in Arson, it may appear that
other factors are not in play at all. This is plausibly an illusion. The fact that something
catastrophic will happen to others if I don’t turn in my friend to the authorities does not mean
that the requirements of friendship do not forbid me from doing so, that the requirements of
friendship do not tell against preventing the catastrophe. It would be overly optimistic, and in
need of independent argument, to think that what’s required for friendship will always be
compatible with what one has all things considered reason to do. Likewise, the requirements of
justice may tell in favor of leveling down, even though we ought not all things considered level
down. We need to explain why there would appear to be no good news if a natural disaster
leveled everyone down equally low. But this can plausibly be explained. Part of what is bad
about leveling down is that what is good about equality would be overshadowed by individuals’
decreased well-being. Justice would be like the sun behind a cloud -- it may not be directly seen
or felt or appreciated, but it has not disappeared.
To conclude, someone can think that justice requires that moral equals should fare equally well without necessarily thinking that one ought to level down when doing so would be worse for everyone. One *would* be committed to thinking that something counts in favor of leveling down, but this is not implausible. Just because some consideration is not of overriding importance in one situation, it’s not safe to assume that it’s never of overriding importance, or that it’s never of any importance. In order for the leveling down objection to work, it must show that equality does not count in favor of leveling down. But the leveling down objection does not show this, it assumes it. Finally, I have suggested how to think about situations where it is very hard to see anything good to say about leveling down. Those situations are not unlike situations where being a loyal friend would lead to the destruction of the entire universe. The badness of the destruction of the entire universe overwhelms the goodness of being a loyal friend in this case, but that does not mean that loyalty isn’t important.

1.5 Conclusion

Someone could argue, as with the examples of failures to appreciate art or nature, that increasing inequality is objectionable but not immoral. But why would we put inequality outside of the moral realm, since it is clearly about how we should treat one another and related to questions of justice? Or, someone could argue that increasing inequality is immoral, but not, strictly speaking, wrong. Again, we could ask, what marks off wrong acts from other immoral acts? This threatens the importance of the category of wrong acts. Why should it matter less if someone does something that is immoral, but not, strictly speaking, wrong?
Despite the considerable resources that the Harm View has to plausibly deal with possible counter-examples to it, there are wrong acts that are wrong even though harm does not figure in any way into an explanation of why they are wrong. I have focused here on one: acts that increase inequality between moral equals. This shows that the Non-Identity Problem is not an anomaly.

The Grading Example is a problem for the Harm View. But one might think that the Grading Example does not threaten the Claim View, which says that harms play a role in explaining an a class of wrong acts, those that involve claim infringements. It could be argued, for example, that Frank doesn’t have a claim to a better grade, which is why considerations of inequality have force in the Grading Example. But when a claim is at stake, inequality, which is a harmless consideration, is less important. This would explain, for example, why we do not think that we should break someone’s arm in order to increase equality between moral equals. The Non-Identity Problem, however, is a problem for the Claim View. In the next chapter, I defend the Non-Identity Problem’s assumption about harm.
Chapter 2: When Is Someone Harmed?

2.1 Introduction

The Non-Identity Problem assumes that someone is harmed by an act only if they are worse-off than they would have been if it hadn’t been performed. In this chapter, I defend this assumption.

2.2 Harm: a Moral Concept

Harm is a moral concept. The harm that an action causes someone is thought to play a crucial role in explaining why that action is wrong. So a theory of harm is, I think, best understood as a theory about which negative effects of an action play this explanatory role. I suggest that our theorizing about harm should be guided by the following consideration: when an action is wrong because it has harmed someone, someone would be wronged, someone would have a legitimate complaint about it and its effects on him or her. To identify harms, then, we should think about when the effects of an action on one are such that one might have a legitimate complaint about it.

I think that one would have a legitimate complaint about an action in virtue of its effects on one only if one would be worse-off on balance than one would have been if that action hadn’t been performed. This is why I defend the *Counterfactual Condition of Harm*.

*Counterfactual Condition of Harm*
One is harmed by an action only if one is worse-off on balance than one would have been if it hadn’t been performed.
Why should we think that the Counterfactual Condition must be met if someone is going to have a legitimate complaint about an action’s effects on one?

Consider the following example:

**Rescue**
Driving home from work late one freezing December evening, you see a man, Jones, trapped in a burning car. You immediately pull over and, risking your own life, run to the burning vehicle, grab Jones’ arm, and yank him out of the car. As soon as you and Jones are a safe distance away, the car explodes. If you hadn’t done exactly what you did, Jones would have been in that car then, engulfed in flames. You suffer some minor injuries, but you save Jones’ life.

Now imagine that one day, several months after the accident, you receive a certified letter in the mail from Jones’ attorney. Jones is suing you for damages incurred on the day of the accident. In extricating Jones from the burning vehicle, you dislocated his shoulder, and he seeks compensation for some of his medical expenses, physical therapy, and lost wages. What would you think? Would Jones have a legitimate complaint against you for what you did?

I don’t think so. And if we accept the Counterfactual Condition, then we can explain why. You didn’t do anything wrong by yanking him out of the car because, though doing so had a negative effect on Jones, if you hadn’t done it, he would have died. The morally relevant feature of the situation is that the Counterfactual Condition is not met. It is because the Counterfactual Condition is not met that we can explain why Jones doesn’t have a legitimate complaint against you and why you didn’t do anything wrong by dislocating his shoulder.

To further support the Counterfactual Condition, consider a development in the Rescue example. Jones’ case goes to court. You and Jones are standing in front of the judge. The judge asks Jones, “Why are you here”? Jones says that you yanked him out of his car and he wants
compensation for the resulting injuries. The judge says to Jones, “This court only gives compensation when we cannot reverse the action and its effects, but we have a special time machine that lets us travel to the past and give the defendant an opportunity to make things right. Do you accept this remedy of the court?” If Jones is like most people, then, knowing what he knows now, he wouldn’t accept this remedy of the court. This undermines the legitimacy of his complaint. In fact, he’d be irrational to accept this remedy of the court. But if he’d only accept this remedy of the court if he were irrational, then that undermines the legitimacy of his complaint, too.

The following underlies these thoughts: A legitimate complaint about an action, X, entails a rationally licensed preference of the complainant’s for not-X over X. When one has a legitimate complaint about X, one has a preference for not-X over X and that preference is rationally licensed. If rationality wouldn’t license a preference for the action’s not being performed, then you can’t legitimately complain about it. This supports the Counterfactual Condition of Harm because whenever you have a rationally licensed preference for X over not-X, on the basis of X’s effects on you, then not-X meets the Counterfactual Condition.

Some points of clarification are in order.

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84 If he’s hardwired differently than the rest of us, or lives in a society where people who have had dislocated shoulders are tortured, then maybe he would be better off dead, and wouldn’t be irrational for preferring that he hadn’t been rescued, but I’m assuming that he’s like us, and lives in a society like ours. If he stubbornly refused to revise his belief, in the face of evidence, that having his shoulder dislocated was worse for him, we might still call him irrational, for being insensitive to reasons and their strength.

85 I take what one’s preferences are to be a psychological fact about one, about which one may or may not be aware. Though I’ve never thought to compare them, my love of Tolstoy and my more tepid feelings for Steinbeck make it the case that I have a preference for Tolstoy over Steinbeck.

86 What does it mean for a preference to be rationally licensed? I don’t have a full theory, but I do think that if A and B are thought to be alike in every relevant respect, then rationality requires indifference between them and it would be irrational to prefer A to B knowing that B is superior to A in every relevant respect. As a matter of psychological fact, someone might have irrational preferences.
First, I think that when someone is wronged because of the negative effects of an action on them, then they have been harmed, and the Counterfactual Condition must be met, but this does not conflate *wronging* and *harming*. Someone could, given everything that I have said so far, be wronged without an act’s having any negative effect on them. I have not argued that someone would be wronged by an action only if they were negatively affected by it, nor am I assuming this. There could be “free-floating” wrongings. But I don’t think that this is very plausible (how would the *wronging* attach to the *wronged*?). Also, someone could be harmed though not wronged. I think that it is not always wrong to make someone worse-off than they would have been if you had done something else. For example, if you return stolen money to its owner, you harm the thief, but you do not wrong her. So, on my view, wrongdoing and harming are conceptually distinct.

Second, I do not restrict the Counterfactual Condition of Harm to any particular kind of negative effect that an act might have on someone. For example, we can talk about negative effects on someone’s well-being, where we typically mean something like negative effects on someone’s health, wealth, or happiness. We can also talk about negative effects on the value of someone’s life, for example, whether they’re engaged in worthwhile projects. I don’t think that drawing distinctions between well-being considerations and value of life considerations, for example, is morally important. It could be better for someone to sacrifice health in order to advance a personal project that makes one’s life meaningful. Someone could be wronged if their projects were destroyed, even if their health is not worse for it. So setbacks to one’s health may not be more morally important than setbacks to the value of one’s life. This suggests that an overall assessment of how an action affects one matters morally, and that how an action affects
one along a single dimension may not. So when deciding whether the Counterfactual Condition is met, when deciding whether someone has been harmed, I don’t assume that we’re assessing how one fares along a single dimension. In this way, my theory about harm may be regarded as somewhat revisionary. Someone could try to draw a distinction between different dimensions along which it makes sense to evaluate a life, and argue that harms only involve setbacks to one dimension, the well-being dimension, but I don’t see how that would helpful, and it invokes a prior conception of harm that would itself need defense.

Third, I think that when someone has a legitimate complaint about an act, then she must have a rationally licensed preference that that act not have been performed. And when someone’s legitimate complaint about an act is grounded in its negative effects on her, then, if her preference is rationally licensed, the act must have made her worse-off than she would otherwise have been. Importantly, this does not mean that someone cannot ever be rationally licensed in preferring to be worse-off. For example, suppose that if a stranger lives, I will get a hangnail, but if he dies, I won’t get a hangnail. Rationality licenses me to prefer that I have a hangnail than that a stranger dies. Rationality licenses me to prefer to be worse-off. But this is because in thinking about the act, we’re looking at more than the effects of the act on me. Rationality doesn’t license a preference to be worse-off when the only relevant considerations are the effects of an act on one, and the only relevant considerations when settling on a theory of harm are an act’s effects on one.

Fourth, though I happen to think that it is not rational to prefer more pain at a later date to less pain at a nearer date, other things being equal, I am not committed to that thesis here, unless
we assume that suffering more pain at a later date is, on balance, worse for you than suffering
less pain at a nearer date.

Finally, I am not saying that the harmless effects of some action might not themselves be
very bad for you, warranting all sorts of moans, groans, and kvetches. For example, Jones is
perfectly warranted in moaning and groaning and kvetching about the dislocation of his shoulder,
about the pain of the accident, surgery, and then recovery. A legitimate complaint when one has
been wronged is not a warranted kvetch about the harmless effects of some action on you. It is a
moral complaint about the action that was performed. It’s a complaint that you could make
against the agent who performed that action. And it is legitimate, or warranted, only if you have
a rationally licensed preference for the act’s not being performed.

So, we started with the insight that harm is a moral concept, the harm that an action
causes sometimes explains what makes it wrong. I then suggested that our theorizing about harm
should be guided by the idea that when an action is wrong because of the harm that it causes,
someone would be wronged, someone would have a legitimate complaint about it and its effects
on him or her. Guided by this idea, I argued that we should accept the Counterfactual Condition
of Harm. If we accept the Counterfactual Condition, then we can explain why you do nothing
wrong by dislocating someone’s shoulder to save their life. Furthermore, one has a legitimate
complaint about an act’s effects on one only if one can rationally prefer, on the basis of an
action’s effects on one, that it not have been performed. It would be strange if someone could
have a legitimate complaint about some action about which they had no preferences, stranger
still if they could have a legitimate complaint about an action that they were rationally required
to prefer or be indifferent to. And when, on the basis of its effects on one alone, rationality
licenses a preference for some action, X, over not-X, then not-X meets the Counterfactual Condition.

2.3 The Damage View

Theories of harm abound. What’s distinctive about my approach is that it is guided by the idea that when an action is wrong because of the harm that it causes, someone has been wronged, someone has a legitimate complaint about the action and its effects on one. In this section, I discuss another view, what I call, the Damage View of Harm. Proponents of the Damage View are not guided by this idea. I show that, consequently, the Damage View leaves mysterious the role that harm plays in explaining what makes some wrong actions wrong.

According to the Damage View of Harm, an action harms one if the action causes one early death, bodily damage, or deformity.\textsuperscript{87}\textsuperscript{88} Death, bodily damage, deformity are bad for someone. Importantly, if we accept the Damage View, then the Counterfactual Condition need not be met for someone to be harmed by an action.

The Damage View is one example of a larger class of theories of harm, non-comparative theories. On a non-comparative theory of harm, in order to establish whether an action harms someone, we need to look at the effects of that action and determine whether any are of the right type, “a damaging”, for example. For another example, some philosophers have argued that one

\textsuperscript{87} Elizabeth Harman, “Can We Harm and Benefit in Creating?” \textit{Philosophical Perspectives} 18 (2004): 89-113.

\textsuperscript{88} The Damage View is an example of an alternative to the Counterfactual Condition. The relevant feature is not the type effect of an action that it identifies as a harm, death, bodily damage, deformity, but the fact that it identifies harm with a type of effect, at all. The problems that I raise for the Damage View would apply equally to a view that identified harm with cuts, bruises, pains, etc.
is harmed if one is caused to be unable to pursue one’s conception of the good life. According to the Counterfactual Condition, however, being damaged, or caused to be unable to pursue one’s conception of the good life may not harm one, because not performing that action may have been even worse for one.

Non-comparative theories of harm, of which the Damage View is one example, have intuitive appeal. Physical and emotional pain, death, disease, and disability all seem, intuitively, to be harms. Whether an effect is one of those types is not always established comparatively, so one might naturally think that their status as harms does not depend on facts about other possible effects. Additionally, pain, death, disease, and disability are effects of actions that seem to count against performing them. Despite their initial appeal, however, non-comparative theories of harm face problems, perhaps the most important of which is that they leave mysterious the role that harm plays in explaining why some wrong acts are wrong.

Reconsider the Rescue Example. It poses a serious problem for the Damage View. You clearly damage Jones when you dislocate his shoulder, but you don’t wrong him nor do you do anything wrong. As we have seen, someone who accepts the Counterfactual Condition can easily explain why. You haven’t harmed Jones. But someone who accepts the Damage View thinks that you have harmed him. Can they explain why you haven’t done anything wrong?

Elizabeth Harman, a proponent of the Damage View, has tried to do so. She thinks that whether an action is wrong is determined by weighing harm based reasons for and against an action. She thinks that you do not do anything wrong by dislocating Jones’ shoulder because the reasons against doing it, the damage to his shoulder, are not outweighed by the reasons against

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not doing it, his certain death. Since it is not the case that there are reasons in favor of not dislocating Jones’ shoulder that outweigh the harm caused by dislocating it, it is not wrong.

But this proposal’s account of the relationship between harm and wrong action is inadequate. The inadequacy is revealed in situations that affect more than one person. There is a moral difference between dislocating Jones’ shoulder to save his life and dislocating Jones’ shoulder to save someone else’s life, Tom’s life. Harman’s proposal is blind to this difference. On the Damage View, the harms are the same, no matter whose shoulder is dislocated and whose life is saved. When we balance the harm based reasons against dislocating Jones’s shoulder on Harman’s proposal, they get weighed against the harm based reasons in favor of dislocating his shoulder, which involve a life; whether it is Jones’s life or Tom’s life makes no difference. But dislocating Jones’ shoulder to save his life is good for him and bad for no one, whereas dislocating Jones’ shoulder to save Tom’s life is good for Tom but very bad for Jones. An adequate theory of harm should recognize this difference. The Damage View does not appear to have the resources to do so, while someone who accepts the Counterfactual Condition can easily explain the moral difference between these two situations. Dislocating Jones’ shoulder to save Jones does not meet the Counterfactual Condition, so Jones is not harmed and could have no legitimate complaint about the action. But dislocating Jones’ shoulder to save Tom makes Jones worse-off than he would otherwise have been, so he may be harmed, and he may have a legitimate complaint about it.

Harman could reply by putting an individualist restriction on her view; she could say that we should only balance injuries within a life. If, after adding this restriction, her view is to
remains distinctive, we would need to explain why injuries like arm cuttings figure into the balance, why they matter morally, but other negative effects on someone, setbacks to their other interests, do not.

So Rescue is a problem for the Damage View. It shows that the Damage View leaves mysterious the role that harms often play in explaining wrong action. A plausible proposal about how to solve that problem, Harman’s proposal, fails. The moral importance of the Damage View thus remains in doubt. This result goes some way toward vindicating my approach and the Counterfactual Condition of Harm.

2.4 Challenges to the Counterfactual Condition

I think that someone has been harmed by an act only if the Counterfactual Condition is met because I think that only then would the negative effects of an act on someone form the basis of a legitimate complaint about it. In what follows, I present some possible counterexamples to my view, examples where it seems plausible to think that someone could have a legitimate
complaint about an act’s effects on them even though the Counterfactual Condition is not met. 91

First, I will introduce the examples. In the next section, I’ll explain what we should think about them.

91 In what follows, I do not discuss every possible challenge to the Counterfactual Condition. I focus on a particular kind of challenge, which says that a set back to some interest is sufficient to harm someone. There are other interesting challenges to the Counterfactual Condition, all of which I cannot satisfactorily address here. For example, some have argued that the Counterfactual Condition fails to identify harms where they obviously occur, for example, in situations in which the harm is overdetermined. Matthew Hanser and Judith Jarvis Thomson reject the Counterfactual Condition for this reason (see Matthew Hanser, “The Metaphysics of Harm,” Philosophy and Phenomenological Research (2008): 421-450 and Judith Jarvis Thomson, unpublished paper, “More on the Metaphysics of Harm”, 4). I am optimistic that the problem of overdetermination can be solved. Here are three cases to consider, and how I would approach them:

Equally Fatal Shots
Agent A shoots victim B in his heart. Agent C shoots victim B in his lungs. Each bullet was sufficient to kill B at time T. If A hadn’t shot B, B would have died at T; If C hadn’t shot B, B would have died at T.

Stronger Poison
Agents A and C inject victim B with poison sufficient to kill him at T, but A’s poison works by deactivating B’s poison. If A hadn’t injected B, B would have died anyway.

Natural Causes
Agent A has a poison that, when injected into victims, kills them instantaneously. The moment that A injects victim B coincides with the time at which B was going to die of natural causes. If A hadn’t injected B at that moment, B would have died anyway.

Consider Equally Fatal Shots. Is B worse off than he would have been if A hadn’t shot him? No, because C shot him, too. It appears that the Counterfactual Condition is not met. But B is worse off than he would have been if no one had shot him. And in order for it to be the case that no one shot him, it had to be the case that neither A nor C shot him. So, we might naturally think that together, A and C make B worse off than he would have been if they hadn’t done what they did. And this gives us the following, desired result: both A and C do something wrong and, together, they both harm B. We can extend this line of thought to Stronger Poison. Is B worse off than he would have been if A hadn’t done what he did? No, because C had injected B with poison, too, so even if A hadn’t, B would have died. But B is worse off than he would have been if neither A nor C had done what they did. He would have been better off if no one had injected him with poison. In order for that to be the case, both A and C had to refrain from injecting him. For this reason, it’s not unintuitive to think of a joint, though uncoordinated, action performed by A and C. Consider, finally, Natural Causes. In this case, there is no joint action, and I think that A does not harm B. Granted, B is worse off than he would have been if he wasn’t going to die of natural causes at that time and if A hadn’t poisoned him, but I am interested in when an action harms someone in the morally relevant sense, when someone would have a complaint against someone on the basis of the effects of what they did on them, and nothing of moral importance is lost by saying that A does not harm B when it was not within anyone’s power to save B from dying at that time.
Trespasser
While you are on summer vacation in Europe, someone, a trespasser, walks across your lawn back in the United States. She notices that someone has left a cigarette burning in some brush. She stamps it out.\(^\text{92}\)

Selfish Promise
“Suppose that Alfred would be delighted by Betty’s failure to keep her promise to him; he is a malicious gossip and can use this failure to present Betty to others in an unfavorable light. Suppose that Betty knows this and nonetheless breaks her promise.”\(^\text{93}\)

Eccentric Millionaire
Suppose that there’s an eccentric millionaire who wants to give away his money to some islanders. He can’t get to the island or communicate with the islanders, there’s no place that it’s safe to land his helicopter, so he can’t get consent. But he really wants the islanders to have this money. So he throws bags of gold (there’s no paper currency) out of his helicopter. You are one of the islanders. You are hit by a bag of gold, your arm is broken, but the bag of gold is yours, and you are now $100,000 richer.\(^\text{94}\)

More Eccentric Millionaire
It is highly likely that things will turn out badly for the islander struck by a bag of gold than that things will turn out well. The islander, when struck by the bag of gold, will have his arm broken and will most likely end up with an infection and die. There’s a small chance that the islander will end up better-off, but, as in Eccentric Millionaire, the islanders can’t be communicated with so it’s impossible to get their consent. The More Eccentric Millionaire goes ahead and throws the bags of gold without anyone’s consent. You are an islander. You are struck. Luckily, against the odds, things turn out well for you. You do not get an infection and die. In fact, you are much better-off than you would have been if the More Eccentric Millionaire hadn’t thrown the bag of gold.\(^\text{95}\)

Discrimination
A racist airport employee, Harold, refuses to let a black man, Peter, on a plane. As a result, Peter misses his flight. The plane that Peter would have been on crashes, killing

\(^{92}\) Joel Feinberg cites trespassing as a possible example of a harmless wrongdoing. Thanks to Derek Parfit for encouraging me to think about the right to private property.


\(^{95}\) This is a variation of Shiffrin’s example.
everyone on board. If Harold had not refused to let Peter on the plane, Peter would be dead, too.\textsuperscript{96}

\textbf{Victor Frankl & the Nazis}
Victor Frankl was a holocaust survivor, who found meaning in pain and suffering. He thought that his life was better, because more meaningful, having gone through the holocaust.\textsuperscript{97}

\textbf{Rape}
Sarah is raped. As a result, she is pregnant. She decides to have the child. She wouldn’t have had that child if she hadn’t been raped.\textsuperscript{98}

\section{2.5 Challenges Addressed}

The thought behind each of these examples is the same. It is that individuals have an interest in more than how they fare on balance, and morality should protect those interests. Let’s call this view, the \textit{Special Interests View}. The \textit{Special Interests View} says that someone can have a legitimate complaint about an action that sets back one of his or her special interests even if the Counterfactual Condition is not met, so the Counterfactual Condition is not the correct account of harm -- someone can be harmed if a special interest has been set back.

There are, as already discussed, problems with the Special Interests View. Recall in 2.2 I said that we should accept the Counterfactual Condition because it’s compatible with something else that we think, that someone would have a legitimate complaint about an action only if they would have a rationally licensed preference that it not have been performed, and if the

\textsuperscript{96} James Woodward gives an example like this in “The Non-Identity Problem,” \textit{Ethics} (1986): 804-831.


\textsuperscript{98} Harman discusses an example like this in “Moral Status” (Ph.D. diss., Massachusetts Institute of Technology, 2003).
Counterfactual Condition is not met, then rationality would not license such a preference on the basis of the effects of the action on someone. Someone who takes the Special Interests View must either think that someone could have a legitimate complaint about an action even if rationality wouldn’t license a preference that it not have been performed, or that rationality could license a preference for an action that made one worse-off, when evaluating the act only on the basis of its effects on one. Neither of these views seems correct, and seem to count against the Special Interests View. But it’s worth taking a closer look at examples it, anyway. Doing so reveals other problems with it and additional strengths of the Counterfactual Condition. So, in this section, I argue that close examination of these examples reveals either that no one was wronged or that someone was wronged but the Counterfactual Condition was met. I conclude that the Special Interests View should be rejected -- set backs to some specific interests will not ground a legitimate complaint unless the Counterfactual Condition is met.

**No Wrong Done, No One Wronged**

It may be thought that we have an interest in having private property, and when this interest is set back, we’ve been wronged, even if we’re not worse-off for it. In the Trespasser example, the trespasser has no negative impact on your property, and actually saves it from fire damage. If the trespasser hadn’t been there to stamp out the cigarette, you would have lost everything. Is this an example where you’re harmed and wronged by the trespasser even though the Counterfactual Condition isn’t met? I don’t think so.

You have a legal right that protects you from trespassers. So, legally speaking, you would have a legitimate complaint against the trespasser. But, I think, your complaint against the
trespasser is merely a legal complaint. That one could have a legal complaint without having a moral complaint is unsurprising. The law says, “Do not trespass”. It does not say, “Do not trespass unless doing so will not cause the property owner some harm.” Clearly, the law was broken even though there was no harm. The point of the more general law is to protect individuals from harm. A law that permitted trespassing when no harm would be caused would not adequately protect the property owner from harm. It would not adequately deter people from trespassing, and trespassing often does lead to harm. So, it is not surprising that the law would forbid actions that did no harm because that might be the best way to prevent harms. But, these aims of the law distinguish the law from morality.

The reason why we have laws against trespass in the first place is that individuals have an interest in having private property and in order to have private property, it must be protected from others’ attempts to seize it. Prior to the legal protection of a claim to land, it is not clear that one strictly speaking has a lawn, let alone a special interest that others not walk on it. I take seriously the possibility that one does not have private property until there are laws protecting it. So, though you would have a legal complaint against the trespasser, nothing follows about morality from that fact. Most likely, we mistakenly think that you would have a legitimate complaint against trespassers who leave no trace because we confuse a legal claim with a moral one. It might even be morally wrong of you to press charges against the trespasser since she caused you no harm, though legally you could. One’s property rights are most likely merely legal rights.

Second, it’s not clear that the property owner in the Trespass example in fact has an interest in no one being on her property on the day of the cigarette fire, and that any of her
interests were set back. Thus, Trespasser is not a problem for the Counterfactual Condition.

Walking across private property and leaving no trace, when the owner is far, far away, and doing so puts the owner at no increased risk of harm, is not morally wrong, though it is, and is perhaps for good practical reasons, illegal. And it is not obviously the case that, while you do have an interest in having private property, that this means that you have an interest in having this trespasser off of your property on that day.

Though the right to private property might be a legal right, the interest in having promises kept is a moral concern, if anything is. James Woodward thinks that promisees have an interest in having promises kept (maybe private property owners have an interest in not having trespassers walk across their lawn), and someone is wronged if those interests are set-back, even if the Counterfactual Condition is not met. He puts his view in the following way: “people have relatively specific interests (e.g., in having promises kept, in avoiding bodily injury, in getting their fair share) that are not simply reducible to some general interest in maintaining a high overall level of well-being and that moral requirements function so as to protect against violations of such specific interests.”

For example, Woodward thinks that Alfred in the Selfish Promise example is wronged if Betty breaks her promise. He says, “All of this [referring to the specifics of the situation] is, to a first approximation, irrelevant to our assessment of Betty’s behavior; we can hold that her promise breaking wrongs Alfred even if Betty knows that its overall impact on Alfred is to make him happier than anything else Betty might have done.”

There are several problems with Woodward’s view.

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99 James Woodward, “The Non-Identity Problem,” *Ethics* (1986): 809. Rahul Kumar, 17 years after Woodward, expresses a similar thought when he says, “to be an instance of a wronging, an action must be such that it can make the kind of difference to a person that can be appealed to as a basis of a claim to have been wronged.” Rahul Kumar, “Who Can Be Wronged?” *Philosophy and Public Affairs* 31 (2003): 8.

First, why should we think that Alfred has any interest at all in having this promise kept, such that, an interest of his is set back if Betty breaks her promise? It looks like in Woodward’s example, Alfred has an interest in having the promise broken, not kept. But, if Alfred doesn’t have any interest in having the promise kept, then how can we explain why he’s wronged if it’s broken? It looks like, if Alfred is wronged, this would be an example of a free-floating wronging. I don’t think that we should grant the assumption that all promisees always have an interest in having promises made to them kept. No one is wronged if, for example, a promise to kill you is not kept. Sometimes, a promisee has zero interest in having a promise kept, just like sometimes a property owner has zero interest in whether someone trespasses on their lawn.

Second, I think that it is disingenuous for Alfred to complain when Betty breaks her promise, since she did exactly what he wanted her to do. Suppose that Alfred had wanted Betty to fail to keep her promise, suppose that he had no interest in having it kept any longer, and, for some reason, could not communicate his wishes to her. Surely Betty would not have wronged Alfred if she broke the promise under those circumstances. That Alfred is prepared to complain even though he’s thrilled about what Betty does is, at least in part, precisely why we find Alfred so contemptible.

Third, even if Alfred had an interest in having the promise kept, it would not necessarily be the case that Betty would wrong him by not keeping it. One does not always wrong someone when one breaks a promise, even when the promisee has an interest in having it kept. Consider again Plato’s example of the suicidal promisee. Suppose that the suicidal promisee had an interest in having his gun returned on time because he wanted to impress his friend who was visiting that day. Still, this interest could be overridden by the fact that he’s suicidal. In the
Rescue example, Jones has an interest in not having his shoulder dislocated. That interest is undoubtedly set-back by yanking him out of the car. But Jones is not wronged. For another example, I have an interest in privacy which is set back when my superintendent barges into my bathroom to save me from drowning in the tub, but he doesn’t thereby wrong me. These set backs to our interests don’t seem sufficient to wrong anyone.

So, not all promisees have an interest in having a promise kept (and not all property owners have an interest in not having someone trespass). No one is wronged if a promise to kill them is not kept. When a promisee has an interest in having a promise kept, they are wronged only if they are worse-off.

Does this mean that you can’t be wronged if someone breaks a promise to help you make a great sacrifice? Consider another example:

**Altruistic Promise**

Wife asks Husband to promise her that, if he can’t save both, he will save their child first. Husband promises, but, when the time comes, out of love for his wife, he breaks his promise and saves her, not their child.

In this example, Wife has been wronged by Husband because he broke his promise. If she could have him re-do it, she would have him save their child rather than her. Wife is perfectly rational to prefer that her child be saved than that she be saved. Is this an example where Wife is wronged because harmed by the set-back to her interest in this promise being kept, though the Counterfactual Condition is not met?

I think that Wife was plausibly wronged, but I also think that the Counterfactual Condition was then met. To see why I think that we can and we should say this, consider another example. I have a rationally licensed preference that the Russians not torture Yumin, a man who
lives in China, a stranger to me. But I have no interest in whether the Russians torture Yumin. Either way, torture, no torture, I fare the same. Still, other things being equal, it's rational for me to prefer that he not be tortured. When the Russians torture Yumin, they do not harm me, or wrong me, even though I have a rational preference that they not torture him. Not all of my rationally licensed preferences are grounded in an act's effects on me.

One must have a rationally licensed preference for not X in order to have a legitimate complaint about it, and whenever you have a rationally licensed preference for X over not-X, on the basis of X's effects on you, then not-X meets the Counterfactual Condition. Does Wife have a rationally licensed preference for X over not-X, on the basis of X's effects on her? It might appear that she does not, given that if the promise is kept, she ends up dead and if the promise is broken, she ends up alive. But people have interests in how others fare, they have interests in personal projects, they have interests in morality, they have interests in living meaningful, as well as happy, healthy lives. Recall that, when we apply the Counterfactual Condition, we need not apply it to a single dimension along which a life can be evaluated, one's well-being, or health. Rather, we should apply it to how someone fares, balancing the different dimensions along which a life can be evaluated, in so far as these dimensions can be made out. So, even though Wife is saved when the promise is broken, she is conceivably worse-off than she would have been if the promise had been kept and her child had been saved instead of her.

It may at first seem like her preference for X over not-X is grounded in X's effects on her children alone, and not X's effects on her, in the way that my preference that the Chinese man, Yumin, not be tortured is grounded in X's effects on him alone. And it may at first seem like the Counterfactual Condition cannot be met since wife's wishes are altruistic -- she's sacrificing her
life for her child’s. But if Wife’s good is completely independent of the good of her child, then it isn’t plausible to think that she could be *wronged* when the child is harmed, just as it isn’t plausible to think that I could be wronged when Yumin is tortured. More plausibly, Wife’s good is tied up with the good of her child in a way that my good is not tied up with Yumin’s, which is why she exacted a promise from her husband to save their child in the first place. She has a strong interest in her child’s welfare. So it very well could be the case that it would be worse for Wife if she were alive and the child dead, so she could be wronged by not having the promise kept.

What if her good is tied up in her child’s well-being, but not to the extent that she would be better off dead than that the child be harmed. Could it still be rational for her to prefer that the child live rather than her? Then it could be rational, I think, for example, if the child stands to lose more than she stands to lose, but her preference would not then be grounded in the effects of the act on her alone, and breaking a promise to save the children may not wrong her, though it may wrong the child. Just as my preference that the Chinese man, Yumin, not be tortured is not relevant to the rightness or wrongness of torturing him, Wife’s rationally licensed preference to save the child because the child stands to lose more would not be relevant to what Husband should do, but probably tracks what Husband should do. Also, it’s unclear why someone would exact a promise from someone to do the right thing and whether doing so adds anything of moral importance.

So, if Wife was wronged by this broken promise, then the Counterfactual Condition was met. Even though Wife is alive when the promise is broken, she is worse-off. Some people think that whenever a promise is broken, someone is wronged. But I don’t think that it’s
plausible that promisees always have an interest in having a promise kept, and, if they don’t, then it’s very difficult to explain why they would be wronged by the broken promise. When they do have an interest in having the promise kept, it looks like it could still not wrong them to break the promise, for example, when more, stronger interests are better satisfied by doing so. And while Woodward is correct that people have interests in “more than in maintaining a high overall level of well-being,” they have interests in how their children fare, in how their projects fare, etc., he’s incorrect in thinking that this means that they can be harmed by a promise being broken even though the Counterfactual Condition is not met.

Besides the interest in private property and in promises being kept, it’s thought that we have a special interest in bodily self-determination--if an action sets it back, that is sufficient for having a legitimate complaint about that action. But what, exactly, does this interest involve? The Rescue example taught us that the interest in bodily self-determination cannot simply be an interest in not suffering some bodily damage at someone else’s hands. Someone’s interest in bodily self-determination must involve more than that. Perhaps one would have a legitimate complaint about an action if it damaged one or caused one pain, or pain above some threshold, without one’s consent. This is too simple. One doesn’t wrong an unconscious person by dislocating his shoulder to save his life. We need a view of the special interest in bodily self-determination that can accommodate the fact that no one is wronged in unconscious rescue cases, when consent is impossible.

Seana Shiffrin makes the following proposal: one is wronged by an action if it causes one
pain without one's consent and that pain was not necessary for averting greater pain. On this view, consent is not necessary for causing pain in an unconscious rescue case because the pain is necessary to avert even greater pain. But consent is necessary if the suffering is necessary to bestow on someone a "pure benefit". A pure benefit is something that would make you better-off than you would be without it but without which you would not experience pain or suffering. Some examples of pure benefits include: $100,000, 20 extra IQ points above your own IQ, the ability to eat fatty foods without one's arteries hardening. You would be worse-off without the pleasure of eating fatty foods, but you wouldn't necessarily suffer--you could just eat well and exercise in order to avoid heart disease. On Shiffrin's view, you can be wronged even though you are not worse-off than you would have been if the action hadn't been performed if you were caused to suffer, without your consent, for the sake of some pure benefit. Why would we accept this view?

Shiffrin gives us the Eccentric Millionaire example to pump our intuition. Even though the Counterfactual Condition is not met, because you were caused pain and the pain wasn't necessary for averting pain and you never consented, Shiffrin thinks that you were wronged. Maybe people can break your arm without your consent in order to save your life, but, she thinks, they can't break your arm without your consent in order to make you richer. Though there's something attractive about this proposal, I do not think that it holds up to closer scrutiny.


\[102\] Shiffrin's proposal captures a common thought. For example, Arthur Applbaum says, "is it sufficient, in order to permit burdening a target, that he has received greater benefit, willingly or not? Suppose you live downwind from a polluting steel mill. You benefit from the economic activity the mill has brought to your town, and the benefit outweighs the health risks of pollution, but this hardly robs you of reasonable complaint. Just as you are not obligated to pay for uninvited valuable books thrown in your house, the book thrower is not permitted to smash your windows, even if the books are more valuable to you than the glass" (Applbaum, *Ethics for Adversaries*, 130).
Shiffrin thinks that the difference between causing someone pain and causing someone to be deprived of a pure benefit makes a tremendous moral difference. But, both are bad for us. So it’s unclear why consent is necessary for the one and not the other. It’s true that pain is different than the deprivation of a pure benefit, which, by definition, does not involve pain. But it’s difficult to see how this difference makes a moral difference—how does it explain why consent is necessary in the one case, the Eccentric Millionaire case, and not in another case, such as an unconscious rescue case?

To see the problem more clearly, consider the following. On Shiffrin’s view, I don’t have to get your consent to cause you a little pain, perhaps a sharp needle pain, in order to diminish your migraine pain by a fraction of its severity, supposing that I can’t get your consent, but I would have to get your consent to give you $100,000 if the only way that I could do so involved causing you a little pain. If I can’t get your consent for some reason, then I couldn’t give you the $100,000 without wronging you. But suppose that the $100,000 means the difference between post-graduate education, maybe law school, and none at all. We can even suppose that you’d be much worse-off not going to law school than you would be if you did go to law school. Probably, you would be much worse-off not going to law school than you would be if you suffered a tiny more from migraines. The point is that being deprived of a pure benefit could have a much greater impact on your life than having a little extra pain would. Given that, it’s not obvious that the fact that being deprived of a pure benefit is morally less of a big deal than being caused pain.

There is an additional problem for Shiffrin’s view. If one is wronged by an action if it causes one pain without one’s consent and that pain was not necessary for averting greater pain,
then everyone was wronged by being brought into existence, because no one who was conceived gave consent, everyone’s life has some pain in it, and that pain was not necessary for averting greater pain—one wouldn’t have experienced any pain at all if one hadn’t been born. So her view has the unintuitive consequence that everyone was wronged by one’s parents just for having been born, and that seems absurd. We should, I think, conclude that Eccentric Millionaire is just like Rescue. No one is wronged, and no wrong act is performed.

Wrong, but No One Is Wronged

For the remaining examples, I think that the act is wrong, but no one was wronged. In Eccentric Millionaire, the odds are certain that breaking someone’s arm will leave them on balance better-off, but we cannot always be certain that things will turn out well. Suppose that it’s likely that if the Eccentric Millionaire breaks someone’s arm with a bag of gold, that person will get an infection and die, and won’t, on balance, be better-off. Maybe an action that does not in fact make you worse-off nevertheless wrongs you because it puts you at high risk of being worse-off than you otherwise would have been, without your consent. Like Shiffrin’s proposal, this one says that you could have a legitimate complaint even if the Counterfactual Condition isn’t met, but it avoids some of the unintuitive consequences of Shiffrin’s proposal.

Suppose that it is most likely that things will turn out badly for the islander struck by a bag of gold. The islander will most likely end up with an infection and die. Perhaps there’s a small chance that the islander will end up better-off, but the islanders can’t be communicated with so it’s impossible to get their consent. The More Eccentric Millionaire goes ahead and

103 Shiffrin is well aware of this consequence, but she is undeterred by it. I discuss the harms involved in creation ethics later on in this chapter.
throws bags of gold without anyone’s consent. You are an islander. You are struck. Luckily, against the odds, things turn out well for you. You do not get an infection and die. In fact, you are much better-off than you would have been if the More Eccentric Millionaire hadn’t thrown the bag of gold. The Counterfactual Condition is not met. Would you have a legitimate complaint, grounded in the act’s effects on you?

It might appear that you would. I think that this is an illusion. It is an illusion that is likely created by the odds themselves. Things are very likely to go badly for you. If they do, then the Counterfactual Condition would be met, and you could have been harmed and wronged. Since it was so likely that things would go badly, it’s equally likely that you would have been wronged. Since it’s exceptional that things turned out well, it’s exceptional that you weren’t wronged. But since things don’t go badly for you, you don’t have a legitimate complaint against the More Eccentric Millionaire.

Another reason why we might think that you were wronged is that the More Eccentric Millionaire exercises bad judgment, given the odds, and so he does something wrong. Someone who performs risky acts does something wrong even when the outcome is good. But, when the outcome is good, no one is wronged. Someone might think that risky acts with excellent outcomes are wrong and always wrong someone. But drunk driving is a risky act that is wrong, driving drunk could have an excellent outcome, but no one would be wronged if, for example no one was on the road. Someone might reply that if someone had been on the road, then they would have been wronged. The person who was on the road could say, “I could have been killed!” But everyone could say that. There’s nothing special about them, about being on the road, as opposed to anyone else who might have gone driving that night and might have been in
an accident with the drunk driver. If the person at home wasn’t wronged by the drunk driver, then the person who was on the road wasn’t wronged.

One might think that the More Eccentric Millionaire must have had bad intentions toward the islander. Why else would he perform such a risky act without anyone’s consent? But sometimes people perform risky acts hoping for the very best. Drunk drivers drive home hoping not to get into an accident. But in the remaining examples, the Rape example, the Viktor Frankl example, and the Discrimination example, the assailants clearly have bad intentions toward the victims. Are they examples of actions that wrong someone because of their bad effects even though the Counterfactual Condition isn’t met?

One way of thinking about these example is in just the way that we thought about risky acts with excellent outcomes, like the More Eccentric Millionaire example. The agents in each of these examples have every reason to believe that they are making someone worse-off than they would otherwise be, and very little reason to believe that they are making their victim better off than they would otherwise be. They are acts that are performed either without consent or against someone’s explicit wishes. Raping someone, torturing someone in a concentration camp, discriminating against someone -- these actions typically make people worse-off. Since there’s very little reason for the agents perpetrating their crimes to think that the outcomes will be good, the actions are risky. We’ve already seen that risky actions can be wrong though no one is wronged.

It may be difficult to believe that in these examples, no one is wronged. Again, we can explain away our intuition. We have an intuition that someone is wronged in these examples
because the good outcomes were extremely unlikely. The odds were that someone would be wronged. Our intuitions are no doubt influenced by these odds.

Furthermore, the assumption that in these examples the Counterfactual Condition was not met is a pretty far fetched assumption. Granting the assumption that Viktor Frank wouldn’t have been better off not being tortured or that the rape victim wouldn’t be better off not being raped is a big concession. In turn, it should be conceded that our intuitions may not be reliable in these philosophical examples.

In the Discrimination example, it may seem more plausible to grant the assumption that someone could be racially discriminated against and better off for it. Besides having an interest in bodily self-determination, one has an interest in being treated fairly, specifically, one has an interest in not being discriminated against on the basis of one’s skin color. Is this a special interest, such that someone would have a legitimate complaint if it were set back though the Counterfactual Condition was not met? It is thought that, in the Discrimination example, Peter would have a legitimate complaint against Harold for being discriminated against, but the Counterfactual Condition is not met. What can someone who accepts the Counterfactual Condition say in reply?

This is a complicated example. Here, I suggest one of reply.

Perhaps discrimination is racially motivated harm. When Harold keeps Peter off the plane, he’s trying to harm Peter because Peter’s black. But Harold fails to harm Peter, so he does

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104 Someone may disagree that discrimination is racially motivated harm. Someone may think that someone could act in a discriminatory way without intending harm, for example, if Harold kept Peter off the plane simply because Harold did not want any blacks on the plane, and not because Harold wanted to deprive Peter of something beneficial. I think that such an act would not wrong Peter, but it would still be immoral because it fails to respect the fact that Peter is the moral equal of non-blacks. I discuss the importance of equality and the extent to which its importance can be explained by harms in Chapter 1. There, I argue that failing to treat someone as a moral equal is wrong and cannot be explained by harms to individuals.
not succeed in discriminating against him. Failed attempts at discrimination don’t wrong anyone.

This interpretation of the situation explains a racist like Harold’s frustration when he finds out that his action left Peter much better-off. Harold attempted to discriminate against Peter but failed, thus he attempted to wrong Peter and failed. It’s a matter of luck, but Peter would not have a legitimate complaint against Harold. It’s because it’s a matter of luck that we can explain why we might have thought that Harold had wronged Peter. Most intended acts of discrimination succeed. The odds were in favor of Harold’s act of discrimination succeeding. But, the exceptional thing happened, and he did not. It is because it is rare that someone could do what Harold did and not wrong someone that we mistakenly think that Harold too must have wronged someone.

Why shouldn’t we think that failed attempts to wrong someone themselves wrong someone? Suppose that I don’t intend to wrong anyone in particular, just whoever is at the door. I wait by the door, to kill whoever knocks. I hear something. I shoot. No one’s there. It seems that though I attempt to wrong someone, no one’s wronged. One could say that this isn’t really an attempt to wrong someone. “Someone” must be someone in particular. Then consider this example. I wait by the door to kill Jones. I hear something. I think that it’s Jones. I shoot. No one’s there. I read in the paper the next day that Jones had actually died a week earlier. Did I harm Jones? Did I wrong him? I don’t think so.

Finally, suppose that someone is in excruciating suffering, wants to die, but is too scared to pull the trigger himself. You, a murderer, who do not know that he is in excruciating pain, shoot him dead. Do you wrong them? I don’t think so. Do you do something wrong? Yes. You
had no reason to believe that what you did would be good for your intended victim, so your action was a risky action. It was highly likely that what you did would be bad for him. So it was wrong.

Finally, I should say something about the value of consent. By hypothesis, everyone in these examples is better-off not being asked for consent, or is better-off even if the act is against their expressed wishes at the time. Why is consent still important if consent was impossible and you are better-off? How can it be morally significant that the act was against your expressed wishes at the time if you are now better-off? It would seem that after we know that you are better-off and consent was impossible, that’s the final verdict on the value of consent. This raises the following question: why is consent important? I’m inclined to think that consent is important because life is risky, and it’s often uncertain how someone will fare as a result of some action that we perform, particularly when we don’t know much about them. I think that, if one consents to an action\textsuperscript{105}, then, no matter how things turn out, one couldn’t have been wronged by it. But if one doesn’t consent to an action and things go badly, the Counterfactual Condition is met, then one may very well have a legitimate complaint about it. And if one doesn’t consent to an action and things go well, the Counterfactual Condition is not met, then one would not have a legitimate complaint about it.

\textsuperscript{105} I do not discuss here what’s involved in giving consent, but when I say, “gives consent”, I mean really gives consent, meaning all of the conditions, whatever they are, for giving meaningful consent are met.
2.5 The Harm of Death

Before turning to the implications of accepting the Counterfactual Condition for creation ethics, it’s instructive to look at the implications that it has on whether someone can be harmed by an action that leads to death. If we accept the Counterfactual Condition, can we account for the fact that an action that leads to our death is, so often, a harm? This might appear difficult.

Consider some action that leads to your death. Does it make you worse-off than you would otherwise have been? On one way of answering this question, we should look at how things would be for you if the action that kills you is performed and compare that to how things would be for you if it weren’t. But there is no way that things are for you if the action that kills you is performed, because there is nothing that it is like for you when you die. If there is no way that things are for you when you die, then we cannot say that you are worse-off dead than alive, but if you wouldn’t be worse-off dead than alive, then, according to the Counterfactual Condition, you are not harmed.

But someone who accepts the Counterfactual Condition need not make these comparisons. To evaluate whether someone’s death is a harm to them, someone who accepts the Counterfactual Condition should compare two possible lives of different duration. Suppose that if I kill you now, you will die at 60, but if I don’t kill you now, you will die at 100. These two different possible life histories are represented in lines L1 and L2 below:

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L1  60
L2  100
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Whether you would be harmed by being killed now depends on whether L₁ would be worse for you than L₂. Whether L₁ would be worse for you than L₂ depends on what happens during the forty extra years that you will live in L₂. Possibly, those years will be filled with pain and misery, so L₂ would be worse for you than L₁. It’s possible for one to be worse-off living a longer life than one would be living a shorter life. Possibly, those years will be filled with pleasure and happiness, and so you would be worse-off if you lived a shorter life. Importantly, the judgment that L₁ would be worse for you than L₂ does not require us to compare how things are for you in L₁ after you die to how things are for you in L₂ from age 60-100. Rather, we compare which of L₁ and L₂ are better for you. If we do that, then the Counterfactual Condition does not have trouble accounting for how an act that causes you death could harm you.¹⁰⁶

The real puzzle is whether someone can be harmed by being created, which appears to require a comparison between how things are for you having been born, with how things would have been for you if you had never existed. I turn to this next.

2.6 Harms in Creating

In this section, I discuss the implications of accepting the Counterfactual Condition for creation ethics. Some have thought that, if we accept the Counterfactual Condition, [Footnote: John Broome argues similarly in “What is Your Life Worth?” in Daedalus, 137 (2008), 49-56. He says, “shortening your life may harm you even though there is no time when it harms you. To determine whether it harms you, we compare the goodness of the shorter life you have, taken as a whole, with the goodness of the longer life you would have had, taken as a whole. If we believe Epicurus’s hedonism, the goodness of the shorter life is made up of the good and bad sensations that occur within it. The goodness of the longer life includes all those sensations, and also all the good and bad sensations you would have had in later life had you not died. If your life is going well, presumably these extra sensations would have been predominantly good ones. So the longer life would have been better than the shorter one. You are therefore harmed by the shortening of your life. But there is no time when you suffer this harm, just as, when the book is shortened, no page in the book loses any words. Epicurus’s hedonism actually implies that death normally harms you. Epicurus thinks it implies the opposite, but he is making a mistake.”]
then no one could be harmed by being born. They interpret the Counterfactual Condition in the following way:

The Counterfactual Condition Version 1
One is wronged by an action only if, had the action not been performed, one would have been better-off than one actually is.

It would appear to immediately follow that no one could be harmed by being brought into existence. To illustrate the difficulty, consider another example. Consider the sentence, ‘If Johnny’s father had chosen a career as a starving artist, then Johnny would have been smaller than he is’. To evaluate this sentence, we compare how tall Johnny actually is to how tall he would have been if his father had been a starving artist. But, now suppose that if Johnny’s father had chosen a career as a starving artist, then he would not have had any children. We can’t compare how tall Johnny is to how tall he would have been if his father had been a starving artist, because if his father had been a starving artist, Johnny would not have existed. So, either the sentence can’t be evaluated or it’s false, Johnny has no height if he does not exist.

The first traditional wrongful life legal case was Gleitman v. Cosgrove, March 6, 1967, Supreme Court of New Jersey. Mrs. Gleitman became pregnant. She asked her physician, Dr. Cosgrove, whether her previous bout of rubella posed a risk to her unborn child. Dr. Cosgrove told her that it posed no risk. That was false. The child was born deaf and mute. If Mrs. Gleitman had known about the risks, she would have had an abortion. So, if Dr. Cosgrove had told Mrs. Gleitman the facts, her child would never have been born. Mrs. Gleitman filed suit against Dr. Cosgrove on her child’s behalf. The court ruled against her child. Following Gleitman, courts have in general been very unsympathetic to wrongful life cases. They doubt that anyone could be wronged just by being alive. Courts in 20 states have denied wrongful life claims. In several states wrongful life claims have been explicitly barred by the legislature. Only a few states allow recovery, and no one has allowed compensation for pain and suffering. In the rare instances in which courts have been in sympathy with wrongful life cases, this is the line of argument is made. The first case found in favor of the child was Curlender versus Biosciences Lab. The judge said, “a plaintiff both exists and suffers...It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all.” as cited by Steinbock, Bonnie. “The Logical Case for Wrongful Life.” Hastings Center Report 16 (1986).
Likewise for interpreting the Counterfactual Condition Version 1. In order to know whether someone is worse-off for having been conceived, we have to compare how things are for him to how things would have been for him had his parents not conceived, but, had they not conceived, he would not have existed. Just as Johnny has no height if Johnny does not exist, and so it can’t be true that he would have been smaller than he is if his father had been a starving artist, it would appear that had one not been conceived, one would not have existed, so one wouldn’t have been better-off than one actually is -- one wouldn’t have been at all. So, it’s thought, no one could be harmed by being born.

But there are cases where it looks like someone is harmed by being born, and that this harm explains why it would be wrong to create. Consider,

**Relentlessly Miserable Child**
A man and a woman want to conceive a child. Unfortunately, they each carry the recessive gene for Tay-Sachs, so there is a 1 - 4 chance that the child that they conceive will be born with this horrible disease. They decide to conceive anyway and conceive Hugo. Hugo has Tay-Sachs. Nerve damage begins in the womb. In the first few months of his life, he is blind and deaf. As the months go on, he has frequent seizures, his muscles atrophy, he has difficulty swallowing, and he suffers from paralysis. He frequently chokes and struggles to breathe. He suffers mentally, with dementia like symptoms, and he is hyper-sensitive--easily startled and frightened. With the best of care, Hugo dies, as is typical of children with Tay-Sachs, by age four.

It looks like, if we accept the Counterfactual Condition, we would have to say that Hugo’s parents do not harm him by bringing him into existence, and we would have to appeal to some other facts in order to explain why they do something wrong, if we think that they do something wrong, by conceiving him. But I think that there are two responses available to someone who accepts the Counterfactual Condition.
The first says that Hugo is harmed by being brought into existence because he is perpetually in a state in which he is worse-off living than he would be if his life had been shorter. This account is similar to the one that we gave to explain the harm of death. The lines below, H1-HN, represent different possible lives that Hugo might live, of different durations.

HUGO'S POSSIBLE LIVES
H1 ------------------ 5
H2 ------------- 4
H3 --------- 3
H4 ------ 2
H5 -- 1
.
.
HN -.0001

H1 is worse for Hugo than H2. H2 is worse for Hugo than H3. H3 is worse for Hugo than H4. H4 is worse for Hugo than H5. H5 is worse for Hugo than HN. From the moment that Hugo exists, Hugo is worse-off for not having a shorter life, so the Counterfactual Condition is met.

One might raise two objections to this interpretation of the harm to Hugo.

First, someone might object that it looks like one harms Hugo by letting him live once he is born, and so the only way not to harm him would be to not let him continue to live, and this would seem to license, or worse, require, infanticide. But it does not, because it does not follow from the fact that because one would harm Hugo by letting him live that it would not still be wrong to kill him. Perhaps the only way to have avoided harming Hugo would have been to never have conceived him in the first place.
Second, someone might object that this reply does not explain why *conceiving* wrongs Hugo. But I think that it does. If an action is necessary and sufficient for harming someone, then it harms that person. Hugo will be harmed by being alive. Conceiving Hugo was necessary and sufficient for his being alive. So conceiving Hugo harms him.

There is a second way for someone who accepts the Counterfactual Condition to explain how Hugo could be harmed by being brought into existence. It avoids these challenges. We can reinterpret the Counterfactual Condition:

*The Counterfactual Condition Version 2*

One is wronged by an action only if the actual state of affairs is worse for one than the state of affairs that would have obtained had the action not been performed. ¹⁰⁸

According to Version 1, when we say that you are worse-off for an action, we compare how you are in one state of affairs to how you are in another. In contrast, according to Version 2, when we say that you are worse-off for an action, we compare which of two possible states of affairs would be better for you, as you are now. I don’t have a full theory of when a state of affairs is better or worse for you; I don’t have a complete theory of well-being. For our purposes here, we could just suppose that a state of affairs is better for you than another one if it satisfies more of your interests. It’s entirely possible, as far as Version 2 is concerned, that someone could be worse-off being conceived than not. But why would we think that anyone *was* worse-off being conceived?

Consider Hugo’s life, again. His life is, unalterably, relentlessly miserable. Recall, H₁ is worse for Hugo than H₂. H₂ is worse for Hugo than H₃. H₃ is worse for Hugo than H₄. H₄ is

worse for Hugo than H5. H5 is worse for Hugo than HN. A state of affairs in which he lives N years is always worse for him than a state of affairs in which he lives fewer than N years. The state of affairs in which he lives a shorter life will be better for him in an obvious way—he will have less misery.

The idea that less life could be better for someone than more is not an unusual idea. It’s often what happens to individuals at the end of a long life. If I had lived a very long, healthy life, and near the end, I was faced with a horrible disease with very few treatment options, I might very well think that, given what’s ahead of me, living longer would be worse for me than dying now. Similar reasoning applies to Hugo’s whole life.

For Hugo, consider any pair of lives that represent possible lives of a certain duration. A longer line is always worse for Hugo than a shorter line. So a life of any length is going to be worse for Hugo than a life that is at the limit of shortness: which is no life, at all. The state of affairs in which Hugo’s life is at the limit of shortness is best for him, and the limit of shortness is no life at all. Any possible state of affairs in which Hugo has a life of any length is worse for him than a state of affairs in which he does not exist. So Hugo is worse-off having been conceived, and could be said to have been wronged by being brought into existence.

Importantly, we do not have to locate Hugo in the state of affairs in which he isn’t conceived and assess how things are for him there in order to judge what would be better or worse for him. Consider some other examples. It is better for you that your grandchildren live well after you die than that they suffer. But, we don’t need to project you into the state of affairs in which you die and they suffer in order to know that. Or, for another example, consider someone who is a cancer researcher; she spends her whole life trying to discover a cure for
cancer. In one state of affairs, no one ever dies from cancer again. In another, a cure is never found, people continue dying from cancer. Which state of affairs would be better for the cancer researcher? We do not need to project the cancer researcher into either state of affairs in order to know that the state of affairs in which no one ever dies from cancer again is better for her.

So we do not have to abandon the Counterfactual Condition in order to capture the intuition that someone has been harmed by being conceived. We can explain why the parents who knowingly conceive the child with Tay-Sachs do something wrong by appealing to the fact that they harm their child. If we accept the Counterfactual Condition, wrongful lives will be rare, but that’s a good result. Someone who can only conceive a child who will have a health problem but who will otherwise have a good life, a life with on balance more of what makes a life good than less, would not have been harmed by his or her parents for having been conceived, and this is a desirable result.

2.7 Conclusion

In this chapter, I have defended the Counterfactual Condition of Harm and I have shown how we can accept it and still explain how someone could be harmed by being created. A puzzle remains: what should we say about the case in which someone chooses to conceive a child with a health defect, like a club foot, when she could have conceived a healthier child, for example, by selecting a different embryo for implantation or by waiting to conceive? A child with a club foot may have a very happy, otherwise healthy life. Then, according to the Counterfactual Condition, the child with a club foot would not have been harmed by being conceived. How can we then explain what, if anything, one would do wrong by choosing to conceive a less healthy child?
This is the Non-Identity Problem. I take up this issue next.
Chapter 3: The Non-Identity Problem

3.1 Introduction

In this chapter, I argue that the Non-Identity Problem is a problem for the Harm View and the Claim View. In Chapter 2, I defended the Counterfactual Condition of Harm, the conception of harm assumed in the Non-Identity Problem. But in Chapter 1, we saw that the Harm View has considerable resources to bring to bear on challenges to it. Even when no one is harmed by a wrong act, harms can still figure into an explanation of why it’s wrong. But, in Chapter 1, I also argued that, despite these resources, harms do not figure into an explanation of why all wrong acts are wrong. Do harms figure into an explanation of wrong-doing in the Non-Identity Problem even though no one is actually harmed?

Contractualists have tried to argue that they do. So I begin this chapter by explaining why the Non-Identity Problem is a problem for contractualism. I then examine a contractualist attempt to explain how harms figure into an explanation of wrong-doing in the Non-Identity Problem, even though no one is actually harmed. I explain why this attempt fails. Then I explore what was attractive about it. It focused on the failings of the agent as a parent. There appears to be convergence on the idea that there is something defective about the agents in Non-Identity examples. I argue that this points us toward another approach to the Non-Identity Problem, a virtue ethics approach.

3.2 The Non-Identity Problem: No one Harmed

We introduced the Non-Identity Problem in the Introduction with the following pair of examples:
Example 1
Mary is 7 months pregnant. Mary and the fetus that she is carrying are both perfectly healthy, except for some mild acne that Mary has developed, for which there is a highly effective treatment. Unfortunately, the treatment causes birth defects, so women who are pregnant are advised not to use it. Mary disregards this advice, uses the treatment, and two months later, gives birth to Johnny, who is born with a clubfoot. His left leg is shorter than his right, and his left foot is completely turned to the side. After multiple surgeries and physical therapy, Johnny’s leg and foot are fine, and he goes on to live a happy, flourishing life.

Example 2
Jane wants to become pregnant. She has some mild acne, for which she has been using a highly effective treatment. Women who have been using this treatment are advised to stop and wait two months before conceiving, because even small traces of it in a pregnant woman’s bloodstream cause birth defects. Jane disregards this advice, conceives a child, and, nine months later, gives birth to Billy, who is born with a clubfoot. His left leg is shorter than his right, and his left foot is completely turned to the side. After multiple surgeries and physical therapy, Billy’s leg and foot are fine, and he goes on to live a happy, flourishing life.

Having defended the Counterfactual Condition of Harm in Chapter 2, we can now say confidently that Mary harms her son, Johnny, but Jane harms no one. This is, in part, because Mary’s act of taking the acne medication while pregnant is not identity affecting, but Jane’s act of not waiting to conceive is. If Mary hadn’t taken the acne medication while she was pregnant, Johnny would have been born without any health problems. But if Jane had heeded her doctor’s advice, stopped the acne treatment and waited two months to conceive, it’s not the case that she would have spared Billy a club foot. If she had conceived in two months, a different sperm and egg would be involved in conception, and she would have conceived a different child, a child not identical with Billy. Since Jane does not harm anyone by not waiting to conceive, it’s difficult to see how harms to individuals figure in any way into an explanation of what she does wrong. If

109 She does not harm her son, Billy, and we’re assuming that no one else is negatively affected by what she does.
harms do not figure in any way into an explanation of what she does wrong, then, in addition to
the problem of inequality discussed in Chapter 1, the Non-Identity Problem is another serious
problem for the Harm View.

3.3 The Non-Identity Problem: a Problem for Contractualists

Contractualists adopt the Harm View. Contractualists says that an act is wrong if and
only if it is permitted by a principle that is not justifiable to someone, if it is a principle that
someone could reasonably reject.\textsuperscript{110} On what basis could someone reasonably reject a principle?
This is a matter of importance to contractualists, and it is where we find their commitment to the
Harm View.

First, if one could only reasonably reject a principle permitting some act on the grounds
that it would not produce the best possible outcome, then contractualism would be very nearly
indistinguishable from consequentialism.\textsuperscript{111} Second, the grounds for rejecting a principle can’t
be that acting that way would be wrong, otherwise contractualism would be viciously circular.\textsuperscript{112}
Third, the grounds for rejecting a principle should be relevant to the part of morality that
contractualism aims to describe, the morality of right and wrong, which, according to
contractualism, is co-extensive with the part of morality having to do with what we, rationally
self-governing agents who care about mutual justifiability, owe to each other.\textsuperscript{113} So the grounds

\textsuperscript{110} T. M. Scanlon, \textit{What We Owe to Each Other} (Cambridge, MA & London: The Belknap University Press of
Harvard University, 2000), 153.

\textsuperscript{111} Ibid., 189.

\textsuperscript{112} Ibid., 216.

\textsuperscript{113} “Reasons for rejecting a principle thus correspond to particular forms of concern that we owe to other
individuals.” T. M. Scanlon, \textit{What We Owe to Each Other} (Cambridge, MA & London: The Belknap University
for reasonably rejecting a principle are an important part of contractualism, important in establishing it as a distinctive, non-consequentialist moral theory that does substantive work describing the morality of right and wrong.

Guided by these considerations, Thomas Scanlon says that contractualist grounds for rejecting a principle must be personal. Scanlon does not give a general characterization of the distinction between personal and impersonal grounds, but he does suggest that grounds for reasonably rejecting a principle are personal just in case they are based on the implications for someone of accepting a principle.\footnote{Rahul Kumar describes Scanlon’s view of personal reasons in the following way, “Contractualism narrows the kinds of implications that are relevant for the assessment of a proposed principle to those that matter to a person because of their relevance for how her life might go. Scanlon refers to this as the class of “personal reasons”. (Kumar, “Reasonable Reasons in Contractualist Moral Argument,” 11)} He says that grounds for reasonably rejecting a principle are ‘generic reasons’ that any person would have in virtue of standing in one of the positions in a situation of the kind to which the principle applies. These must be reasons that such a person would have ‘on his or her own behalf’..This...rules out, as grounds for rejecting a principle, appeals to impersonal values, such as the intrinsic value of preserving the Grand Canyon, or to aggregate benefits. What it allows are reasons arising from the way a person would be affected by following the principle, or by having others do so.\footnote{T. M. Scanlon, “Replies,” in On What We Owe to Each Other, Philip Stratton-Lake (Oxford: Blackwell Publishing, 2004), 128.}

So personal reasons are reasons that persons have on their own behalf, based on the effects of accepting principles on them. This makes contractualism a theory about the morality of what we owe to each other as rationally self-governing agents, and not about some other system of values regulating behavior. Personal reasons are non-aggregative. This makes contractualism non-consequentialist. Facts about how one would fare under a principle are not facts about right and wrong, so reasoning about contractualist principles is not reasoning in a vicious circle.

Restricting the range of reasons to personal ones thus seems to be essential to contractualism.
Since contractualists think that the only reasonable grounds for rejecting a principle are *personal*, and grounds are *personal* because they arise from the “way a person would be affected by following the principle, or by having others do so,” they appear to accept the Harm View. Harm to someone plays a fundamental role in explaining which principles could be reasonably rejected and so which acts are wrong. But it is difficult to see how harms figure in any way into an explanation of the Non-Identity Problem. There appear to be no personal grounds for rejecting a principle that permits Jane to conceive when she did. Billy has no personal grounds for complaint, and we assume that no one else is negatively affected.\(^{116}\) This makes the Non-Identity Problem an especially troubling problem for contractualists. Next, I turn to a contractualist approach to dealing with it.

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\(^{116}\) One could argue that someone does have personal grounds for complaint, if there are possible people. Richard Hare argues that there are duties to possible people in “Possible People,” *Bioethics* 2 (1988): 279-293. Essays on *Bioethics* Oxford: Oxford University Press, 1993. How would this help the contractualist? Possible people include actual people and merely possible people. Actual people include everyone who existed, exists, or will exist. Merely possible people never actually exist. Consider some possible person, P1. There is some chance, 1/n, that P1 will be actual. If Jane waits to conceive, P1 would have that same 1/n chance of being actual, born without a club foot. If Jane doesn’t wait to conceive, P1 would have a 1/n chance of being actual, but with a club foot. So P1 could reasonably reject a principle that permitted Jane to conceive when she did because it's better for P1 to have a 1/n chance of being born without a club foot than a 1/n chance of being born but with a club foot. There are several problems with this approach. First, it assumes that possible people can be harmed and benefited by being made actual, but it's not clear why we should think that we can. Second, if we assume that possible people can be benefited by being made actual, and would be harmed by not being made actual, then it’s difficult to avoid an obligation to procreate. Third, there are some possible people who will never be born, who will never be actual people. They too have a 1/n chance of being born, and so could reject a principle permitting Jane to conceive when she did. But it is not in the spirit of contractualism to ask whether merely possible people, people who will never be actual, would have reasons to reject a principle. Contractualism is motivated by the idea that we, living with one another, should live together on terms that are mutually acceptable. But merely possible people are not people with whom we live and so why should we care about justifying ourselves to them? Finally, the Non-Identity Problem asks us to assume that Billy wouldn’t be born if Jane waited to conceive. On this assumption, we would have to ask whether possible Billy is better off living in possible heaven and never becoming actual, or whether he is better off being actual but having a club foot. How things are for possible people is murky to me, but if possible Billy is better off being actual and having a club foot than not ever being actual, and if Jane waits, then Billy would not ever be actual, then possible Billy would not have personal grounds for complaining about what Jane does.
3.4 A Contractualist Reply: Do Harms Play an Abstract Role?

Rahul Kumar has argued that the Non-Identity Problem is not a problem for contractualists. He thinks that the Non-Identity Problem only appears to be a problem for contractualists if we ignore a crucial feature of contractualist moral reasoning. When contractualists are reasoning about right and wrong acts, they are reasoning from an abstract perspective, and not on the basis of the particular effect of a particular act on a particular person. I will argue that, while Kumar is correct to emphasize the importance of the abstract perspective in contractualist moral reasoning, it will not help the contractualist to address the Non-Identity Problem. First, I will introduce the idea of reasoning about moral principles from an abstract perspective and explain why it is an important aspect of contractualism, with an eye toward explaining how, looked at from the contractualist’s abstract perspective, harms may figure into an explanation of wrong-doing when no one is actually harmed. Then I will explain why Kumar thinks that taking an abstract perspective helps the contractualist deal with the Non-Identity Problem. In the next section, I will explain why it does not.

When contractualists deliberate about moral principles they take an abstract perspective. What does this mean, exactly? Scanlon says,

When we are deciding whether a given principle is one that could be reasonably rejected we must take a broader and more abstract perspective. This perspective is broader because, when we are considering the acceptability or rejectability of a principle, we must take into account not only the consequences of particular actions, but also the consequences of general performance or nonperformance of such actions and of the other implications of having agents be licensed and directed to think in the way that the principle requires. So the points of view that the question of reasonable rejectability requires us to take into account are not limited to those of the individuals affected by a
particular action.\textsuperscript{117}

So contractualists, when reasoning about moral principles, must do more than identify considerations about a particular act’s effects on particular people. Contractualists must take a “broader and more abstract perspective.” This involves looking at what the effects would be on individuals of general compliance with a principle. It also involves looking at the effects of acting on a principle from various “points of view.”

There are many reasons why contractualists think that moral reasoning should take place from an abstract perspective. I think that one reason is best made evident by the problem for contractualists of explaining what is wrong with risky acts that have unexpectedly excellent outcomes. Consider, for example, the following game of Russian Roulette:

\textbf{Russian Roulette}

Susy lives in low income housing and is out of work and struggling quite a bit. I play Russian roulette with Susy, without her consent. There’s a 5 in 6 chance that she will get shot and killed. If my gun doesn’t go off, she wins 100 million dollars. I miss. She gets 100 million dollars, moves to Hawaii, and lives happily ever after.

I put Susy at high risk of something horrible without her consent, but, against the odds, things turn out spectacularly for her. Let’s suppose that if I hadn’t done what I did, then Susy wouldn’t have been as well off as she is now. In other words, let’s suppose that the Counterfactual Condition of Harm is not met, because I couldn’t have given her the money without playing this dreadful game. Even though I do not harm Susy, I do something wrong. How could a contractualist explain this?

\textsuperscript{117} T. M. Scanlon, \textit{What We Owe to Each Other} (Cambridge, MA & London: The Belknap University Press of Harvard University, 2000), 202-203.
They could say that the following Risk Principle could not reasonably be rejected: People should not put others at high risk of harm without their consent. But Susy has no personal reasons on the basis of the performance of the particular act in Russian Roulette to reject a principle that would have permitted the performance of that act. In this particular instance, Susy should welcome the risk with open arms. There’s no bullet in the chamber. She will be tremendously better off if the risky act is performed. So her reasons for rejecting a principle permitting this act, if she has any, can’t be based on the effects of this token act on her. This might appear to be a problem for contractualists -- what reason would Susan have to object to what I did? But it is not.

It is not a problem precisely because contractualists reason about moral principles from an abstract perspective, meaning, in part, that they don’t look exclusively at the token effects of token acts when deliberating about moral principles. Though Susy doesn’t have personal reasons on the basis of this particular act to accept a principle forbidding risk of harm without consent, she does have personal reasons to want people to act in accordance with a principle forbidding putting people at risk without their consent. We, Susy included, have no way of knowing which people are the lucky ones. So Susy’s reasons grounding her acceptance of a principle forbidding my playing Russian Roulette with her are based on what she expects the effects to be on her if people acted on a principle permitting Russian Roulette. She would be in a bad way if they did. So she does have personal reasons to reject a principle that permitted what I did even though her reasons aren’t grounded in the effects of what I did on her. Reasoning from an abstract perspective is an important aspect of contractualism, and it explains why someone does
something wrong by performing risky acts without someone's consent even when the outcomes are good and no one is actually harmed.

Kumar thinks that the fact that contractualists reason about moral principles from an abstract perspective can help them to deal with the Non-Identity Problem. He characterizes contractualism in the following way:

Though the moral wrongs of this domain are those having to do with one person having wronged another person by having related to her in a certain way, the view does not characterize a claim of having been wronged as requiring an appeal to how one has been made worse-off than one otherwise would have been. Rather, a claim to have been wronged requires that certain legitimate expectations, to which one is entitled in virtue of a valid moral principle, have been violated.¹¹⁸

Kumar seems to be reasoning in the following way: He thinks that whether someone has been wronged figures crucially into contractualism's account of whether something has been done wrong, and he thinks that whether someone has been wronged depends solely on whether a "legitimate expectation" of theirs has been violated. A legitimate expectation is established by contractualist moral principles. Contractualist moral principles are not established by looking at the particular effects of particular acts on particular people. They are established by looking at the effects of general compliance with a principle from general points of view. So whether someone has been wronged shouldn't depend on the particular effects of particular acts on particular people, either.¹¹⁹

So Kumar would think that Susy has been wronged because, in acting on a principle that


¹¹⁹ I explain why this argument is not valid in the next section and dispute that it is a correct characterization of contractualism. It depends on the assumption that if wrongdoing someone is going to figure into an explanation of why an act is wrong, then when an act is wrong, someone must be wronged, but this assumption is false.
she could reasonably reject, I violated a legitimate expectation of hers. Extending this to the Non-Identity Problem, Kumar would say that just as Susy’s reasons grounding her acceptance of the Risk Principle aren’t about the effects of this particular act on her, perhaps the reasons grounding Billy’s rejection of a principle permitting the act of conception in Example 2 aren’t grounded in the act’s effects on him. Perhaps it doesn’t matter that Billy is not harmed by being conceived because contractualists never establish a moral principle and therefore an individual’s legitimate expectations by looking just at a particular act’s effects on a particular person, but by looking at the effects of acceptance of principles more generally, by looking at general compliance with a principle and the effects of general compliance from general points of view. Susy’s reasons grounding her acceptance of the Risk Principle aren’t about the effects of this particular act on her. Why then should Billy’s reasons be?

It’s clear what principle Susy would reject. She would reject a principle permitting me to perform a risky act without her consent. It’s clear why she would reject it: she’d be worse off if people performed risky acts without others’ consent. And it’s clear that I act in accord with a principle that Susy would reject when I play Russian roulette with her. What principle would Billy reject, why would he reject it, and does his mother, Jane, act in accord with this principle in Example 2?

Kumar would answer these questions in the following way. To tell what are someone’s legitimate expectations, and so whether they’ve been wronged by a failure to meet those expectations, one needs to know what kind of relationship one has with someone. To tell what kind of a relationship one has with someone, however, one need not know anyone’s identity.

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120 Kumar does not explicitly discuss this example, but he is explicitly interested in risky acts with good outcomes, and discusses driving drunk but not hitting someone else who is on the road.
One only needs to know something more general. One needs to know how the act would look from their point of view, and points of view are themselves general.

For example, Kumar asks that we suppose that you are trying to decide whether you can leave office hours a little early, even though you expect a student to arrive. In order to decide whether you can leave early, you do not have to know anything about the identity of the expected student. All that you need to know are the general characteristics of students and professors. You would examine your obligations qua professor and the legitimate expectations of someone, qua student.

Consider another principle, “be prepared to help strangers”. We don’t have to look at the effects on any actual stranger in some particular circumstance when we decide that this principle could not be reasonably rejected. We just ask what we think strangers and natives can legitimately expect of each other.

So in approaching the Non-Identity Problem, Kumar thinks that we do not need to know the identity of the child who would be conceived in order to know whether it would be wrong to conceive. We can just ask what parents and their children can legitimately expect of each other. Kumar thinks that all that one needs to do is think of the responsibilities of someone as a caregiver and think of the legitimate expectations of their child, whoever it is. It will be legitimate for whoever fills those roles to expect certain things of each other. Which things?

Kumar thinks that the child will have a legitimate expectation that his parents not have “let her [him] suffer a serious harm or disability or serious loss of happiness that they could have prevented without imposing substantial burdens or costs on themselves or others.”

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121 Scanlon discusses this example in *What We Owe to Each Other*, 203.

would think, did not meet this legitimate expectation. The only problem that remains, thinks Kumar, is this: the child does not exist when the wrong act is performed. He says, “The challenge of the non-identity problem...is easily recast in contractualist terms how can one have wronged another when there was no “other” who stood to be wronged by one’s conduct at the time of that conduct.” But this problem is easily solved by pointing out that someone can be wronged by an act that pre-dated them.

**Problems**

Kumar sums up his view in the following way:

On the proposed view, a child's claim to have been wronged owing to pre-conception negligence, for example, should focus on the way in which the alleged wrongdoers risked the child's health by culpably failing to comply with standards of due care which the child, whose development was under their control, was entitled to have expected them to successfully comply.

There are several problems with this view and with Kumar’s argument for it.

First, Kumar moves from the idea that contractualists reason about moral principles from an abstract perspective to the claim that contractualists think that someone can be wronged even though they are not harmed. But it is not obvious that this is a move that contractualists should make, nor is it obvious that it is necessary to make this move in order for contractualists to...

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124 Kumar thinks that the Non-Identity Problem is a problem because no one exists at the time of the action to have been wronged. But, this is not a serious problem, as he recognizes. One can easily explain why it’s wrong to set a time bomb to go off in London in 200 years. There will be someone who is harmed. There will be someone who is wronged. But this is not like the Non-Identity Problem.

address the Non-Identity Problem. I think that a more attractive implication of taking an abstract perspective when reasoning about contractualist moral principles is that contractualists can then say that no one would have to actually have been wronged in order for someone to do something wrong. Then it would not be the case that the child in the Non-Identity Problem would have to actually be wronged in order for the mother to have done something wrong, even according to contractualism. Emphasizing the abstract perspective of contractualist moral reasoning does not itself help to make the case that someone can be wronged even though they are not harmed. And, by emphasizing the importance of the abstract perspective of moral reasoning, contractualists do better to avail themselves of resources to explain how an act that wrongs no one could still be wrong.\textsuperscript{126} That said, can a contractualist explain why Jane’s conceiving in Example 2 is wrong?

There is another problem with Kumar’s view. While it is clear that harms figure into an account of why risky acts like Russian Roulette are wrong (though Kumar does not emphasize the important, albeit abstract, role that harms play in the contractualist explanation) even though no one is actually harmed, and why Susy would object, it is less clear how harms would figure into an account of the wrong-doing in the Non-Identity example, and who would object. There is no harm in examples like Example 2, nor is there any risk of harm. It is in this way crucially

\textsuperscript{126} It is better for these reasons: (1) While I agree that Susy has personal reasons to reject a principle that permits risky acts, I disagree that that means that when a risky act is performed, she is wronged. I have personal reasons to reject a principle that permits risky acts. So do you. We all have personal reasons to reject a principle permitting risky acts, and none of our reasons are grounded in the particular effects on Susy of this particular violation of the principle. So, when a risky act is performed, and the principle is violated, which one of us is wronged? Why Susy, and not us? We all have personal reasons to reject the principle and none of our reasons are grounded in the effects of this particular violation on Susy. (2) Not all attempted wrongings wrong someone, but all attempts to perform wrong actions are themselves wrong. Attempted murders are attempted wrongings. Wronging someone may figure into an explanation of what has been done wrong, even if no one has been wronged. (3) Not all risky acts that are wrong are wrong because someone is wronged. Someone who drives drunk does something wrong, even if it turns out that no one else was on the road at the time. If no one else was on the road at the time, no one was wronged. Similarly, one does something wrong if one is not prepared to help strangers, even if no strangers show up and so no one is wronged.
different than our other examples. Playing Russian roulette, pointing and shooting a gun at someone when one doesn’t know whether there’s a bullet in the chamber, would sometimes harm someone. Failing to be prepared to help strangers would often harm someone. In the case of the teacher and the student, it’s the case that whoever the student is, she will most likely be harmed if the teacher skips out on office hours. However, it’s not the case, in the Non-Identity Problem, that whoever the child is, it will be harmed if the parents don’t wait to conceive. Permitting the mother in the Non-Identity case to conceive would never harm anyone.

Perhaps Kumar thinks that a principle that permitted conceiving in Example 2 would in general do harm, though it doesn’t in this particular case. This would make it more like a risk case with excellent outcomes. Kumar offers the following principle which he claims was violated:

Those individuals responsible for a child’s, or other dependent person’s welfare are morally required not to let her suffer a serious harm or disability or a serious loss of happiness or good, that they could have prevented without imposing substantial burdens or costs or loss of benefits on themselves or others.¹²⁷

Not complying with this principle would generally be harmful. But is it the case that conceiving in the Non-Identity Example violates this principle? Whether this principle has been violated needs defense.

There’s no ambiguity in whether someone has failed to be prepared to help strangers -- they didn’t go to the market to buy extra groceries. In the Russian Roulette example, it’s unambiguous what it means to put someone at risk -- we don’t know whether there’s a bullet in

the chamber, but we fire the gun anyway. But there is ambiguity in whether someone has failed to make their child well off. In the Non-Identity case, was the principle, “don’t let your children suffer a loss when you could prevent them from suffering this loss at no cost to you” violated? Here’s a reason to think that it was not: Billy wouldn’t have existed if his mother had waited two months to conceive. Since it’s not the case that he would have existed without a problem with his foot if she hadn’t done what she did, he was not harmed and he suffered no loss. Kumar thinks that we can establish that they do something morally wrong from the standpoint of their child. But we cannot. We cannot because from the standpoint of their child, there are no personal reasons to reject a principle that would permit conceiving.

Finally, even if Kumar’s principle were violated, it’s unclear whether this violation would matter morally. The Non-Identity Example seems in this way crucially different from Risk Cases: in Example 2 we know what the outcome will be. But if we knew that the bullet was in the chamber, or that no strangers were going to need our help, then we wouldn’t do anything wrong by pulling the trigger of the gun, or by not being prepared to help strangers. So if we know that the child conceived isn’t going to be harmed, then why would it be wrong to conceive?

Kumar wanted to argue that what Jane owes her son Billy is not established exclusively by how what she do affects Billy, but by what she owes her child, whoever it is. What she owes her child, whoever it is, is established by contractualist principles, principles that no one could reasonably reject. I have argued that he has failed to show that there is a principle permitting conceiving that her child, whoever it is, could reasonably reject, since her child, whoever it is, has no personal grounds for complaint. Kumar has shown neither that the child, Billy, was harmed nor that harms to individuals figure into an account of the parents’ wrong-doing.
A key component of Kumar’s position is that he thinks that our moral obligations are determined, at least in part, by the roles that we occupy. He thinks that parents and children have obligations to each other, and these can be established without knowing anything about the identities of the people who occupy those roles. This is an aspect of contractualist moral reasoning from an abstract perspective. But to complete the contractualist approach to the Non-Identity Problem, Kumar must say what obligation the parents are under, as parents, that they violate, he must make the case that a principle establishing this obligation has in fact been violated, and he must explain why their son would have personal grounds to object to a principle that permitted them to conceive when they did. This is, I have argued, where Kumar’s approach is weak. Kumar says that the parents fail to shield their child from harm, but it’s unclear that they do fail to shield their child from harm, since Billy is not harmed by being conceived. Since the occupant of the role, “their child”, has not been harmed, and would not object to being conceived, Kumar leaves unexplained who would object to what the parents do, and why. If no one would have a personal objection to what they do, then contractualists cannot explain why what the parents do is wrong. So the Non-Identity Problem remains a problem for contractualists.

3.5 De Dicto Obligations: A Role Approach to the Non-Identity Problem

This may be the end of the road for the contractualist approach to the Non-Identity Problem. The prospects for explaining how harms to individuals figure into an explanation of wrong-doing in the Non-Identity Problem look bleak. But it is not necessarily the end of the road for a “role approach”. “Their child” is ambiguous between “their actual child, Billy” and
the role or type, “their child”, which could have been filled by someone other than Billy, for example, if Jane had waited to conceive. For the contractualist, it’s essential that the occupant of the role, “their child”, have personal grounds for complaint about the effects of adopting a principle that permitted the act, since we’re assuming that no one else would be negatively affected. Since Billy does not, and we assume that no one else does, the contractualist approach fails. But, if we are not contractualists, then it’s not essential that the occupant of the role, “their child”, have personal grounds for complaint.

Caspar Hare thinks that it is sometimes morally required for people to be concerned about people of a certain type, X, where X is a description like, one’s children, or the King of France. Like Kumar, Hare thinks that what concern for people of a certain type requires of one can be known without knowing anything about the identity of anyone of that type, without knowing who fits the description. For example, one doesn’t know anything about the identity of one’s child prior to conception, but one knows that it will be one’s child, that it will meet that description. Unlike Kumar, Hare defends the view that this alone sometimes imparts obligations on one, and, since Hare is not a contractualist, it does not matter for his purposes if the occupant of a role could not have personal grounds for complaint.

Hare explains that corresponding to the different meanings of “their child” are different ways in which parents can make their child better or worse. When parents make things worse for their child, say, for example, Billy, they make things de re worse for their child. Hare says, a state of affairs, S1, is de re better for their child than another state of affairs, S2, when the thing that is actually their child is better off in S1 than in S2. When they make things worse for their child, whoever it is, they make things de dicto worse for their child. Hare says, a state of affairs,
S1, is *de dicto* better for their child than another state of affairs, S2, when the thing that is their child in S1 is better in S1 than the (possibly different) thing that is their child in S2 is in S2.128

In the Non-Identity Problem, it is *de dicto* better for her child if Jane waits to conceive because if she waits, the child that she conceives will be healthier than the child that she will conceive if she doesn’t wait. She doesn’t, however, make things *de re* worse for her child.

On the one hand, we think that it matters morally what type or role one is in. We think that this informs how we should act. For example, we may think that I am morally required to help my husband before I help a stranger. And this is something that we can know without knowing anything about me or my husband. On the other hand, it doesn’t seem to matter morally when I make things *de dicto* better for my husband. For example, I can make things *de dicto* better for my husband by divorcing him, even hastening his death, and marrying a healthier man.129 When we said that I am morally required to help my husband before I help a stranger, this was not the sort of help that we had in mind. So why should we think that making things *de dicto* better for someone matters morally?

Hare argues that just because making things *de dicto* better for someone doesn’t *always* matter morally, that doesn’t mean that it *never* matters morally. He argues that it matters morally when (i) it is appropriate to show concern for people of a certain type and (ii) when showing that concern cannot have any *de re* expression. To defend this view, he gives various examples. One is his example of Tess the Safety Officer:

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129 See Hare’s Zsa Zsa Gabor joke, Caspar Hare, “Voices from Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?” 514.
Noticing that people in her state are not wearing safety belts, she implements some tough new regulations, and, a year later, pleased to discover evidence that they have been effective, the severity of injuries sustained in automobile accidents has been reduced as a result of people belting up.  

There is a puzzle about why Tess does well because her act is identity affecting. If she had not implemented her new regulations, most of the actual accident victims would never have been involved in accidents of any kind. Hare explains why she does well anyway in the following way: Tess’s job is to help accident victims. So, it is appropriate for her to show special concern for them. But, because her act is identity affecting, she cannot know the identity of the accident victims in advance. So her obligation to help accident victims cannot be fulfilled by making them de re better. Since it’s her job to care for accident victims, and she cannot make them de re better, she must have an obligation to make them de dicto better. Hare thinks that the best explanation for why she has done well is that she had a de dicto obligation to accident victims to make it the case that, whoever they are, their accidents were not fatalities.

Like Kumar, Hare thinks that sometimes what we should do is informed by what type of person we are -- a parent, wife, a safety officer -- and how we’re related to other types of people -- our children, our spouse, accident victims. Our obligations are not merely consequentialist obligations to perform the action with the best possible outcome. Like Kumar, Hare thinks that we do not always need to know anything about the identity of the person who fits this description in order to know what we should do. Unlike Kumar, Hare explains how we can understand why Jane in the Non-Identity does something wrong by making things worse for her child even though her child, Billy, is not harmed. She makes things de dicto worse for her child and, Hare

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130 Caspar Hare, “Voices from Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?” 516.

131 Ibid., 517.
argues, this is morally significant. It is a morally significant way to show appropriate partial
concern for a certain type of person. But are there *de dicto* obligations? Do parents have an
obligation to make their children *de dicto* better?

**Problems**

When it is appropriate for someone to show special concern for a certain type of person,
and that concern cannot be expressed by making anyone of that type better *de re*, are there *de
dicto* obligations? There are some reasons to doubt that there are. In this section, I raise some
difficulties for establishing the existence of *de dicto* obligations.

First, if we doubt that there are *de dicto* obligations, then it’s important that we be given
examples of them, and there are questions about whether we yet have evidence by way of
examples that there are *de dicto* obligations. Reconsider the example of Tess the Safety Officer.
Just as I could make things better for my husband by divorcing him, or even hastening his death,
and marrying someone healthier, Tess could improve the health of accident victims *de dicto* by
making it the case that healthier people become accident victims in the first place, by, for
example, targeting a population who is less likely to be in fatal accidents and increasing their
odds of being in accidents. She could make it the case that young people with strong bones are
in accidents, as opposed to older people with frail bones. Perhaps she makes safety guidelines on
expensive cars, which older people tend to buy, more stringent than safety guidelines on cheaper
cars, which younger people tend to buy. Suppose that this has no effect on the total number of
accidents. She simply decreases the number of elderly people who are in accidents by increasing
the number of young people who are in accidents. She decreases the number of fatalities,
because the elderly were more likely to die, and thereby makes things *de dicto* better for accident victims. But has she done well? It would, I think, be controversial to say “yes”. She targets a particular population in order to decrease the number of accident fatalities. The population that she targets is one that is often thought of as being especially important to protect. And it’s not obvious that it’s worse for an elderly person to die than it is for a young person to be disabled, either from their perspectives or from an impersonal perspective. It’s far from obvious that she has done well, or as well as she would have if she had made accident victims better off by, for example, decreasing the risk of serious injury to every driver. If she had to choose between making things *de dicto* better for accident victims by targeting young people and making things *de dicto* better for accident victims by implementing seat belt regulations, she would do better to not target young people and implement seat belt regulations instead. Why?

An answer to this question points us to a different account of why Tess does well when she implements tougher seat belt regulations. Maybe making things *de dicto* better for accident victims doesn’t best explain why Tess does well to implement seat belt regulations in the first place. If we describe her obligation as an obligation to accident victims, then there’s a puzzle about how she could do well if her policy affects the identity of who is in an accident. But if we redescribe her obligation as an obligation to drivers, then there isn’t a puzzle about how she does well, though her policy is identity affecting. It’s an obligation to drivers to make it the case that if they are in an accident, their accident will be not that bad. Under her policy, every driver is at a decreased risk of being in a *fatal* accident. Though some accident victims wouldn’t have been
in any accident under a different policy, she has satisfied her obligation to them. Her obligation is therefore sensitive to the description of the type of person to whom she has an obligation. So, there appears to be another, de re, explanation of why Tess does well. Perhaps Tess does well because she has made many drivers de re better off by decreasing their risk of being in a fatal car accident. She could remind the actual accident victims, if they complain, that she decreased their risk of being in a fatal car accident. And then we could explain why she does not do well to target young drivers. In so doing, she fails to fulfill her obligation to drivers. She increases the risk to young people of being in an accident and suffering very serious injury in order to decrease the risk to the elderly of dying from a serious injury. She makes elderly drivers safer, de re, by decreasing their risk of being in a fatal accident, but at the price of making young drivers worse off, de re, by increasing their risk of being in any accident. Whenever someone does well by making things de dicto better, perhaps they are actually doing well by making things de re better. We need more evidence that making things de dicto better matters morally. We need an example that is not also plausibly explained in de re terms. We also need more guidelines about how to describe the appropriate objects of concern.

But we don’t need more guidelines about the appropriate objects of concern of parents. “Their children” accurately describes the appropriate object of parents’ concern, so we cannot object to this way of characterizing the relevant type. But there is another problem. You can make things de dicto better for your children by disowning your own children and adopting healthier, smarter children, and no one would do well to do this. There is this reply: if there’s a

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132 She is like a doctor who vaccinates. This decreases risk to individuals of polio. It is for this reason that the doctor does well to vaccinate. Someone who probably wouldn’t have gotten polio without the vaccine will as a result have a side effect from the vaccine. Vaccinating everyone makes some worse off. This doesn’t mean that there’s a puzzle about why we vaccinate. We vaccinate in order to decrease individuals’ risk of polio.
*de re* way to make things better for your children, then that is supposed to trump any *de dicto* obligation. But if one doesn’t yet have any children, then one couldn’t make things *de re* better for one’s children. So it would appear that if one doesn’t yet have any children, then one has a *de dicto* obligation to adopt the most well off children in the orphanage. But that can’t be correct. Surely one does not do something wrong if one adopts the least well off children in the orphanage, though at the time of adoption, one’s obligation to one’s children can take no *de re* expression. To address this problem, we could say that there is a way to make your child *de re* better off before adoption, because your child already exists in the orphanage, so it’s not the case that concern for your child cannot take *de re* expression. Still, it’s hard to see how *de re* concern for your child could influence the decision of which child to adopt. It’s open to someone to say that this is not a situation where partiality for one’s child *should* figure in. But if not here, why should it figure into Jane’s deliberations in the Non-Identity example?

Or, for another example, consider a pre-conception case. Suppose that there’s a pill that will prevent nearsightedness, but it’s very scarce and it must be taken prior to conception. You are affluent. Suppose that you forgo access to the pill so that it is more readily available to less affluent families. Let’s assume that the affluent child will be better off over-all than the poor child, and it’s just a question of how much better off. Let’s also assume that the difference in how well off the children would be depending on who gets the pill is just the difference between nearsightedness and no vision problems. In forgoing the pill, you make things *de dicto* worse for your child. But it doesn’t appear that you do anything wrong. But if I have an obligation to pay you $100, then I can’t give the $100 to someone else who will benefit equally. The obligation singles you out. So if we think that the parents have an obligation to their child, whoever it is, to
make them as well off as possible, then they shouldn’t forego the benefit to someone else who
will benefit equally, even if that person is overall worse-off.

Someone might argue that this example doesn’t show that the affluent family doesn’t
have a *de dicto* obligation to make things better for their child. They do, it’s just trumped by a
justice consideration in this situation. There are two problems with this reply. First, we could
ask whether the justice consideration would trump the obligation that parents have to show
special consideration for their children and make their children *de re* better off. Consider what
we would say about a post-conception case. Suppose that there was a scarce pill to prevent
children from being near-sighted but children had to take it themselves. If we think that it would
be appropriate for parents to show partiality for their child to receive the treatment in this case, or
if we think that parents would not do something wrong by not making their actual child worse
off in order to make someone poorer family’s actual child better off, then we may doubt that, pre-
conception, justice trumps the parents’ *de dicto* obligation to their child.

So even if we thought that parents should show partiality to their own children, there
remains the question of whether this partiality is ever appropriately expressed by making things
*de dicto* better for their children. Suppose that the justice system demanded that the pre-
conception nearsightedness pill be given to less affluent families. If the rich parents protested
that the treatment was being given to the poor, their protestations could hardly be explained by
the appropriate partiality we think that parents should show for their children. It seems to be
instead a self-centered concern of the parents. They are more like the woman who makes her
husband better by divorcing him and marrying a healthier man, or the general whose army wins
the war just because he switched sides at the last minute. These parents just want to be on the
winning team.

But again suppose that the pill has to be taken by the child. If the pill had to be taken by the child, then forgoing the pill would make things *de re* worse for the affluent child. The affluent parents’ protestations to a system that demanded that the nearsightedness pill be given to less affluent families could more easily be regarded as an appropriate expression of partiality for their child. The kind of partiality that we think it is appropriate for parents to have toward their children is perhaps never appropriately expressed by parents when they make things *de dicto* better for their children.

Finally, there is a problem about how to understand the importance of *de dicto* obligations. In order to solve the problem about disowning one’s own children and adopting better children in order to make things *de dicto* better for one’s children, we said that a *de dicto* obligation is only important when appropriate partial concern can take no *de re* expression. But if *de re* obligations trump *de dicto* obligations in this way, this suggests that *de re* obligations are more stringent than *de dicto* obligations, other things being equal. Why would *de re* obligations be more stringent than *de dicto* obligations unless failing to fulfill a *de re* obligation was morally worse than failing to fulfill a *de dicto* obligation? For example, telling a white lie to a friend counts as a failure to be a good friend. So does devastating a friend emotionally. But if one had to choose between telling a white lie to a friend and devastating her emotionally, one would be a better friend to tell the white lie. This suggests that telling a white lie is less of a failure of friendship than devastating one’s friend emotionally. Similarly, when we say that whenever one could make things *de dicto* better for one’s children or *de re* better for one’s children, the demands of parenthood require that one should make things *de re* better for one’s children, we
seem to be suggesting that failure to make things *de dicto* better for one’s children is less of a failure of parenthood than failure to make things *de re* better for one’s children. This raises a puzzle about how to reconcile the idea that *de re* obligations are more stringent than *de dicto* obligations with the idea that in the Non-Identity example, we think that there’s no moral difference between what Mary and Jane do, though Mary breaks a *de re* obligation and Jane breaks a *de dicto* obligation. An important lesson of the Non-Identity Problem is that harms do not unify even an especially important class of moral considerations. The relative importance of *de re* obligations over *de dicto* obligations is in tension with this. I turn to this issue next.

### 3.6 The Claim View

In Chapter 1, I argued that there are harmless injustices. In the end, I suggested that someone might think that though harms do not explain *all* wrong acts, perhaps they unify an especially important class of moral considerations. The Claim View says that claims are especially morally important and that when a claim infringement is wrong, someone has been harmed. Another lesson of the Non-Identity Problem is that the Claim View is false.

The Claim View has two parts. The first part says that when a claim infringement is wrong, someone has been harmed. I think that this part is plausible. As I argued in Chapter 2, when the negative effects of an act on someone wrong them, then the Counterfactual Condition must be met. This means that if one could be wronged harmlessly, then it cannot be because of the negative effects of an act on one. But if one could be wronged but not because of the negative effects of an act on one, then it’s somewhat mysterious how they have been wronged.
Since having a claim wrongfully infringed is one way of being wronged, wrongfully infringing a claim plausibly involves harming someone.

The second part of the Claim View says that claims are especially morally important. This is the part that we must reject.

What could it mean to say that claims are especially morally important? Here are three different ways of cashing out this idea:

Proposal 1: Claims cannot be overridden by non-claims.

Proposal 2: You always need a stronger reason to not fulfill a claim than you would need to override a non-claim, other things being equal.

Proposal 3: Some claims can’t ever be trumped by non-claims.

Proposal 1 and 2 are dead on arrival because someone could have a trivial claim that was easily overridden by a non-trivial non-claim moral consideration. For example, suppose you have a claim to this book, but lots of other people would benefit a lot more if I failed to return the book to you. I cannot seek a release. Perhaps you would not grant it. Surely the non-claim consideration trumps your claim. Proposal 1 would have us deny this. It’s not the case that all claims are such that they cannot be overridden by non-claims.

Proposal 2 says that you always need a stronger reason to not fulfill a claim than you would need to override a non-claim consideration, other things being equal. In other words, a non-claim consideration that’s minimally adequate to override another non-claim consideration is not going to be adequate to override a claim consideration.

Suppose that:

S1 is the strength of a non-claim, R1, needed to override another non-claim, R2.
S2 is the strength needed to override a claim, R3.

Proposal 2 says that in any situation, S2 is always greater than S1.

Suppose that A is a non-claim reason not to help Jones -- it's more convenient to help Bloggs -- which trumps B, Jones needs your help, a non-claim reason to help Jones. If Jones has a claim to your help, then a consideration that will trump it has to be stronger than A. Example: Jones and Bloggs each need your vial of medicine, you can only give it to one. Here's a non-claim consideration to give it to Bloggs and not Jones: convenience. Bloggs is closer and so it'd be more convenient for you to give it to him. In the absence of any claim, convenience gives you overriding reason not to give the vial to Jones. Since it's better for you to give it to Bloggs, you may permissibly do so. Suppose that you had promised Jones the vial. Convenience cannot trump the reason that a claim gives you. Even if it's less convenient, you must give the vial to Jones. But Proposal 2 suffers from the same problem as Proposal 1. Suppose that two groups are stranded on two different islands, 5 on one, 2 on another. The 5 are all strangers to you. They do not have a claim to your aid. Still, you have a non-claim reason to save 5 people rather than 2. Suppose that you had promised one of the 2 a letter that you wouldn't be able to deliver if you saved the 5. That wouldn't trump the reason that you have to save the 5. Though the 5 don't have a claim to your aid and aiding them will involve failing to fulfill a claim, you have stronger reasons to save the 5 in this situation.

That leaves us with Proposal 3. Proposal 3 says that some claims, call them maximally stringent claims\textsuperscript{133}, can only be trumped by other claims; they can't ever be trumped by non-claims. The best candidates for maximally stringent claims are claims not to be harmed. But the

\textsuperscript{133} Following Thomson, \textit{Realm of Rights}, 168-169.
Non-Identity Problem suggests to us that there aren’t any maximally stringent claims. How does it do this? It does this because Mary and Jane do something equally wrong but Jane cannot be plausibly thought to be violating a claim because she does no harm.

Suppose that Mavis is the pregnant mother of a toddler, James. She finds herself in the predicament of doing something that would cause her new child to be born with a club foot, or doing something that would cause James to have a cavity. Perhaps she has to choose between receiving pre-natal care and giving James fluoride treatments. In this situation, Mavis must choose between harming her newborn more or harming her toddler less. In this situation, she should probably choose to receive pre-natal care. Though doing so would cause James to have a cavity, she would thereby spare her next child a club foot, something much worse. In this situation, a claim is trumped by another, stronger claim.

Now consider a Non-Identity case. Suppose that Mavis, prior to pregnancy, has to choose between:

- **Future**
  
  Cause a future person to have a club foot.

  *and*

- **Present**
  
  Cause James, a present person, to have a cavity.

If Mavis chooses Future, a future person will be born with a club foot, and James will not have a cavity. If she chooses Present, James will have a cavity, but one future person will not be born
with a club foot. Since causing a future person to have a club foot is an identity affecting act, choosing Future wouldn’t harm anyone. Since choosing Future wouldn’t harm anyone, choosing Future wouldn’t violate anyone’s claim. But choosing Present will harm James, and could be said to violate a claim of James’, a claim that a son has against his mother that she not harm him. But if Mavis were forced to choose, she should choose Present; at least, she wouldn’t do anything wrong if she did. This suggests that claims to not be harmed are not maximally stringent because they can be trumped by non-claim considerations. But claims to not be harmed are the best candidates for maximally stringent claims. So the Non-Identity Problem is a problem for the Claim View.

3.7 My Approach

I think that Kumar and Hare were on the right track. By focusing on general points of view, on how types of people ought act and ought to relate to one another, they converged on this idea: Jane fails as a parent. They then set out to explain the demands of a good parent, and how Jane falls short of meeting them. This suggests another way of thinking about why it would be wrong to choose to create an unhealthy child when one could create a healthier child, a virtue ethics approach.

On a virtue ethics approach, an action is wrong just in case it reveals a defective character. In trying to figure out why an act is wrong, we should ask, “what kind of person would do that?” What Jane does exemplifies a bad character, the character of someone who is insensitive to suffering. Sensitivity to suffering requires actions that are appropriately

134 Whether Jane herself has a bad character is another issue. It’s reasonable to think that we would need to know more about Jane than we know on the basis of this one action of hers. Nevertheless, we can say that this action is wrong because it exemplifies a bad character.
responsive to differences in suffering. In Example 2, Jane could conceive now or later, and chooses to conceive now. These choices are alike except with respect to the amount of suffering that will occur. Choosing to perform the action that would cause more suffering rather than less, when all of the considerations in favor of one option also weigh in favor of the other, is wrong, not because someone is wronged, not because someone is harmed, but because it is an expression of a character that is insensitive to suffering. Insensitivity to suffering is the mark of a defective character.

What, exactly, is required to warrant the charge of insensitivity to suffering? Sensitivity to suffering requires actions that are appropriately responsive to differences in suffering. I don’t have a complete account. The proposal is complicated by the fact that there are various kinds of suffering considerations, for example, the total amount of suffering in the world and the amount of suffering in any individual’s life. For simplicity’s sake, let us assume that these are the only suffering considerations. If two possible actions are the same as each other with respect to all suffering considerations, that is, if there are no differences between them with respect to suffering, then neither action is required for sensitivity to suffering. If two possible actions are different from each other in one and only one suffering respect, then sensitivity to suffering requires responsiveness to this difference and requires the action which would cause less suffering in that respect. If two possible actions are different from each other in all suffering respects, but one possible action is such that there would be less suffering in every respect than there would be if the other possible action were performed, then sensitivity to suffering requires it.

There’s a connection between whether an action is insensitive to suffering and whether an
agent is insensitive to suffering. I have been explaining how an action is more or less insensitive to suffering depending on the size of the differences of suffering involved. However, in determining whether an agent is insensitive to suffering, one must determine how willingly s/he makes suffering versus non-suffering tradeoffs. If an agent were perfectly sensitive to suffering, then she would always do what perfect sensitivity to suffering required. An agent is more insensitive to suffering the more willing she is to trade small gains in some non-suffering respect for large losses in some suffering respect. When we are assessing an agent’s character, we are, in part, assessing how responsive s/he is to what is required in order to be sensitive to suffering. If action A is required to be sensitive to suffering, and the agent chooses A unless she will win 1 billion dollars, then she is quite sensitive to suffering, meaning, she takes what’s required to be sensitive to suffering quite seriously. However, if an agent chooses A unless she will win 1 dollar, then she is not quite so sensitive to suffering.

So now we have an account of what Jane does wrong in Example 2. Jane’s act of conceiving Billy is wrong because it is insensitive to suffering, the mark of a gravely defective character.

In Jane’s defense, something is at stake for her: her complexion. But it’s not clear that she would suffer from poor complexion. Even if she would, there is a significant difference in suffering from a club foot and suffering from mild acne.

We can also explain why Mary and Jane do something equally wrong. Mary’s act is wrong, too, for the same reason. Her act is equally insensitive to suffering. Mary’s act is the act of a character that is equally as defective as the character exhibited by Jane’s act, so Mary and Jane do something equally wrong.
This account accommodates the intuition that one would do something wrong by bringing into the world a wretched child. Conceiving a wretched child as opposed to no child at all would be insensitive to suffering.

This approach would not condemn all procreation. Consider Todd and Susan in Example 3 from the Introduction:

**Example 3**
Todd and Susan are in love, they are newly wed, and they want to conceive a child. Their doctor tells them that, unfortunately, if they conceive, they will give birth to a child with a club foot. They are devastated, but they want to have a child who is biologically related to each of them, so they conceive anyway. Nine months later, they give birth to a son, Teddy, who is born with a clubfoot. His left leg is shorter than his right, and his left foot is completely turned to the side. After multiple surgeries and physical therapy, Teddy’s leg and foot are fine, and he goes on to live a happy, flourishing life.

Todd and Susan do not act in a way that is completely indifferent to suffering. Even though, by conceiving a child, they increase the total suffering in the world, they are not indifferent to suffering because the only way that they can have a child biologically related to each of them is to have a child who is born with a clubfoot. For many couples in love, having a child who is biologically related to them is very important. Given that the clubfoot is treatable, and given what’s at stake for the parents, they do not seem to do anything wrong. Their act is not the act of a defective character, a character that is indifferent to suffering. Someone might disagree. But what cannot be denied is that they are in a very different situation than Jane and Mary, for whom nothing is at stake but their complexion.

Nor does this approach commit us to thinking that we would do something wrong by not procreating. One wouldn’t necessarily do something wrong by not conceiving, at all.
Conceiving no child at all rather than a perfectly happy, healthy child, would not be insensitive to suffering because no one would suffer if one chose not to conceive.

A virtue ethics approach fits nicely with the second lesson of the Non-Identity Problem, that claims aren’t an especially important moral consideration. Though claims aren’t especially morally important, this approach is not consequentialist. It does not entail that one must maximize anything nor does it deny that claims matter morally. To further illustrate that it is non-consequentialist, consider what we would say about Example 4:

**Example 4**
If Abby conceives now, she will conceive Sally. Sally will be blessed with good health, she will live a wonderful life, and she will die peacefully in her sleep when she is 100 years old. If Abby waits two months, she will conceive, not Sally, but Sam. Sam will also be blessed with good health, he will live a wonderful life, and he will die peacefully in his sleep, but when he is 101 years old. Sam’s life would be better than Sally’s only to the extent that he would have one more wonderful year of life than she would have. Abby decides to conceive now. She conceives Sally.

A consequentialist would think that Abby did something wrong. But nothing that I have said would condemn what she has done. She does not show herself to be someone who is insensitive to suffering. There are no suffering considerations in play. Sally does not suffer more than Sam. That is not to say that Abby does nothing wrong. Perhaps she does. But she is not like Jane.

Finally, this approach avoids some of the repugnant conclusions of consequentialist approaches. For example, a traditional consequentialist would say that an outcome with a big enough population, where individuals have lives that are just barely worth living, is better than an outcome with a much smaller population of completely different people, but where everyone’s lives are exceedingly good and contain much less suffering. But someone who was perfectly
sensitive to suffering would not choose an outcome that would massively increase total suffering when doing so did not diminish suffering along any other dimension.

### 3.8 Conclusion

In this chapter, I have defended the view that harms to individuals do not figure into an explanation of wrong-doing in the Non-Identity Problem, at even an abstract level. I focused on the problem that this raises for contractualists, adherents of the Harm View. Though the Non-Identity Problem remains a problem for contractualists, we learned something from a contractualist’s attempt to deal with the Non-Identity Problem. Kumar’s contractualist approach pursued the idea that there was something defective about Jane as a parent. He thought that our obligations to each other derive from the roles that we occupy, not the effects of our acts on individuals who occupy those roles. This approach fails as a contractualist approach to the Non-Identity Problem, because it’s essential to contractualism that some individual would have personal reasons to object to being conceived, and no one does. But the idea that our obligations derive from the roles that we occupy can be developed on its own, independent of contractualist moral theory. To see it developed, we looked at Hare’s view. Hare argues that parents have obligations to make their children *de dicto* better. I have suggested that there are some difficulties in motivating the idea that there are *de dicto* obligations, particularly if we want to explain why Mary and Jane do something equally wrong. But if we combine the insight that, in solving the Non-Identity Problem, we should look at the defects exhibited by Jane with the idea that harms to individuals do not always play a role in explaining why a wrong act is wrong, then, we gravitate toward a virtue ethics approach that can explain why Mary and Jane do something
equally wrong. Rather than asking what is defective about Jane as a parent, in the hopes of establishing a parental obligation, I asked, simply, what is defect of character does Jane exhibit. Her role as a parent is not important in my account, except in so far as it helps us to understand what actions are within her power to perform. I found that her act is insensitive to suffering. Being insensitive to suffering is the mark of a defective character. On a virtue ethics approach to evaluating acts, an act that is the mark of a defective character is wrong. Mary’s act, too, is insensitive suffering, to the same extent as Jane, so what they do is equally wrong.
Conclusion

Harms do not unify any especially important class of considerations against an act; they do not make the most seriously immoral acts immoral. This is the lesson of the Non-Identity Problem. We should reject the Harm View and the Claim View. What are some of the implications of this lesson?

If we reject the Claim View, would that mean that people shouldn’t keep promises? No. If there is nothing special about claims, it is less obvious what one should do when one has promised to help Jones, but one would do more good by breaking one’s promise to Jones by helping Bloggs. But that is not to say that a promise shouldn’t break a tie, when both Jones and Bloggs stand to gain and lose the same. This can be explained even if claims are not especially morally important. It may be wrong to break a promise because of what breaking a promise would tell us about the promisor. Someone who wouldn’t keep their word in these circumstances would not be loyal, dependable, or value their relationships with others very highly. These are not the traits of a good person.

If there aren’t any maximally stringent claims, claims that can only be trumped by other claims, then it’s very hard to make out the distinction between claims and non-claims. It’s not clear that there would be any point to doing so. Promises are paradigmatic examples of claims, but we can talk about promises without talking about claims.

On the assumption that there are no harmless wrongings, if harms aren’t especially important, then wrongings aren’t especially morally important.

If we reject the Harm View, does that mean that harms are not important? Not at all. Not harming others is important, very important. But not harming others isn’t the most important
thing. If morality is going to be of the utmost importance, then morality cannot be exclusively concerned with harms. This means that someone could do something wrong if they failed to finish their novel, if they gave up on their projects. Pursuing their projects might involve harming others. But the fact that it would involve harming others would not settle the matter what they should do.

Given the wide variety of things that are important, things that are worth pursuing, it seems likely that if morality is going to be about what's important, then morality won't be a distinctive domain of evaluation.
Bibliography


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