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## **“What the Utilitarian Cannot Think”**

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### Abstract:

I try to articulate a new criticism of utilitarianism: that it cannot accommodate a very basic sort of moral judgment that many people want to make. I raise a real-life example of shockingly bad behavior and ask what can the utilitarian say about it. I concede that the utilitarian can say that this behavior caused pain to the victim; that pain is bad; that the agents' behavior was impermissible; even that the agents' treatment of the victim was vicious. I argue, however, that there is still one thing the utilitarian *cannot* say, namely that the agents *wronged the victim*, that they violated *her*. According to utilitarianism, moral offenses are offenses against global utility, right reason or the totality of sentient beings, but never against individual victims, yet it is this aspect of the action – that it is an offense against a particular person – that is highlighted when we say that *this* action violated *that* woman. This resembles certain familiar objections against utilitarianism, so I examine these objections (concerning, e.g., laxity, injustice, absolutism, separateness of persons, integrity, agent-relativity, etc), but conclude that none of them is the same as mine. We are thus presented with a new objection against utilitarianism.

### Introduction

In a strikingly poor piece of prognostication, Bernard Williams remarked in 1963 that “... the day cannot be too far off in which we hear of [utilitarianism] no more.”<sup>1</sup> Arguments about utilitarianism continue unabated, so clearly there are still things to hear about it and to say about it. Insofar as these arguments oscillate around increasingly refined versions of familiar positions, however, it is not clear that there is much *new* to say about it. But I shall try to say something new about it. I shall try to articulate a new criticism of utilitarianism, namely, that it cannot accommodate a very basic sort of moral judgment that many of us want to make. Perhaps even this will not be a wholly new thought: it resembles or resonates with any number of criticisms that have been leveled against utilitarianism over many years, but I hope at least to make explicit something that has been at best implicit in these familiar criticisms.

### Example: Lockerbie and CNN

Let me begin with an example. In December, 1988, a bomb on board Pan Am Flight 103, from London to New York, caused the Boeing 747 to explode over Lockerbie, Scotland, killing some 270 persons. It is hard to look such an atrocity in the face, so let us focus not on the murder of so many innocents, but on the news media's response to the event. Journalists and camera crews were dispatched to JFK International Airport in New York to cover the response of those awaiting the plane's arrival, and some of these crews were

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<sup>1</sup> J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1963), p. 150.

at JFK before many of the friends and relatives waiting for passengers on the flight had even heard about the crash. Unfortunately, as one commentator recounts:

One couple had only just arrived at the airport after most of the reporters, photographers, and television cameras had camped down near to the First-Class Lounge which had been sectioned off. The woman approached a Pan Am official standing near the journalists and cameramen and asked why there was all this fuss. She was told that Flight 103 had gone down – her daughter’s flight. She then collapsed into a hysterical fit, screaming and howling for her baby, crawling on the floor, her skirt up, in what can only be described as the most painful exhibition of grief and rage for the death of her daughter.

The cameras immediately zoomed in on her for the duration of the fit: people were fighting to get shots of her howling on the floor....The footage went out almost immediately on CNN.<sup>2</sup>

What are we to say about this? What are we to say about this treatment of a bereaved mother? It is not on a par with the murder of the innocent, certainly, but most of us want to say it is still a shocking and inexcusable way to treat a human being. What is it, however, that the camera crews did that was so wrong? They did not kill, rape, coerce or physically harm the woman. They did not deceive, defraud, steal from or threaten her; nor did they provoke the heart-rending scene that they beamed to the whole world: the bombers (or the Pan Am official) did that. As a first attempt, we may say that the camera crews behaved insensitively in exposing her during a terrible crisis, but that scarcely does justice to the situation. We may also want to say that they intruded upon the woman’s privacy, but this is not obvious, as the bombing was an international event and the airport was a public place.<sup>3</sup> Even when exactly the right words escape us, however, we do want to say that, in treating the woman in this way, the camera crews *wronged* her, or even *violated* her.

#### What the Utilitarian Cannot Say

Now, what can the utilitarian say about this? He can say, of course, that this behavior caused pain to this woman, her family and friends – if not at that moment, at least later. He can also say that this pain will be acute, complex and long-lasting. He can say that the public and long-lasting record of this incident may add to the misery caused for this woman by the murder of her child. He can say all of that and add to it the claim that this pain and misery is bad. He can certainly say that the television crew’s behavior was impermissible (assuming that their filming and broadcasting of the scene brings about a lesser balance of utility in the world, over the long run, than some alternative action open to them). He can even say that the camera crew’s treatment of the woman (hereafter “Mrs. V”) was vicious, in the sense that it manifested bad character traits (i.e., traits not included in the list of virtuous traits, i.e., traits the general inculcation of which would

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<sup>2</sup> Matthew Kieran, *Media Ethics: A Philosophical Approach* (Westport, CT: Prager, 1997), pp. 14-15.

<sup>3</sup> I am not necessarily denying that the camera crews intruded upon Mrs. V’s privacy. I am denying only that it is *obvious* that they did and that their violation consisted primarily in this intrusion.

maximize utility).<sup>4</sup> These are things that many of us might want to say, and the utilitarian can say all of them.

But notice: there is something that the utilitarian *cannot* say, namely that the camera crews wronged Mrs. V, that they violated her. He can say that the camera crews caused her pain *and* that they did something wrong *and* that the thing that caused her pain was also the thing that was wrong. But he cannot say that *they wronged her*. According to utilitarianism, moral offenses are offenses against global utility or right reason, or possibly against the totality of sentient beings, but never against individual victims, yet it is precisely this aspect of the action – that it is an offense against a particular person – that is highlighted when we say that *this* action wronged *that* woman.<sup>5</sup> In case the difference is not yet clear, consider the common sense thought that, when we have wronged an individual, we believe that an apology is owed *to that* individual (even when, on balance, wronging that individual was the lesser of two evils).<sup>6</sup> But in cases where we simply fail to maximize utility, to whom should we apologize? It seems odd to suppose that we should apologize to, say, the bereaved mother, since our failure to achieve maximal utility is nothing uniquely or specially to do with her. Even if the action *is* wrong, that fact has as much to do with its effect on other people's utility as with its effect on Mrs. V's. Moreover, it could just as easily have been right if things had gone a little differently, things primarily to do with other people, unconnected with her.<sup>7</sup> To be clear, my point here is not the familiar one that utilitarianism makes this judgment too insecure, too conditional on other assumptions which may too easily fail to obtain. My point is that utilitarianism cannot make this judgment at all. In the "conceptual space" of utilitarianism, there is simply no room for it. Nor is the situation substantially improved if we shift to rule or indirect utilitarianism. Rule utilitarians can, of course, allow for – indeed, require -- a rule against something they call "violating persons", so long as that rule is part of the best set of rules, as determined by utilitarian considerations. From a non-utilitarian perspective, however, this is merely a useful fiction that mimics the judgment, but does not make it.

But is this a new criticism? Is this not one of the standard criticisms of utilitarianism, expressed many times over the last two centuries: that, in its monomaniacal pursuit of maximal utility, utilitarianism disregards, or even tramples on, individual persons? Obviously, if we ascend to a high enough level of generality, it may

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<sup>4</sup> For a discussion of utilitarian treatments of the virtues, see Roger Crisp, "Utilitarianism and the Life of Virtue", *Philosophical Quarterly*, vol. 42, no. 167, 1992, pp. 139-60.

<sup>5</sup> Actually, it is not clear, on utilitarianism, against whom we offend, when we do offend. I think utilitarians should be more worried about this than they are. Interestingly, a parallel point arises for some Kantian positions: when we offend against the moral law, it is likewise not clear against whom we offend. At least, if the first formulation of the categorical imperative is anything to go by, one could be forgiven for supposing that we offend against reason, or even against ourselves as reasoners. On this view, the problem with immoral behavior is that it embodies maxims which undermine or compromise or conflict with the agent's own nature *as a rational agent*. Even if this is true, and even if Kantianism correctly identifies all and only bad maxims as bad, and even if actions that wrong or violate persons always proceed from, or embody, or reflect bad maxims, this version of the categorical imperative also does not locate the offense in the right place.

<sup>6</sup> W.D. Ross makes the same point in *The Right and the Good* (Oxford: Clarendon Press, 1930), pp. 28.

<sup>7</sup> To suppose otherwise is to make the same mistake as the disappointed student who complains to a particular teacher, "It's because of *you* that I've got a C minus average!"

be difficult to distinguish between my criticism and others, so let us consider a number of other criticisms in closer detail.<sup>8</sup>

### 1. *Laxity*

One familiar criticism of utilitarianism, in its treatment of persons, concerns its laxity. As a normative theory, utilitarianism is too lax: it permits actions against persons that are in fact impermissible. For example, Alan Donagan observes:

Act-utilitarianism has generally been put down as incredible on the ground that in certain circumstances it enjoins as duties what virtually everybody considers to be criminal. To employ a hackneyed example: it might well be the case that more good and less evil would result from your painlessly and undetectedly murdering your malicious, old and unhappy grandfather than from your forbearing to do so: he would be freed from his wretched existence; his children would be rejoiced by their inheritances and would no longer suffer from his mischief; and you might anticipate the reward promised to those who do good in secret. Nobody seriously doubts that a position with such a consequence is monstrous.<sup>9</sup>

Plausible as such a criticism may be, it is not my criticism, as I am allowing that, in the case of Mrs. V, the utilitarian *also* judges the camera crew's action impermissible.

### 2. *Injustice*

A related criticism of utilitarianism is not merely that it is lax, but that it is lax in a particular way, namely, in permitting *unjust* actions. John Rawls, e.g., contrasts his doctrine of "justice as fairness" with utilitarianism on precisely this point:

Every member of society is thought to have an inviolability founded on justice, or as some say, on natural right, which even the welfare of every one else cannot override. Justice denies that the loss of freedom for some is made right by a greater good shared by others. The reasoning which balances the gains and losses of different persons as if they were one person is excluded.<sup>10</sup>

Again, this may be plausible, but it is not my criticism, for the same reason as before *and* because, in any case, what was wrong with the camera crew's treatment of Mrs. V is not necessarily best described as *injustice*. (It is not obvious that there is a natural right, e.g., not to be filmed in distressing situations, or that Mrs. V was treated unfairly or inequitably.) This latter thought leads naturally enough to the thought that, whether or not they are unjust, some actions must never be done, which, in turn, leads to the issue of absolutism.

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<sup>8</sup> Obviously, some criticisms will not come into play here at all, e.g., the criticism that utilitarianism sets absurdly demanding standards in respect of famine relief.

<sup>9</sup> Alan Donagan, "Is There a Credible Form of Utilitarianism?" in W. Frankena and J. Granrose, eds., *Introductory Readings in Ethics* (Englewood Cliffs, NJ: Prentice Hall, 1974), pp. 165-171, at p. 166.

<sup>10</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard Belknap Press, 1971), p. 28.

### 3. *Absolutism*

According to the absolutism objection, some types of action, such as intentionally killing or punishing the innocent are absolutely wrong and must never be done, but utilitarianism cannot allow this, because it does not rule out any type of action, in advance of calculating their effect on global utility. Elizabeth Anscombe, e.g., expresses precisely this point when she fulminates, “But if someone really thinks, in advance, that it is open to question whether such an action as procuring the judicial execution of the innocent should be quite excluded from consideration – I do not want to argue with him; he shows a corrupt mind.”<sup>11</sup> Yet, even if we allow that filming and broadcasting the emotional collapse of an innocent bystander is another such type of action that is absolutely wrong, Anscombe’s criticism is not my criticism.

Again, this is partly because I am granting for the sake of argument that (contingently) such actions will never maximize utility, and therefore, will never be permissible according to utilitarianism. But also – and this is a rather different point – the critic who says that Mrs. V was wronged need not hold that such actions are never to be done. Such a critic may hold, e.g., W.D. Ross’s mixed deontological theory of obligation according to which the camera crew’s action was *prima facie* wrong (because it wronged Mrs. V, e.g., by harming her) but that, in those circumstances, the *prima facie* duty not to harm Mrs. V was outweighed by some other *prima facie* duty, say, of beneficence.<sup>12</sup> Such a critic may even hold a kind of “negative consequentialism” about wrong actions, such that our goal is to minimize the number of “wrongings” in the long run. This critic may allow that Mrs. V was wronged, but insist that, by wronging her, we avoid more or worse wrongings overall.

### 4. *Separateness of Persons*

Together, the above considerations suggest that the objection we are after cannot be a surface-level objection about what actions utilitarian does or does not permit, and that we need to go deeper. A deeper objection has been pressed by John Rawls, among others, to the effect that it is no mere coincidence that utilitarianism is susceptible to the criticisms expressed in (1) – (3). It is susceptible to these criticisms because of the very structure of utilitarian thinking, according to which:

...just as it is rational for one man to maximize the fulfillment of his system of desires, it is right for a society to maximize the net balance of satisfaction taken over all of its members.... On this conception of society, separate individuals are thought of as so many different lines along which rights and duties are to be assigned and scarce means of satisfaction

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<sup>11</sup> G.E.M. Anscombe, “Modern Moral Philosophy”, *Philosophy*, vol. 33, no. 1, 1958, pp. 16-7.

<sup>12</sup> Peter Geach criticizes Ross’s theory for not being absolutist on precisely these grounds: “This speciously strict doctrine leads in fact to quite laxist consequences....Sir David Ross explicitly tells us that on occasion the right act may be the judicial punishment of an innocent man ‘that the whole nation perish not’; for in this case the *prima facie* duty of consulting the general interest has proved more obligatory than the perfectly distinct *prima facie* duty of respecting the rights of those who have respected the rights of others. (We must charitably hope that for him the words of Caiaphas that he quotes just had the vaguely hallowed associations of a Bible text, and that he did not remember whose judicial murder was being counselled.)”. See his “Good and Evil”, *Analysis*, Vol. 17, No. 2 (1956), pp. 33-42, at p. 41.

allocated in accordance with rules so as to give the greatest fulfillment of wants....

He concludes that,

This view of social cooperation is the consequence of extending to society the principle of choice for one man, and then, to make this extension work, conflating all persons into one through the imaginative acts of the impartial sympathetic spectator. *Utilitarianism does not take seriously the distinction between persons.*<sup>13</sup>

This point is deeper, but it still seems not to be the criticism we are after. At best, it seems to be a favorable background for making our criticism, but not that criticism itself. For one thing, it seems almost a metaphysical point, while our concerns about the camera crew's treatment of Mrs. V had little to do with metaphysics. (Though it is a disputed matter of interpretation, I take Rawls to be doing more here than merely asserting that it is inappropriate to "extend to society the principle of choice for one man". He is also explaining *why* this rule is appropriate in the case of persons but not for societies. His explanation relies on the "metaphysical" point that persons are units that can balance trade-offs against each other in a single life, but societies are not such units.<sup>14</sup>) For another, the "separateness of persons" objection is meant as an explanation of why utilitarianism is prone to yield a certain kind of erroneous judgment, but, since I am granting for the sake of argument that utilitarianism does *not* yield that sort of judgment in this case, no such explanation is needed. Finally, it is worth noting that even if we *did* think that utilitarianism tended to yield such erroneous judgments, and even if we *did* want to explain that tendency, Rawls's point about individuals is no help because the problem could still arise if victims came in pairs or triplets and not as individuals!<sup>15</sup>

With this in mind, let us stay with criticisms of utilitarianism that focus on individual persons, but shift from those that concern the metaphysics of individuality to those that concern the *perspectives* of the persons in question.

### 5. Integrity and Agent-relativity

One such criticism concerns the phenomenon of agent-relativity. This phenomenon has been conceived of in various ways, but one conception of it emerges from discussions of integrity and cases such as Williams's "Jim and the Indians". In such cases, e.g., where an

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<sup>13</sup> Rawls, *op. cit.*, pp. 26. See also Robert Nozick on the justification of side constraints in *Anarchy, State and Utopia* (New York: Basic Books, 1974), pp. 32-3 (my emphasis).

<sup>14</sup> Even if this is not what Rawls meant, it is pretty clearly what Nozick meant: "Individually, we each sometimes choose to undergo some pain or sacrifice to avoid worse suffering later....Why not, *similarly*, hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall good? But there is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives..." and "The moral side constraints on what we may do, I claim, reflect the fact of our separate existences. They reflect the fact that no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall social good." See Nozick, *op. cit.*, pp. 32-3.

<sup>15</sup> That is, if we countenance the concept of "wronging", there is no reason to suppose that a larger unit, such as a family, could not be wronged, so Rawls's emphasis here on individuals is not exactly what is needed.

innocent bystander is forced to choose between killing one to save nineteen or allowing twenty to be killed by someone else, it appears that utility would be maximized by the agent overriding his own moral feelings in order to kill the one. Moreover, as has often been observed, if we move from simple utilitarianism to a more sophisticated version according to which such killings are intrinsically bad, it is still the case that the number of bad acts will be minimized by the agent overriding his own moral feelings in order to kill the one. Thomas Nagel has suggested that, given such cases, the only way to distinguish meaningfully between deontology and consequentialism is in terms of agent-relative reasons for action, which are "...not neutral reasons for everyone to bring it about that no one is maltreated, but relative reasons for each individual not to maltreat others himself, in his dealings with others."<sup>16</sup> Given their usual assumptions about value, reason and obligation, utilitarians cannot countenance such reasons, and the upshot of this is, in Williams's terms:

...to alienate [the agent] in a real sense from his actions and the source of his action in his own convictions. It is to make him into a channel between the input of everyone's projects, including his own, and an output of optimific decision; but this is to neglect the extent to which his actions and his decisions have to be seen as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus, in the most literal sense, an attack on his integrity.<sup>17</sup>

Many will agree with these sentiments, or at least be moved by Williams's rhetoric; unfortunately, it is irrelevant to the criticism we are groping for, because, as his own words make clear, Williams is concerned with the integrity of *agents* and, by extension, the relativity of reasons to *agents*, while we are concerned with the violation of persons *qua patients*.<sup>18, 19</sup>

#### 6. *Rights and Persons as Ends: first pass*

One obvious place to look for criticisms of utilitarianism and its treatment of persons *qua patients* is in discussions of its treatment of rights, since rights are first and foremost restrictions on what persons may do *to* other persons. They establish "zones of inviolability" protecting patients from agents, and may not be traded away, even in order to maximize some good. Utilitarianism, at least in its simpler versions, is famously supposed to be unable to admit such rights. Rawls, again, notes:

The striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfaction is distributed among

<sup>16</sup> Thomas Nagel, *The View from Nowhere* (New York: Oxford University Press, 1986), p. 165.

<sup>17</sup> Smart and Williams, *op. cit.*, pp. 116-7. To be accurate, Williams does not, in the passage quoted, invoke the concept of "agent-relativity" by name. The wording of the passage, however, does eloquently express the reasons why some deontologists insist on agent-relative reasons.

<sup>18</sup> It would be interesting to see whether Williams's argument could be extended to cover the integrity of persons *qua patients*, though I am not aware of any sustained examination of this possibility.

<sup>19</sup> That is, we are looking for a position that does justice to the "victim-centered" nature of this judgment. For a related view, see Jorge L.A. Garcia's account of "patient-centeredness" in "Interpersonal Virtues: Whose Interest Do They Serve?", *American Catholic Philosophical Quarterly*, vol. 71, 1997, pp. 31-60.



individuals any more than it matters, except indirectly, how one man distributes his satisfactions over time. The correct distribution in either case is that which yields the maximum fulfillment. Society must allocate its means of satisfaction whatever these are, rights and duties, opportunities and privileges and various forms of wealth, so as to achieve this maximum if it can. But in itself no distribution is better than another except that the more equal distribution is to be preferred to break ties. *It is true that certain common sense precepts of justice, particularly those which concern the protection of liberties and rights contradict this contention.*<sup>20</sup>

But if the objection here is that utilitarianism all too easily justifies actions, such as the filming of Mrs. V, that violate the rights of persons, then this is just another version of the laxness or injustice objections, and, like them, it is not the objection we are looking for. The same point, moreover, applies to that fraternal twin of the rights objection, i.e., Kant's second formulation of the categorical imperative, "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."<sup>21</sup> If this were interpreted as implying that the problem with utilitarianism is that it sometimes sanctions treating persons as mere means, then again it is not the objection we are looking for.<sup>22</sup> The objection to utilitarianism that we are looking for is a sort of "fugitive thought": we want to make a particular sort of judgment, that certain kinds of actions wrong persons or violate them, but that judgment can find no place to lay its head, on the clean, hard, well-lit surfaces of the utilitarian system.<sup>23</sup>

### 7. *Rights and Persons as Ends: second pass*

As soon as we put the point in this way, however, we can see how the "Rights and Persons as Ends Objection" can be restated so as to come closer to this fugitive thought. The problem with utilitarianism is not that it justifies rights violations, but that, conceptually speaking, it cannot countenance the idea of rights -- or their violations -- at all. After all, was Bentham not making a linguistic or conceptual point when he declared that, "Natural rights is simple *nonsense*: natural and imprescriptible rights, rhetorical

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<sup>20</sup> Rawls, *op. cit.*, p. 26 (my emphasis).

<sup>21</sup> Immanuel Kant, [1785] *The Foundations of the Metaphysics of Morals*, translated with an introduction, by Lewis White Beck (Indianapolis, IN: Bobbs-Merrill, 1959), p. 47.

<sup>22</sup> Admittedly, this interpretation of Kant is a bit of a stretch, though there are passages in Kant's work that, taken together, suggest it: "The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment.... Juridical (or judicial) punishment ... can never be administered merely as a means for promoting another good either with regard to the criminal himself or to any politically organized society; but must in all cases and exclusively be imposed only because the individual, on whom it is inflicted, has committed a crime. For a man ought not to be dealt with as a means subservient to the ends of another...." *Metaphysics of Morals*, VII, 139.

<sup>23</sup> The phrase "fugitive thought" was, I believe, coined by Philippa Foot in "Morality as a System of Hypothetical Imperatives", *Philosophical Review*, vol. 84, 1972, pp. 305-16, at p. 311. The term was made famous, however, by D.Z. Philips in "In Search of the Moral 'Must': Mrs. Foot's Fugitive Thought", *Philosophical Quarterly*, vol. 27, no. 107, 1977, pp. 140-57.

nonsense, -- nonsense upon stilts”?<sup>24</sup> The same point can be extended easily to talk of “persons as ends in themselves”, so here we have two related – and well-known – objections to utilitarianism:

- a. There is no room in the conceptual space of utilitarianism for positive judgments about the rights of persons.
- b. There is no room in the conceptual space of utilitarianism for positive judgments about persons as ends in themselves.

Surely, we are now closing in on the fugitive thought, the thing we wanted to say about the camera crew’s treatment of Mrs. V, but could not say, given utilitarianism’s limited conceptual resources. We may note that (a) and (b):

- are not judgments that utilitarianism is too lax or prone to injustice;
- are not metaphysical explanations of *why* utilitarianism is too lax or prone to injustice;
- apparently concern (individual) persons, especially persons *qua* patients rather than persons *qua* agents;
- allow us to say something that utilitarianism does not allow us to say, in that they give us a way of criticizing actions in terms that go beyond the failure to maximize utility.

The problem for me, given my goal of articulating a new criticism, is that objections (a) and (b) have been familiar in philosophy since the time of Kant. This is old hat.

Even though we are indeed rapidly closing in on our fugitive objection, I do not believe that we are there yet. Objections (a) and (b) are important and, in my view correct, but they are not precisely the same as my objection. They are not the same, because the judgments I want to make about the Flight 103 case, viz., “The camera crew wronged Mrs. V” or “The camera crew’s action violated Mrs. V” are not the same as either:

a\*. In filming Mrs. V during her emotional collapse, the camera crew treated Mrs. V as a mere means and not as an end in herself; or

b\*. The camera crew violated Mrs. V’s rights by filming her during her emotional collapse.

### *Rights and Wrongs*

Let us consider first, whether our fugitive thought may be the same as (b\*), the claim that Mrs. V’s rights were violated. According to the standard conception, rights are:

- abstract principles or rules or laws
- capable of finite formulation and at least implicitly general;

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<sup>24</sup> “Critique of the Doctrine of Natural, Inalienable Rights”, from Jeremy Bentham, *Anarchical Fallacies*, vol. 2 of Bowring (ed.), *Works*, 1843 (emphasis mine).

- distinct from the persons who bear them;
- strong trumps, i.e., they override other considerations (especially those of utility), cannot be traded away, and are such that we are justified in using force to protect or enforce them.

In saying that the camera crews wronged Mrs. V, are we necessarily invoking this sort of thing? I do not think that we are, for two reasons.

First, and as noted before, we need to be able to say which rights of Mrs. V were violated in those circumstances. The most plausible candidate is the right to privacy, but, as noted, it is not obvious that we have such a right, or, even if we have it, that *that* action was a violation of it. (As noted, the Lockerbie bombing was an international event, the airport was a public place and the camera crews took no liberties with her clothing, person or “personal space”. They simply turned their cameras on her, and broadcast what they saw.) It would be challenge, I think, to spell out any general principle of right that was plausible, applicable to Mrs. V and not *ad hoc*, but also that was violated in that situation by the actions of the camera crew.

Second, and again as noted above, to say that Mrs. V was wronged is not necessarily to make a claim as strong as rights claims normally are. For example, rights claims are not supposed to be “trumpable”, but the idea of wronging at the center of our judgment is not necessarily the basis of a non-overridable claim. It could be consistently held both that Mrs. V was wronged, and that such a wrong may be permissible as a necessary condition of minimizing such wrongs overall (though I am aware of no reason to suppose such in this case).

But even *if* there is such a particular right (not to be filmed for broadcast in such unusual circumstances) and even if it has been violated, I want to go further. I want to say that Mrs. V *herself* was violated, and that this fact is distinct from, and more basic than, the claim that *her rights* were violated. It is more basic in the sense that the former explains the latter, and not the other way round. But if that is so, then the “wronging” objection is more basic than the “rights objection”, and if it is more basic than the rights objection, it cannot be the same thing as the rights objection. It is not essential to my argument here, but we might even suppose that rights (or rights claims) are simply codifications of, or generalizations from, such claims about actions that wrong or violate individuals. (One advantage of such an idea is that it allows us to accommodate the inkling, felt by many, that rights are in some sense constructs, without embracing skepticism or eliminativism about rights.)

#### *Detour: Thickness*

In view of the above, we may be tempted to suppose the criticism we are after is merely a version of the familiar “thick concepts” criticism of utilitarianism developed by Bernard Williams, Philippa Foot and others. After all, our fugitive criticism faults utilitarianism for its impoverished ethical vocabulary, presses for a richer and more specific vocabulary that includes some idea of “violation”, and even conjectures that this more specific idea may be more basic or central than an abstract idea such as “rights”. Even so, it is not exactly the same thought as the thickness objection. For one thing, “violation” is not one of the thick terms standardly cited (such as “cruel”, “rude”, “cowardly” or “lie”). For another, “violation” does not have anything like the empirical content in virtue of which

thick terms are supposed to be “world-guided” in their application as well as action-guiding.<sup>25</sup>

### *Wrongings, Means and Ends*

Let us consider next, whether our fugitive thought may be the same thought as (a\*), the claim that in the camera crew treated Mrs. V as a mere means and not as an end in herself. It is of course a tricky business, because it is not clear what “being the same thought” amounts to here, and it quickly leads to issues in the philosophy of language of synonymy, concept identity, etc that are quite beyond this discussion. But with these reservations recorded, it still seems to me that what I am calling the fugitive thought, that, “The camera crew wronged Mrs. V” (or “The camera crew violated Mrs. V”) is not the same thought as the claim that they treated her as a means only.

One reason for suspecting that they are not the same thought is that this formulation of the categorical imperative presupposes a means/end model for understanding action, but we can judge actions as having violated persons without being committed to this substantive philosophical thesis about the nature of action. Moreover, while some actions naturally fit the means/end model, it is not obvious that all do; purely “expressive” actions, e.g., arguably do not. When I chop firewood, it makes sense to say that I perform action A<sub>1</sub> (the chopping) with tool T<sub>1</sub> (the axe) as a means to bring about end E<sub>1</sub> (the having of firewood), where E<sub>1</sub> is notionally distinct from both A<sub>1</sub> and T<sub>1</sub>. But when I kiss my baby, it is at best strained to think of it as my performing action A<sub>2</sub> (the kissing) with tools T<sub>2</sub> (my lips, her cheek) as a means for bringing about end E<sub>2</sub> (the satisfaction of a desire to express feelings of affection), where E<sub>2</sub> is distinct from both A<sub>2</sub> and T<sub>2</sub>. In particular, it is unnatural to think of my kiss is a means to bringing about some end distinct from the kiss itself. The kiss *expresses* something, but it does not *bring about* anything, except accidentally.<sup>26</sup> If this is correct and some actions are better understood in terms of the expressive model than in terms of the means/end model, and if some primarily expressive actions may wrong or violate persons, then we will want a way of understanding or judging such actions that does not commit us to the means/end model.<sup>27</sup>

Another reason for suspecting that they are not the same thought emerges when we ask what it means to “treat someone as a mere means”. The clearest explanation I know of this idea is Onora O’Neill’s gloss that “To use someone as a *mere means* is to involve them in a scheme of action *to which they could not in principle consent*.”<sup>28</sup> It is not clear, however, whether it fits the case of Mrs. V, because it is not clear that filming someone collapsing in hysteria in a public place is to involve them in a scheme of action

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<sup>25</sup> See, e.g., Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana, 1985), pp. 140-1, and Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge, MA: Harvard University Press, 2002), pp. 34-43.

<sup>26</sup> If the baby has a messy face after her dinner, my kissing her may accidentally bring it about that I transfer tomato sauce from her face to mine.

<sup>27</sup> Even so, these characterizations of actions need not be mutually exclusive. The camera crew’s treatment of Mrs. V – and what is morally wrong with it – can be understood in terms of both the means/end model and the expressive model.

<sup>28</sup> From “Ending World Hunger”, in Tom Regan, ed., *Matters of Life and Death* (New York: McGraw-Hill, 1986), reprinted in M. Timmons, ed., *Conduct and Character: Readings in Moral Theory*, 2nd ed., (Belmont, CA: Wadsworth, 1995), pp. 165-70, at p. 167.

to which they could not possibly consent. Even if most normal people would be *unlikely* to consent to being filmed in such circumstances, it is hard to rule out consent to such *in principle*, via the same tidy *a priori* arguments as, e.g., consent to fraud or coercion.<sup>29</sup> Moreover, even if O'Neill's gloss does fit the case of Mrs. V, there are plenty of cases that it doesn't fit. A quaint way of putting the point would be to say that "involving someone in a scheme of action to which they cannot in principle consent" seems not to be a necessary condition of wrong-doing. It is now a commonplace that babies, senile persons, persons in persistent vegetative states, the dead and even animals can be violated or wronged by some actions – and not wronged by others -- when they cannot give or withhold consent to anything, even in principle.

Finally, even if I am wrong about this and we conclude that our judgment that the camera crew wronged Mrs. V is the same judgment as (*a\**) "*In filming Mrs. V during her emotional collapse, the camera crew involved Mrs. V in a scheme of action to which she could not in principle consent*", we have not yet arrived at the precisely the criticism that I want to make until we take a further step and observe that *this* judgment can find no home in utilitarianism. This is not how the categorical imperative has normally been understood, but this is the criticism I want to make. It is one thing to have the materials to make an objection; it is another thing actually to make it.

#### 8. McNaughton's Objection

The closest thing to my objection that I have seen made in the philosophical literature is found in an extended passage from David McNaughton. In discussing consequentialist criticisms of W.D. Ross's pluralism about duty, McNaughton asks:

What about the duty not to harm? Is this a duty which consequentialism could accommodate? It depends on how we understand that duty, and here Ross is not as clear as he might be. He claims that it is wrong to inflict a certain level of harm on someone in order to produce a similar, or slightly larger, benefit for someone else. But this might be because bringing about a harm of a certain sort produces more disvalue than failing to give a benefit of a similar sort. Generally speaking, taking away something someone already has seems far worse than failing to give them that thing when they lack it. If that is so, then consequentialism can accommodate the thought by simply recognizing the greater disvalue in depriving someone of an existing good.

But there seems to be more to the duty not to harm than this. We tend to think it wrong to inflict a harm directly on some (innocent) person, even to prevent a similar harm being perpetrated against another innocent person. This suggests, though the issue is disputed, that the fact that the act would involve my directly harming another person is a reason for me not to do it, even if the disvalue would be the same whatever I do (since if I refrain from harming, someone else will be harmed). There are things we owe it to others not to do to them, even to prevent other people doing similar

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<sup>29</sup> This is similar to the familiar difficulty in arriving at Kant's preferred verdicts about the maxims in particular practical cases via the *a priori* application of the categorical imperative.

awful things. Clearly the consequentialist could not allow the thought that it would be *I*, rather than someone else, doing the harming to be a morally significant reason. There is nothing, of course, to prevent a consequentialist claiming, as before, that a policy of trying to avoid harming people oneself might have beneficial long term consequences. And, as before, *this appears to fail to capture the intuition that somehow I owe it directly to my potential victim not to harm him.*<sup>30</sup>

Here, we come even closer to the objection I want to make, as:

- This is an objection to utilitarianism (or consequentialism, as McNaughton presents it);
- The objection is that utilitarianism cannot accommodate a particular thought;
- That thought concerns the harming of persons (which is close to what I am calling “wronging” or “violating”);
- The thought is that it may be wrong for me to harm my victim even if doing so would maximize utility.
- We are not required to understand the wrongness of such actions in terms of the victim’s rights, or treating the victim as a mere means.

Despite these similarities (and the suggestion that “I owe it directly to my potential victim not to harm him”), some differences remain between McNaughton’s objection and mine.<sup>31</sup> On the one hand, McNaughton’s claim that “There are things we owe it to others not to do to them, even to prevent other people doing similar awful things” suggests that his main point is that consequentialism cannot accommodate absolutism (the idea that there are some things that simply ought never to be done). On the other hand, McNaughton’s claim that “...the consequentialist could not allow the thought that it would be *I, rather than someone else*, doing the harming to be a morally significant reason” suggests that his main point is agent-relativity (i.e., the fact that action A would harm the victim could be a reason for me not to do A, even when this would not reduce the number of harms, or amount of harm, overall). As I have already argued, however, the judgment that *to broadcast films of Mrs. V’s emotional collapse is to wrong Mrs. V* is not the same as either the thought that the camera crews have agent-relative reasons not to act broadcast films of her collapse, or the thought that *Camera crews ought never to do the sort of thing they did to Mrs. V*. Indeed, the fugitive thought we are after seems to lie between these two claims: it is the thought that, whether or not filming persons in a state of emotional collapse is the sort of act that ought never to be done, such an action wrongs or violates the person(s) in question, and this fact has at least as much to with them as it has to do with us.<sup>32, 33</sup>

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<sup>30</sup> David McNaughton, “Intuitionism”, in Hugh LaFollette, ed., *Blackwell's Guide to Ethical Theory* (Blackwell Publishers, 2000), pp. 269-87, at p. 278 (my emphasis).

<sup>31</sup> I shall set aside the question of whether all wronging is harming.

<sup>32</sup> McNaughton comes close to this last thought when he echoes Nagel’s point that we owe it to our potential victims not to harm them, but he does not pursue it.

<sup>33</sup> I suspect that the difference between McNaughton and me boils down to this: I am criticizing utilitarianism in particular and not consequentialism in general. I am arguing for retaining “wronging” as a category, while admitting that such wrongings might in theory be permitted (on, say, consequentialist

### *Conclusion*

This is what I have been calling our fugitive thought: that, in doing what they did, the camera crews wronged Mrs. V, and they wronged her by *violating* her. This thought has seemed “fugitive” in two senses: first, in the sense that there is no place for it in the utilitarian system (though perhaps “refugee” or “homeless” might be more apt terms for that sense). In a second sense, it is fugitive in that it has proved elusive and difficult to find it explicitly articulated in the philosophical literature criticizing utilitarianism. Yet perhaps I have exaggerated the novelty or uniqueness of my objection, for it resembles criticisms of utilitarianism already voiced by many philosophers, including Bernard Williams. I began this essay -- unkindly perhaps -- by calling attention to a remark by Williams that now appears silly. For the sake of even-handedness, then, let us conclude with a less silly point that he makes a few lines earlier. There, he points up utilitarianism’s “simple-mindedness”, which he describes as:

...not at all the same thing as lack of intellectual sophistication: utilitarianism, both in theory and practice, is alarmingly good at combining technical complexity with simplemindedness. Nor is it the same as simple-heartedness, which it is at least possible (with something of an effort and in private connexions) to regard as a virtue. *Simple-mindedness consists in having too few thoughts and feelings to match the world as it really is.*<sup>34</sup>

I believe that Williams’s insight here is correct; indeed, my whole argument may be seen as another illustration of the idea that the utilitarian has too few thoughts. If I am right, one of the utilitarian’s missing thoughts is that some actions violate some people.<sup>35</sup>

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grounds). McNaughton, on the other hand, wants to articulate how consequentialism (including objective list versions) cannot accommodate agent-centered restrictions.

<sup>34</sup> Bernard Williams, in Smart and Williams, *op. cit.*, p. 149 (emphasis mine).

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