The Loop Case and Kamm's Doctrine of Triple Effect

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Abstract

Judith Jarvis Thomson's Loop Case is particularly significant in normative ethics because it calls into question the validity of the intuitively plausible Doctrine of Double Effect, according to which there is a significant difference between harm that is intended and harm that is merely foreseen and not intended. Recently, Frances Kamm has argued that what she calls the Doctrine of Triple Effect (DTE), which draws a distinction between acting because-of and acting in-order-to, can account for our judgment about the Loop Case. In this paper, I first argue that even if the distinction drawn by DTE can be sustained, it does not seem to apply to the Loop Case. Moreover, I question whether this distinction has any normative significance. The upshot is that I am skeptical that DTE can explain our judgment about the Loop Case.

The Loop Case and Kamm's Doctrine of Triple Effect

I.

Most nonconsequentialists intuitively believe that it is morally permissible to redirect the

trolley in the

>   **Original Trolley Case:** A runaway trolley is headed toward five people who will
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>   be killed unless something is done. The trolley, however, can be redirected onto
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>   another track where an innocent bystander sits, whereby the five would be saved
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>   but the one would be killed.

At the same time, most nonconsequentialists intuitively believe that it would be

impermissible to do the following:

>   **Push Case:** A runaway trolley is headed toward five people who will be killed
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>   unless something is done. We can push an innocent bystander in front of the
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>   trolley, which would be stopped by hitting the bystander, thereby saving the five
>
>   but killing the one.

A principle that seems neatly to capture the intuitive judgments in these cases is the

>   **Doctrine of Double of Effect (DDE):** There is a moral constraint on intending
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>   evil (such as harm), even when the evil will be used as a means to a greater good.
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>   However, we may be permitted to employ neutral or good means to promote a
>
>   greater good, even though we foresee the same evil as a side effect, if (a) the good
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>   is proportionate to the evil, and (b) there is no better way to achieve this good.

According to DDE, because we merely foresee the death of the one in Original Trolley

but do not intend him to be hit as a means to saving the five, it is permissible for us to

redirect the trolley. But in Push, because we intend the one be hit by the trolley as a means to stopping it from hitting the five, it is not permissible for us to push him into the trolley's path.

Judith Jarvis Thomson has famously challenged DDE on the basis of the

Loop Case: A trolley is headed toward five people and can be redirected onto another track where one innocent bystander sits. However, the track loops back toward the five. Hence, if it were not the case that the trolley would hit the one and grind to a halt, the trolley would go around and kill the five.[1]

As Thomson explains, in Loop, as in Push, the hitting of the one is causally required to stop the trolley to save the five. Also, Thomson notes that if we redirect the trolley, it seems that we would be doing so with the intention of hitting the one.[2] If so, DDE would forbid our redirecting the trolley in Loop. However, according to Thomson, intuitively it seems permissible to redirect the trolley in Loop. As Thomson asks, what difference can an extra bit of track make?[3] In light of this intuitive judgment, Thomson argues that we should give up DDE.

More recently, Frances Kamm has argued that one can modify DDE so as to accommodate Loop.[4] In particular, Kamm argues that what she calls the Doctrine of Triple Effect (DTE) can explain the permissibility of redirecting the trolley in Loop. To supplement the intending/foreseeing distinction of DDE, DTE distinguishes further between doing something *because* an effect will occur and doing it *in order* that it occurs,

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[1] See, e.g., Thompson, J. J. "The Trolley Problem." The Yale Law Journal 94 (1985): 1395-415. It might be worthwhile stipulating that if the five were not present, the trolley would not go around and hit the one, but would carry on harmless down the track.
[2] Thompson, "The Trolley Problem," p. 1403.
[3] Thompson, "The Trolley Problem," p. 1403.
[4] See, e.g., Kamm, F. M. Intricate Ethics: Rights, Responsibilities, and Permissible Harm. New York: Oxford University Press, 2007.

whereby doing something because an effect will occur need not imply that one intends that the effect occurs. To motivate this distinction, Kamm offers the

> **Party Case:** We intend to throw a party in order to have fun. We foresee though that this will result in a big mess, and we will not have a party if we will be left to clean up that mess by ourselves. However, we foresee that if we throw the party, our friends will feel indebted to us and this will cause them to help clean up. Hence, we have the party because we believe that our friends will feel indebted and because we will not have a mess to clean up. However, we do not give the party in order to make our friends feel indebted or to clean up for us (p. 103).[5]

Using the because/in-order-to distinction, Kamm argues that in Loop, when we redirect the trolley, we likewise act because we believe that the one will be hit, but not in order that the one is hit. This means, according to Kamm, that we do not intend that the one is hit. Consequently, Kamm believes that DTE accounts for Thomson's intuition that redirecting the trolley in Loop is permissible.

In this paper, I question whether DTE applies to Loop, even if it were a valid principle, and whether DTE is in fact a valid principle.[6] I begin by examining more closely why Kamm believes that DTE is applicable to Loop.

II.

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[5] Unless otherwise specified, all references to Kamm refer to *Intricate Ethics*.
[6] For some other recent discussions of Loop and Kamm's ethics generally, see, e.g., Norcross, A. "Off Her Trolley? Frances Kamm and the Metaphysics of Morality." Utilitas 20, no. 1 (2008): 65-80; Richardson, H. "Discerning Subordination and Inviolability: A Comment on Kamm's Intricate Ethics." Utilitas 20, no. 1 (2008): 81-91; Otsuka, M. "Double Effect, Triple Effect and the Trolley Problem: Squaring the Circle in Looping Cases." Utilitas 20, no. 1 (2008): 92-110.

Kamm's analysis of Loop can be divided into four steps. The first is her general account

of the structure of Loop. As Kamm sees Loop, the initial problem facing the five that

prompts our intervention is the trolley's heading toward them from one direction (p. 94).

When we redirect the trolley, according to Kamm, we create a second, new problem,

which is the trolley's heading toward the five from a different direction.

      The second step is her introduction of the because/in-order-to distinction, using

Party as an example. On the basis of this distinction, Kamm also rejects a common test

for the presence of an intention, known as the

> **Counterfactual Test**: If we decline to perform an act (e.g. redirect the trolley)
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> because the act would not bring about the effect (e.g. hitting a bystander), this
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> means that we intended to produce the effect.

According to Kamm, if we do an act (e.g. give a party) because we believe that it will

have a certain effect (e.g. inducing feelings of indebtedness), then we would not do that

act if it would not have that effect. We can thus satisfy the Counterfactual Test without

intending the effect, which shows the test to be inadequate. If this is right, Kamm argues,

this test cannot be used to show that we intend to hit the bystander in Loop.

      In the third step of her analysis of Loop, Kamm appeals instead to Michael

Bratman's test for intention, which, as Kamm interprets it, has three components:

> 1) if we intend to bring about X, then we seek means to accomplish the end of
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> bringing it about.
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> 2) if we intend to bring about X, then we pursue X. This means that if one way
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> fails to produce X, we would adopt another way.

3) if we intend to bring about X, and our intentions should be consistent in so far as we are rational, then we will filter out intentions that conflict with intending X. Kamm argues that we do not meet these conditions in Loop. For instance, she claims that we fail to meet 1), because we do not survey the field for various ways of hitting the one. Instead, according to Kamm, we only "notice that what we must do to accomplish one of our aims, that is, stopping the trolley from hitting the five from the first direction (that is, from the front), will also, *without our doing anything extra,* cause the one to be hit" (pp. 96-97).

Moreover, we fail to meet 2), according to Kamm, because in Loop, we need not "be committed to hitting the one by other means if the hitting fails to come about" (p. 97). To support this claim, Kamm offers the

> **Extra Push Case:** Suppose the redirected trolley would jump over the one person on the track and loop back toward the five. We need not be committed to giving the trolley an extra push, which would be unnecessary to get the trolley away from hitting the five from the front, but which would be necessary to get the trolley to hit the one person, supposing that hitting the one is what is causally necessary to prevent the trolley's jumping over him and looping back toward the five (p. 97).

Kamm argues that if we give the extra push in Extra Push, then we would be doing something that was undertaken especially to accomplish hitting the one, which would clearly involve intending to hit the one. However, so she argues, in Loop we need not be willing or committed to give the extra push. This suggests, according to Kamm, that we do not intend to hit the one.

Furthermore, we fail to meet 3), Kamm argues, since "it is consistent for someone who redirects the trolley because he believes that it will hit the one to then try to rescue the one from being hit" (p. 98). If so, and if intending to rescue the one is inconsistent with intending to hit the one, then, according to Kamm, this would show that we did not intend to hit the one. To motivate this idea, Kamm proposes that when we redirect the trolley in Loop, we may be thinking the following:

> We will redirect the trolley and then try to push the one out of the way. For if we have an opportunity to save the one and do not do so, we would be intending his being hit. If we fail to rescue the one, we still get the advantage of the five's being saved because the one will be hit. If we succeed in rescuing the one, the five are no worse off and they had some chance of being saved (p. 98).

According to Kamm, if these are our thoughts in Loop, then we can have the intention to rescue the one, and thus need not intend to hit him.

In the fourth step of her analysis of Loop, Kamm seeks to justify the moral significance of the because-of/in-order-to distinction. As far as I can tell, she suggests that this distinction can be justified (or at least supported) by the distinction between primary and secondary reasons for action.[7] Although she does not spell it out, she appears to be claiming that one intends to bring about X, if and only if X is one's primary reason for action. To motivate this idea, Kamm points out that in Party the primary reason for giving the party is to have fun. The secondary reason is that the undesirable effect of giving the party can be taken care of by the foreseen evil (our friends' feeling indebted) that we produce. As Kamm says, "The bad effect . . . defeats the defeaters of [our]

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[7] Kamm says that the primary/secondary reason distinction is "another way of understanding the cases I discussed" (p. 102).

primary reason, and so maintain the sufficiency of [our] primary . . . reason," but it is

"not, however, [our] goal in action to produce what will defeat the defeaters of [our]

goal" (p. 102).

By analogy, in Loop, the primary reason for redirecting the trolley is to prevent

the five from being hit in the front. The secondary reason is that the undesirable effect of

redirecting it can be taken care of by the foreseen evil of hitting the one. Following

Kamm's reasoning, since our goal in redirecting the trolley is to protect the five from a

frontal collision with the trolley, not to produce what will "defeat the defeaters" of that

goal, our primary reason for acting is not to hit the one. Therefore, we do not intend to

hit the one.

III.

While the distinction between acting because-of and in-order-to may be clear in some

contexts, it is harder to draw in Loop than in Party. In Party, it seems plausible that the

agent did not throw the party in order to make her friends feel indebted. This is because

one can tell a plausible story in which the friends' indebtedness is not a means to the

agent's end in throwing a party – to have fun – but a means of preventing the mess from

spoiling that fun.[8] In Kamm's terms, the guest's indebtedness need not serve the agent's

end in throwing the party – to have fun – but may only serve to defeat a defeater of that

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[8] It might be worth mentioning that it is hardly a conceptual truth that one could not throw a party in order to make someone else feel indebted. For example, consider the

Election Party Case: Suppose you are running to be elected to the board of your local country club. You could throw a party in order that your friends feel indebted and would thereby vote for you in the upcoming election.

end – the mess. As such, it would only be a secondary, not a primary, reason for her action.

Kamm tries to make the same distinction in Loop by claiming that the agent's initial end in diverting the trolley is to stop it from hitting the five <u>from the front</u>, an objective that would be defeated – deprived of its value – if the trolley hits the five <u>from the back</u>, as it would do in Loop without the convenient presence of the one.[9] But unlike Party in which one can tell a plausible story in which the friends' indebtedness is not a means to the agent's end to have fun, it simply seems implausible that the agent's end is "preventing the trolley from hitting the five <u>from the front</u>". The agent in Loop has the same reason to prevent the trolley from hitting the five from the back as from the front. The former would be as lethal as the latter, and could even occur earlier than the latter. It seems therefore that on any plausible way of individuating ends and threats to them, the agent's end is to prevent the trolley from hitting the five, *simpliciter*.

In addition, Kamm's appeal to Bratman's conditions for intention is problematic. In particular, Bratman's first two conditions, as Kamm interprets them, are too strong, excluding some clear-cut cases of intending.

Let's begin with the first condition: if we intend to bring about X, then we seek means to accomplish the end of bringing it about. Consider the following:

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[9] Kamm addresses the question of why the problems should be differentiated this way by treating it as a question of whether different threats must have different objects doing the threatening. She responds that Loop "is the same, for moral purposes," as

> **Wagon**: The trolley is headed toward killing the five. We divert it and, as it goes on the side track, it stops. But we know that it will stop on a button whose depression will cause a wagon on the side track to be set in motion. The wagon will head around the loop toward killing the five, but it will be stopped by hitting one person on the side track (pp. 94-95).

But the similarity of Loop and Wagon for moral purposes, which let us assume for the sake of argument, may cut either way: It may be taken to show, as Kamm intends, that a second threatening object isn't

> **Mortal Enemy Case:** At a party, we notice by chance that we could kill our
> mortal enemy, who has asked us to pass him a tray of nuts. Unbeknownst to him,
> the tray contains nuts to which he is deathly allergic. We pass the tray at his
> request. Previously, we had no intention of killing our enemy.

As in Loop, we do not survey the field for various ways of causing the harm. In Mortal
Enemy, we merely observe that what party etiquette requires us to do – pass our enemy
the nuts at his request – will also, *without our doing anything extra,* cause him to die.
Nevertheless, it seems clear that when passing him the nuts, we intend to kill him.

Bratman's second condition, as Kamm interprets it, is also too strong. We can
intend to bring about X without its being the case that we would adopt other ways of
bringing about X should one way fail to produce it. Consider

> **Mortal Enemy Case II:** Everything is the same as Mortal Enemy. Further,
> suppose that if our enemy decides not to eat the nuts, for whatever reason, we
> would not try to kill him by other means.

It should be clear that in Mortal Enemy II, we still intend to kill our enemy even though
we are not committed to killing him by other means if he decides not to eat the nuts. If so,
Mortal Enemy II shows that one can intend to bring about X without being committed to
trying again – without satisfying Bratman's second condition. Just as we can intend to
kill our enemy without surveying possible means or being committed trying again, we
can intend to hit the one in Loop without such a survey or commitment.

IV.

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required for there to be a second threat, since Loop is morally like Wagon. But it may also be taken to show
that a second threatening object need not create a second threat, since Wagon is morally like Loop.

Moreover, even if the because-of/in-order-to distinction, and the corresponding distinction between primary and secondary reasons, could be applied to Loop, it is questionable whether these distinctions are normatively significant. In particular, don't we use people as mere means in cases where we cause them evil not in order to bring about a greater good, but only in order to defeat a defeater of that good?

Even in Party, where the because-of/in-order-to distinction is easier to draw and where our friends would benefit from the party, this seems to be the case. To be sure, our end in Party is in part the fun our friends will share, and we believe their fun will outweigh their feelings of indebtedness and their burden of cleaning up. Nevertheless, in relying on their feelings and efforts for the success of our plan, we seem to be manipulating them, to take advantage of their sense of social propriety, even if we do so in part for their good. That is, the success of our plan seems to depend on knowingly doing something to induce feelings of indebtedness in our guests, something that we perhaps as good hosts, and certainly as friends, should not do. Indeed, it would seem more respectful if we had asked them explicitly to help with the clean-up.

To make the problem more vivid, consider

> **Dinner Case:** We want to have dinner with a friend at a nice restaurant in order to have a good time with our friend. We foresee, however, that dinner will be very expensive, and we would not arrange it if we expect to have to pay. But we also foresee that our friend, who is extremely wealthy, will be so happy to be invited that he will insist on paying.

Similar to Party, we have the dinner at the restaurant because we believe that our friend will pay, but we do not arrange the dinner in order to get him to pay. Our primary reason

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for the invitation is not to cause our friend to lose money, but to have a good time with our friend. We nevertheless seem to manipulate our friend, to take advantage of his wealth. It might have been more respectful to him, if perhaps less likely to succeed, to be upfront about the expected arrangements; to invite him to take us out to dinner.

In response to the idea that we are taking advantage of our friends in Party, Kamm explains that our guests would make us worse off than we would be without the party (as the mess they produce overrides the fun for us): "Hence, when they serve [our] interests, they merely eliminate the threat of the mess they themselves present to [us]. This is unlike improving [our] position from what it would be without their presence" (p. 103). But arguably, this misses the point of friendship and further suggests that in Party, we are in fact taking advantage of our friends. In friendship, we do not just aim to break even, so to speak. We often undertake additional burdens for the sake of the friendship.

Kamm also argues that we do not treat the one as "available" for our purposes, because we may refuse to do anything else to him in support of our primary or secondary reasons for acting: "we need not be willing to give the extra push in the Extra Push Case" (p. 103). But our unwillingness to give the extra push in Extra Push does not show that we are not taking advantage of our friend. Consider

> **Dinner Case II:** Everything is the same as Dinner, except that we have agreed
> that we will take the bill when it comes, and will not do anything to induce our
> friend to pay it, such as remarking on its size. Moreover, if our friend insists on
> paying, we will initially refuse, giving him ample opportunity to change his mind.

Just because we are willing to take a risk of getting stuck with the bill does not mean that we do not regard our friend as a means paying the bill (that is, as a walking check book).

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While it is not clear whether a person can be treated as a mere means by acts whose primary reason would also benefit the person in some sense, our manipulation of our friend still seems disrespectful in these circumstances.

We can make analogous points regarding Loop. Even if one grants that in Loop, we are redirecting the trolley because the one will be hit, but not in order to hit the one, it seems that we are nevertheless taking advantage of the one's being on the track. This seems especially the case, when, as in Loop, it is not even in part <u>their</u> good we seek to achieve. If we treat the one as available for our purposes in harming him to achieve our ends, aren't we treating him as available for our purposes in harming him to defeat a threat to the achievement of our ends? The fact that we may also be committed from the outset to preventing the very evil we set in motion serves at best to mitigate our offense.

Here it is worth making a note about the debate between Warren Quinn and Kamm, on which the previous discussion is based.[10] Quinn has distinguished between harmful direct agency and harmful indirect agency. The former involves treating other people as available for our purpose in a way that is harmful to them (without their consent); whereas the latter does not involve such intention.[11] Kamm has argued that Loop and Party do not count as treating people as available for our purpose in Quinn's sense of harmful direct agency, because of our reluctance to act in Extra Push. I have provided some reasons to doubt this judgment based on Dinner II, and I have argued that Party might also fall under Quinn's harmful direct agency category. Here it is worth noting that Quinn may be able to respond to Kamm in another way. In particular, Kamm seems to assume that Quinn's distinction between harmful direct and indirect agency

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[10] I would like to thank an anonymous reviewer for suggesting the following point.

yields as output judgments about permissibility or impermissibility. As Kamm says, "If Quinn's explanation predicts these acts are wrong, I suggest that would show his explanation is wrong" (p. 103). However, Quinn has suggested that harmful direct agency might just demand "more offsetting benefit as a minimum justification for choices of one sort than for equally harmful choices of another sort."[12] If so, for Quinn, there might be cases of harmful direct agency that are permissible nonetheless, and Party may well be one such case.

V.

Kamm has argued that DTE, that is, the distinction between acting because-of and in-order-to, can explain the permissibility of redirecting the trolley toward the one in Loop. In this paper, I argued that even if this distinction can be sustained, it does not seem to apply to Loop. Moreover, I questioned whether this distinction has any normative significance. The upshot is that I am skeptical that the permissibility of Loop can be justified by DTE.[13]

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[11] Quinn, W. "Actions, Intentions, and Consequences: The Doctrine of Double Effect." Philosophy and Public Affairs 18, no. 4 (1989): 334-51, p. 343.

[12] Quinn, W. "Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing." Philosophical Review 98, no. 3 (1989): 287-312, p. 288.