

Trolleys and Transplants: Derailing the Distinction Between Doing and Allowing

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Two key elements in Judith Jarvis Thomson's most recent response to the famed Trolley Problem produce a tension that threatens to undermine her account. First, in a reversal of part of her 1985 position, Thomson now argues that a bystander is not permitted to divert a threat. Second, her use of the Doctrine of Doing and Allowing (DDA) to explain intuitions about the permissibility of threat diversion conflicts with her constraint of an agent's available options to the present tense, which is designed to prevent past bad acts from justifying bad acts in the present. I contend that the conflict between DDA and the tense constraint creates an inconsistency in Thomson's current position and supports the conclusion that no one, including the trolley driver, is permitted to turn the trolley. In order to resolve this conflict, Thomson must either abandon one of the core features of her explanation or reject a fundamental intuition driving the Trolley Problem, that the driver may divert the trolley to save lives.

Two key elements of Judith Jarvis Thomson's 1985 and 2008 responses to the famous Trolley Problem produce a tension that threatens to undermine her account.¹ In order to explain intuitions about the permissibility of threat diversion, Thomson appeals to the Doctrine of Doing and Allowing (DDA), according to which it is more objectionable to do harm than to allow it to be done. Thomson also endorses what I call the Present Choice Constraint (PCC), which is designed to place limits on the circumstances under which threat diversion is permissible, in order to prevent past bad acts from justifying bad acts in the present. I contend that a conflict between DDA and PCC renders Thomson's current position on the Trolley Problem untenable. In order to resolve this conflict, Thomson must either abandon one of the core features of her explanation or reject a fundamental intuition driving the Trolley Problem (an intuition Thomson shares) that the driver may divert the trolley to save lives.

To demonstrate the difficulty, I first explore Thomson's position on the Trolley Problem, contrasting her 1985 and 2008 accounts, both of which appeal to DDA understood in terms of positive and negative rights to explain why an agent may

¹ Judith Jarvis Thomson, 'The Trolley Problem', *The Yale Law Journal*, 94:6 (1985), pp. 1395-1415; 'Turning the Trolley', *Philosophy & Public Affairs*, 36:4 (2008), pp. 359-374.

sometimes kill in the process of diverting a threat in order to reduce harm. Next, I explain why the lack of clear criteria to distinguish killing from letting die creates a significant problem for Thomson's current position. The main claim here is that there appears to be no morally relevant feature that can be used to distinguish between killing and letting die across versions of the Trolley Problem. Not only is DDA not doing the important explanatory work in these cases, but, I contend, it conflicts with another of Thomson's principles, namely PCC. This in turn prevents her account from accommodating the very intuitions it was designed to explain. The conclusion is that Thomson must either sacrifice a key intuition motivating her account and claim that the driver of the trolley may not divert it in order to save lives, or let go of DDA and seek another means of support for her intuition.

The Trolley Problem(s)

First introduced by Philippa Foot, the Trolley Problem has been revised and extensively explored by Thomson in defense of DDA, a doctrine that holds that doing harm is more objectionable than allowing harm to be done.² There have been many variations on the Trolley case, but the simplest remains the most problematic. In her well-known article from 1985, 'The Trolley Problem', Thomson considered the original case and a variation thereon, which are summarized as follows:

Trolley Driver: As a trolley Driver rounds a bend, driving through a steep point in a valley, he sees five people on the track ahead, who cannot get off the tracks in time. As he applies the brakes to stop the trolley he realizes they have failed. He sees an inactive spur of track to the right onto which he could turn the trolley to avoid hitting the five, but alas, there is someone stuck on that track too. His choices are to allow the trolley to continue forward, hitting the five who will surely not survive, or turn the trolley onto the spur of track, hitting the one, who will also not survive. Is Driver permitted to turn the trolley?

Bystander: The situation above is unfolding before an otherwise uninvolved Bystander who happens to be in front of a track switch. Driver has fainted at the shock of the impending disaster, and Bystander is the only one with the ability to divert the trolley. Bystander has the option to do nothing and allow the trolley to hit the five, or pull the switch and divert the trolley toward the one. Is Bystander permitted to turn the trolley?

Thomson then agreed with Foot that if in each of the above two cases, there are only the two specified options, Driver is permitted to turn the trolley, according to the *Killing Five*

² Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect', in Philippa Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (Berkeley: University of California Press, 1978), pp. 19-32.

vs. Killing One Principle, which states: 'A must not kill five if he can instead kill one.'³ She also concluded that Bystander may pull the switch to divert the trolley, killing the one and sparing the five. Furthermore, Thomson argued that the distinction between doing harm and allowing it to be done can account for intuitions that, when faced with a similar dilemma, prohibit a surgeon from harvesting the organs of one person in order to save five. Consider this summary of Thomson's case:

Original Surgeon: A brilliant Surgeon, who is superbly adept at performing organ transplants, has five patients suffering from organ failure. Two patients each need a lung, two a kidney, and one needs a heart. If they do not receive the proper organs today, they will die. A young man with the correct blood type enters the clinic and, upon being informed of the situation, politely declines to donate his organs. Is Surgeon permitted to take the man's organs to save the five?

Intuitively, Surgeon is not permitted to take the organs of the one in order to save the five. However, the question then becomes: if Driver may turn the trolley, why may not Surgeon take the organs? What is the morally relevant difference between the two cases? Foot concluded that while Driver is *responsible for the threat* posed to the five and so is faced with killing them, Surgeon is not responsible and would merely allow them to die by failing to operate.⁴ In accordance with the *Letting Five Die vs. Killing One Principle*, which states that A must let five die if saving them requires killing B,⁵ Foot concluded that Surgeon must not perform the transplant. Thomson argued that although this is an attractive solution, there is one significant problem: Bystander seems to be in the same situation as Surgeon, facing a choice between killing five or killing one, yet only Bystander is permitted to divert the threat.

In 'Turning the Trolley', published in 2008, Thomson attempts to solve this problem by reversing her position that Bystander is permitted to turn the trolley, further claiming that there is no morally relevant difference between Surgeon and Bystander: they are both faced with a decision between killing one and letting five die, so neither may divert the threat.⁶ While her initial conclusion that Bystander is permitted to turn the trolley was more consistent with commonly held intuitions about the bystander's choices, Thomson now recognizes that this conclusion is inconsistent with the *Letting Five Die vs.*

³ Thomson, 'Turning the Trolley', p. 360. Though more clearly labeled in her 2008 article, the principles are the same as those Thomson mentions in 1985. For clarity, I herein refer to the principles as they appear in her 2008.

⁴ Foot, pp. 27-29. See also Judith Jarvis Thomson, 'Killing, Letting Die, and The Trolley Problem', *The Monist*, 59:2 (1976), pp. 204-217, at pp. 205-206.

⁵ Thomson, 'Turning The Trolley', p. 360.

⁶ A. W. Friedman's work appears to have been the impetus for Thomson's shift in 'Turning the Trolley'; see A. W. Friedman, *Minimizing Harm: Three Problems in Moral Theory* (Massachusetts Institute of Technology, PhD diss., 2002). Friedman very thoroughly examined the issues of threat initiation and threat type and dismissed each as insufficient to justify the distinction between the driver and the bystander. He specifically examined them as defenses of the intuition that it is okay for the bystander to turn the trolley but not to push the fat man onto the tracks, concluding that it is indeed impermissible to do either.

Killing One Principle,⁷ which she takes to be true. The rationale is that if Bystander (like Surgeon) allows the threat to continue on its original course, she merely allows the five to die, whereas if she acts to divert the threat, she kills the one. On the other hand, Driver, being in a relevantly different relationship, may divert the threat since any action he takes will result in killing. Thus, Thomson purports to account for the morally relevant differences between the trolley and surgeon cases, and intuitions that it is morally permissible in certain situations (e.g., the Driver case) to divert a threat in order to reduce harm. However, I contend that Thomson's most current solution to the problem is untenable—the differences between Driver and Bystander cannot support her application of DDA in these cases. If this is indeed so, then as long as Thomson wishes to maintain that Bystander is not permitted to turn the trolley, she must also accept that Driver is not permitted to turn the trolley either.

In both her 1985 and 2008 articles, Thomson takes for granted that Driver is responsible for killing innocent people regardless of what action he takes (or refrains from taking),⁸ but she admits that what makes this so is not at all clear. Thomson asserts that the justification for her conclusion lies in the *Killing Five vs. Killing One Principle*, but there is little indication as to why the driver should be considered to be killing no matter which option he chooses.

In her 2008 article, Thomson appeals to positive and negative rights to illuminate DDA. A negative right is one of non-interference, and a positive right is an entitlement to some provision, which generates a less stringent claim than a negative right. According to Thomson, Driver violates the negative rights of the all the victims regardless of which option he chooses, whereas Bystander only violates the positive rights of the five by allowing the trolley to continue on its track, but will violate the negative rights of the one if she turns the trolley. Since negative rights are violated by acts and positive rights by omissions, Thomson argues that Driver kills the five while Bystander merely allows them to die. But in virtue of what can Driver but not Bystander be said to violate the negative rights of, and therefore be responsible for killing, the five unfortunate victims?

There are four possibilities:

- i) *Threat initiation*: A kills B (rather than lets B die) if A initiated the threat that results in B's death.
- ii) *Control*: A kills B (rather than lets B die) if A is in control of the threat that results in B's death.
- iii) *Professional obligation*: A kills B (rather than lets B die) if A has a professional obligation to prevent the threat from harming (or resulting in the death of) B.
- iv) *Part of the threat*: A kills B (rather than lets B die) if A is a part of the threat that results in B's death. Unfortunately, Thomson has not

⁷ Thomson, 'Turning the Trolley', pp. 363-364. Thomson relies on Friedman's exploration of the various defenses of DDA, and agrees with his conclusion that the principle prohibits Bystander from turning the trolley.

⁸ Thomson, 'The Trolley Problem', p. 369.

convincingly explained what feature(s) ground the difference between killing and allowing to die in the trolley cases, or whether an agent can really find him or herself in such a situation where he or she is morally permitted or even obligated to kill one instead of five (or any such number).

There are a few reasons why these concerns bear further scrutiny. First, the lack of clear criteria for determining whether an action constitutes a killing or an allowing to die undermines the application of DDA in certain cases, making the implications of the distinction unclear. Second, Thomson's explanation of the differences between the cases seems to rule out features, such as control, that seem *prima facie* relevant to the distinction between killing and allowing to die. Finally, the features Thomson's explanation does not definitively rule out are insufficient to qualify an act as a killing rather than an allowing to die. Careful comparison of the conditions in each case reveals that the differences between the positions of Driver and Bystander cannot support the distinction between doing and allowing in a way that enables DDA to do the explanatory work in Thomson's answer to the Trolley Problem. However, before comparing the conditions, I will address Thomson's attempt to defend the difference between Driver and Bystander through an appeal to positive and negative rights.

Killing vs. Allowing To Die

In 'Turning the Trolley' Thomson mounts a defense of the difference between Driver and Bystander, citing DDA and the distinction between positive and negative rights. She argues that the difference between Driver and Bystander is that Driver violates the negative rights of the victims regardless of which option he chooses, whereas Bystander violates the positive rights of the five if she does nothing, but violates the negative rights of the one if she turns the trolley. Unfortunately, this justification is circular since determining whether Driver violates the positive or negative rights of the five depends on whether he is killing the five or simply failing to provide them with life-saving assistance.⁹ Given that the determination of which rights are violated depends upon the classification of an action as a killing or an allowing to die, and much of Thomson's justification for classifying Driver's actions as *killing* and Bystander's as *allowing to die* rests on the distinction between positive and negative rights, neither classification is sufficiently justified. But there are other possible explanations for the difference between Driver and Bystander.

First, it is important to understand the conditions under which Thomson thinks it is permissible to kill one in order to avoid killing a greater number. Thomson holds that the threat posed to the five must be numerically identical to that posed to the one in order for the agent to be justified in killing the one to save the five. An agent is not permitted to save the five by initiating a new threat to the one. Second, Thomson endorses what I call the Present Choice Constraint (PCC), which requires that an agent's options be restricted to those presently open to him or her, prohibiting an agent from acting, here and now, to

⁹ Thomson, 'Turning the Trolley', pp. 360, 372. Thomson believes that Foot and Friedman were right to appeal to positive and negative rights to explain the distinction.

better his or her own moral record or that of another.¹⁰ For example, if Thomson's Surgeon had poisoned five victims then had a change of heart and could only save the five by extracting and transplanting the organs of the one, he would not be permitted to infringe the rights of the one to better his own moral record.¹¹

According to Thomson, Surgeon's past action initiated a threatening sequence that is still in train, and despite his past action, *here and now* he faces the choice between killing one and letting the five die from the threat he initiated (after which it will come to be that Surgeon has killed the five). This constraint also holds interpersonally. If someone else had poisoned the five, Surgeon is still prohibited from killing one, and must let the five die.¹² If these two requirements are met—that the threat be the same and the choice not be an attempt to improve one's own or another's moral record—the case can plausibly be considered one in which it is permissible to divert the threat. By comparing the conditions in the various eligible cases, we can now attempt to identify the relevant factor whose presence makes it the case that the trolley driver will kill the five (rather than let the five die).

Threat Initiation

In *Trolley Driver*, Thomson explains that the death of the five qualifies as a killing on the part of Driver because he is 'driving' the threat to five. So, what about 'driving' is relevant to the distinction between killing and letting die? One possible explanation is that Driver initiated the threat that is now barreling toward the five, and threat initiation is the distinguishing factor. This means that any agent who initiates a threatening sequence is responsible for that sequence in such a way that makes any death resulting from that sequence a killing on the part of the agent. Thus, in such cases, the agent is permitted to divert the threat toward the lesser number. However, the mere fact that someone initiated a threat is insufficient to show that her failing to divert the threat would constitute a killing. In her 1985 article, Thomson argued that if a malicious surgeon were responsible for the threat posed to the five victims, having poisoned them, he would not be permitted to kill the one in order to save the five. The rationale is that even though the malicious surgeon initiated the threatening sequence, that sequence is still in train. So, despite the moral significance of his past actions, he is faced, here and now, with the choice of killing one and letting five die, after which it will come to be that he has killed the five.¹³ This seems to bar Driver from turning the trolley as well, if he is responsible for the threat's initiation. But this will be discussed more, later.

For now, let us discuss threat initiation independent of intent. Consider a variation on the Trolley Problem, the *Radio Switch case*:

¹⁰ In 'The Trolley Problem', this is Thomson's principle '(II)'; an expansion of Foot's initial *Killing Five vs. Killing One Principle*.

¹¹ Thomson, 'The Trolley Problem', p. 1414.

¹² *Ibid.*, p. 1413. Thomson says that if a villain started the trolley it is plausible that we may divert it. In fact, she says, we *may* be permitted to divert it *regardless of who started it*. This claim creates a fair bit of tension with her 2008 position that Bystander is not permitted to turn the trolley, and casts doubt over just how DDA and Thomson's appeal to positive and negative rights are to be understood.

¹³ Thomson, 'The Trolley Problem', p. 1413.

Radio Switch: Rupert is the 'driver' of an automated trolley that starts on its own and runs on a program. All that Rupert controls from the cab are the brakes, which he and the engineer inspected and approved the night before. The automated system is monitored from a control room at headquarters, which monitors track and train activity, and Controller is responsible for shifting the tracks, should the need arise. Although Rupert may radio in a request to shift the track, he has no direct control over the course of the trolley. The trolley proceeds along its programmed route, operating properly for several hours, when Rupert routinely applies the brakes and finds that they have failed. Upon radioing the control room to request a track shift in order to divert the trolley onto an inactive spur of track, Controller informs Rupert that a person is somehow stuck on the inactive track and no one can extricate him in time. What is worse, there are five other people stuck on the active track ahead, none of whom can be removed in time to avoid being hit by the trolley.

Examining this case through Thomson's framework, I see four possible options for the agents involved, each of which highlights different factors as morally relevant: (1) Only Rupert (like Thomson's Driver) is morally permitted to turn the trolley,¹⁴ (2) only Controller herself is permitted to turn the trolley; (3) neither Rupert nor Controller are permitted to turn the trolley; or (4) both Rupert and Controller are permitted to turn the trolley.

Option (1) removes threat initiation and control from the list of features potentially relevant to killing versus allowing to die. First, Rupert did not start the trolley, nor is he responsible for the brake failure, which is a crucial part of the threatening sequence. If threat initiation is the key feature distinguishing killing from letting die, then Rupert is not permitted to turn the trolley since doing so would constitute killing the one, while letting the trolley continue on its course would be allowing the five to die. So, by the *Killing One vs. Letting Five Die Principle*, Thomson must conclude that in this case either Rupert may not turn the trolley, or threat initiation is not the morally relevant feature at play.

Second, when there is a mismatch between the agent who initiated the threat and the agent who controls it, the situation is analogous to Thomson's Bystander case, wherein the only agent with the power to divert the trolley is (in her view) not permitted to do so. Given that Bystander did not initiate the threat he is not permitted to divert it, by the *Killing One vs. Letting Five Die Principle* and Thomson's PCC. Note, this also rules out option (4). Since Controller's position is directly analogous to that of Bystander (aside from the professional aspect, which will be discussed later), Thomson cannot endorse option (4) while maintaining that Bystander may not divert the trolley. Herein lies another difficulty for Thomson's current view.

¹⁴ Note that although Rupert is not *able* to turn the trolley, he may still be morally permitted to do so. I am morally permitted to kill someone who poses a direct threat to my life though I may lack the means to do it. If, however, Thomson means obligated rather than merely permitted, then (1) does not make much sense. If this is the case, (1) would still speak against threat initiation as the relevant difference between Driver and Bystander.

According to Thomson, what an agent may permissibly do depends on the choices available to her here and now. PCC further constrains the available options, holding that one is not permitted to do harm in order to better her own moral record or that of another. Thus, any agent who initiated a threatening sequence in the past is not permitted to do harm here and now to ameliorate the consequences of that action. So, if the feature relevant to the distinction between killing and letting die lies in the past, as does threat initiation in trolley cases, no agent—not even the initiator of the threat—is permitted to divert the impending threat if that involves killing another. This effectively turns all trolley drivers into bystanders, an odd consequence of PCC.

Thus, Thomson's argument cannot be that Driver is permitted to turn the trolley because otherwise his past behavior initiating the threat will kill the five. Given PCC, if initiating the threat in the past makes it so that Driver kills (rather than lets die) the five, he is not permitted to turn the trolley to make it so he will have killed just one instead of five. While this point does not itself prove that threat initiation cannot be the morally relevant difference between the trolley driver and the bystander, it does show that if Thomson wishes to maintain both PCC and her conviction that Driver is permitted to turn the trolley, the distinguishing factor between killing and letting die cannot be threat initiation. Nor, as I shall now argue, can it be control.

Control

Advocates of (1) may not appeal to control as the relevant difference since Rupert lacks control of the trolley, given the brake failure and the role of Controller. So, if control of the threat is indeed the relevant feature, then Thomson must opt for (2), which states that only Controller may turn the trolley. Advocates of (2) may appeal to the fact that Controller governs the behavior of the trolley now that the brakes have failed and is therefore the agent faced with the option of killing five or killing one, permitting her to divert the trolley.

This, however, cannot be right. Aside from her status as a railway employee, her situation is no different from that of Thomson's Bystander, who Thomson now claims is not permitted to divert the trolley because the decision she faces is between either killing one, or allowing five to die from an existing threat that she did not initiate.¹⁵ Moreover, endorsing (2) would be not only a significant rejection of the intuitions that motivate the Trolley Problem, but also a reversal of Thomson's most recent stance that Bystander is not permitted to turn the trolley. So, control cannot be the morally relevant difference tracked by DDA in Thomson's explanation. But what of the common thread between Rupert and Controller, that of professional obligation?

Professional Obligation

Thomson could respond that both Rupert and Controller have a professional obligation to prevent the threat from harming the unfortunate individuals on the tracks, an obligation that Bystander lacks. The idea is that given their status as railway employees,

¹⁵ Thomson, 'Turning the Trolley', pp. 369-372. This permission need not be employment-based. In her 2008 Thomson considers the case of Alfred, who experiences brake failure while driving his car. She argues that since he is in control of the threat, if he is faced with the option of killing one or killing five (not having the option of being altruistic and killing himself, which, if available, he must choose), he should swerve to kill one.

both Rupert and Controller assume responsibility for any possible mishaps related to the operation of the trolley and are obligated to do what they can (short of creating a new threat), to minimize the harm done by the threatening sequence in progress.¹⁶ Thus, if they divert the trolley they will kill one, but if they do nothing they will kill five, in virtue of their professional relationship to the threat and to the potential victims. Therefore, according to the *Killing Five vs. Killing One Principle*, both Rupert and Controller are permitted to turn the trolley, whereas Bystander is not. However, professional obligation does not seem to be what distinguishes between doing from allowing, nor does it appear robust enough to bestow on an act the status of killing.

First, it seems quite implausible that the difference between killing and allowing to die hinges on one's profession. It does not seem right that Rupert's inability to divert a threat he did not initiate transfers to any coworker (including Controller), in virtue of their shared employment with the trolley company, the moral status of killing regardless of whether they act or refrain from acting. It is also implausible that one's employment entails the acceptance of limitless responsibility for any and all mishaps that could occur in relation to their employment duties.¹⁷ Second, failure to fulfill an obligation of protection against a threat one is otherwise not morally responsible for does not thereby generate the responsibility necessary for killing rather than letting die. Consider self-defense. Thomson argues that permission to kill in order to defend against a threat is not transferrable to a third party.¹⁸ While any one of five people may shoot the driver of a car careening toward them, a bystander is not permitted to do so on their behalf. The single exception is an officer of the law, who may kill the driver to protect the five. However, though the officer's professional obligation may permit him to kill the one, the permissibility of his doing so is not due to the fact that he also faces the choice of killing the five.

Failure to fulfill an obligation to protect against harm does not translate into *killing*. If the officer does nothing he will have merely allowed the five to die. Moreover, it seems that such a professional obligation to prevent harm may run counter to Thomson's PCC, requiring persons in certain professions to intervene even when the result improves the moral record of another. The bottom line is that, while Thomson notes that what makes the driver's decision one between *killing and killing* rather than *killing and allowing to die* is not easy to identify, it looks suspiciously like this may be due to the fact that no such morally relevant difference exists in these cases. However, there is one more potential explanation for this difference: being part of the threat.

¹⁶ I am indebted to an anonymous reviewer for suggesting that the notion of professional obligation be expanded and the assumption of responsibility for trolley-related contingencies be directly addressed.

¹⁷ Imagine some freak natural occurrence causes the trolley to collide with a number of innocent victims. It seems improper that the driver of the trolley should be said to have killed the victims because, as a trolley company employee he has assumed responsibility for any and all trolley-related happenings. There are (and should be) limits to professional responsibility, an idea that was born in mind during the construction of the *Radio Switch* case.

¹⁸ Judith Jarvis Thomson, 'Self-Defense', *Philosophy and Public Affairs*, 20:4 (1991), pp. 283-310.

Part of the Threat

In 'Equating Innocent Threats and Bystanders', Helen Frowe explores the question of whether one is permitted to kill an innocent person who is part of a threat to her life.¹⁹ The important point for our purposes is the notion of a composite object, whereby an individual attached to a threatening object is considered part of the threat. Applied to the Trolley Problem, the argument is roughly that if the driver is part of the threat posed by the trolley, then he is somehow responsible for that threat in a way that makes his action or inaction a killing, thereby permitting him to turn the trolley. For Frowe, it does not matter whether the individual in the composite object is innocent; if he is *instrumental* to the threat then he is part of the threat in a way that makes him responsible for killing whoever dies from the threatening sequence. If being part of the threat is sufficient to account for the difference between killing and letting die, then Thomson may have a means to remedy the inconsistencies in her present response to the Trolley Problem.

Frowe argues that someone threatened by a trolley may destroy the trolley in defense of her life, even when that entails the death of an innocent person trapped inside the trolley. The innocent person inside the trolley is part of the threat and is therefore a proper target of self-defense. However, if we take this sense of being part of a threat as the relevant condition for killing rather than letting die, then it seems all and only those individuals on the trolley are permitted to divert it, and if no one diverts then all are responsible for killing the five. This does not seem quite right. In the trolley cases, what it means to be part of a threat (in a sense relevant to the difference between killing and allowing to die) lies in Frowe's notion of instrumentality—whether an agent is instrumental to the threat.

Recall Thomson's PCC, which restricts the scope of options open to the agent in the present, and forbids an agent from causing harm here and now to better his or her own moral record or that of another. This constraint also affects the way we characterize the causal chain and its relevance to the agent's available options. When determining whether an agent is instrumental to a threat, which, according to Frowe, means that killing the agent would halt the threat to the victim, we must look to the present circumstances. Given this requirement, being part of the threat cannot explain the difference between the driver of the trolley and a bystander, since none of these agents are instrumental to the threat in the manner described by Frowe.

In Thomson's original Trolley Driver, Driver is not instrumental since killing Driver would not affect the threat the trolley poses to the five. This is also the case with Bystander and the agents in Radio Switch. Interestingly, Frowe's condition would affect the potential threat to the one on the side-track. Whoever controls the trolley currently directed toward the five is instrumental to the threat to the one if he or she diverts the trolley. Thus, once the threat is in train the only significant factor in the killing/letting die distinction becomes control, and only with respect to diverting the threat toward the one. In terms of Frowe's argument, this means that the one has a claim against the agent in control and may kill the agent in self-defense to prevent the agent from diverting the threat toward her. But the five have no such claim, since the death of the agent in control would not halt the threat to the five. The absence of this claim suggests that no one stands

¹⁹ Helen Frowe, 'Equating Innocent Threats and Bystanders', *Journal of Applied Philosophy*, 25:4 (2008), pp. 277 - 290.

in the relation to the threat necessary to allow an agent to divert it. So, if being part of the threat is the morally relevant feature tracked by DDA in Thomson's explanation, she is forced to conclude that no one may divert the threat.

The argument is that if the killing of A saves B from the threat, and if the threat is allowed to proceed, A will kill B (rather than let B die). If A has the choice between killing and letting die, A must choose letting die. But, where A is Driver, Bystander, Rupert or Controller, killing A will not save B, where B is the five on the track ahead. Thus, what Driver, Bystander, Rupert or Controller does to the five is not killing but letting die. Therefore, since the present choice to divert the trolley would constitute killing the one (because eliminating the agent would halt the threat to the one), and the agents each face a choice between killing one and letting five die, none of the agents are permitted to divert the trolley.

The conclusion then must be that no one is permitted to turn the trolley, option (3). Indeed, Thomson must also conclude the same in the Driver and Bystander cases. DDA, as it has been deployed by Thomson to explain intuitions in trolley cases, does not appear to track any consistent feature common to the relevant agents across the cases. It looks as though intuitions, rather than carefully constructed principles and distinctions, bear the weight of her conclusions. If Thomson is to avoid the tension between PCC and DDA, and her intuition that Driver but not Bystander may divert the trolley, she must abandon one of these commitments. I will argue that there is reason for Thomson to give up her reliance on DDA rather than PCC. Though DDA is an intuitively meaningful distinction that effectively supports conclusions in other types of cases, it is out of place in Thomson's proposed solution to the Trolley Problem. To demonstrate the importance of PCC, let us now turn to transplants.

Transplants

PCC is an important requirement, as we do not want DDA to justify present bad acts in order to prevent past bad acts from coming to fruition. To illustrate the concern, consider a variation on the case of the *Malicious Surgeon*.

Malicious Surgeon: A surgeon administers a poisonous chemical to his five patients, who are slowly dying from the organ damage caused by the chemical. They will not survive unless the poison is thoroughly removed from their bodies. The surgeon has a change of heart and realizes that the only way to save the five is to hook them up to a young man with unusually strong and healthy kidneys that will be able to filter the poisons from the systems of the five, diverting the threat from the five to the one. Unfortunately, absorbing the poison from the five will overwhelm the young man's system and cause his death. Upon being informed of the situation, the young man politely declines to be hooked up to the five.

Tension may arise here given Thomson's position that the moral status of an act is determined by what options are available to an agent here and now.²⁰ Though Malicious Surgeon's past act of poisoning the five patients was indeed wrong, if Malicious Surgeon is permitted to act here and now to better his own past moral record, and the five are not yet dead, then he should be considered to be facing a choice between killing five and killing one, thereby making it morally permissible for him to kill the one in order to have not killed the five. This seemingly allows one bad act to justify another bad act in order to lessen the severity of a past wrong that has not yet reached its conclusion. This consequence is not likely to be embraced by many DDA defenders who wish to say that a surgeon in such circumstances should not be permitted to sacrifice the one.

The rationale behind denying that Malicious Surgeon may sacrifice the one seems to be that, although the five are not yet dead, the deed has been done and the surgeon is now faced with the choice of allowing the poison to continue coursing through the veins of the five, destroying their organs and eventually resulting in their deaths; or attach the one to the five to filter out the poison, thereby killing the one. Here and now Malicious Surgeon has the option of killing one or allowing five to die (though if he lets them die, it will then come to be that he has killed them).²¹

Now apply this to the trolley case. Let us assume Driver is responsible for the threat posed by the trolley, thereby making his position relevantly similar to that of Malicious Surgeon. If Thomson thinks Driver is responsible for the threat posed to the five by having started the trolley, then why is Driver not faced with the very same options as either of the surgeons?²² Why does Driver not face a choice between allowing five to die and killing one, as Malicious Surgeon is held to be?²³ Even if the case is amended such that the surgeon's poisoning the five was somehow non-culpable, Thomson would likely still wish to block the conclusion that he is therefore permitted to kill the one.

²⁰ Thomson, 'The Trolley Problem', p. 115.

²¹ For more on this point see Jason Hanna, 'Doing, Allowing, and the Moral Relevance of the Past', *Journal of Moral Philosophy*, (2014, online). Does the fact that he will have killed provide a potential way out of the present problem for DDA? I do not think so but am not discounting the possibility. Introducing the notion 'will have killed' may get the desired result in the driver's case but not likely in transplant cases.

²² One could appeal to the Doctrine of Double Effect (DDE) arguing that the surgeon uses the death of the one as a means to save the five while the driver does not. However, this does not appear to be the distinction Thomson is drawing. Moreover, although DDE may easily prohibit the surgeon from killing the one, it is DDE not DDA doing the work, and it does not get the desired results in the bystander trolley cases. Appeals might be made to intention and threat type in an effort to establish morally relevant differences between the surgeon and the driver. However, intention does not appear to clarify the distinction between doing and allowing and can easily be stripped away from the surgeon case in order to place him on par with the hapless trolley driver. One may also point out that while the surgeon has threatened the five with poison and is therefore not permitted to create the new threat of an operation toward the one, while the driver would be diverting a threat toward the one, rather than creating a new type of threat. However, this condition can easily be eliminated and we still end up with the inconsistent results already observed.

²³ Note that even if *Malicious Surgeon* and *Driver* must allow the five to die, once they die it will come to be that *Malicious Surgeon* and *Driver* have killed them.

Moreover, if an agent is not permitted to kill one in order to improve his or her, or another's, past moral record, then in situations in which a trolley driver is responsible for some non-accidental brake failure, out of neglect or sabotage, or some other agent is responsible for the failure, turning the trolley would presumably not be permissible for the driver. In this case, the driver would be killing the one in order to save the five he otherwise would have killed by his own fault, or the fault of another. This seems a clear-cut case Thomson would define as *killing vs killing*, which closely resembles Driver's circumstances. If being responsible for a threat in a way that leads to a killing also makes the agent responsible in a way that prohibits him or her from acting in the present to reduce the harm of a past wrong, then apparently, diverting a threat in a case of *killing vs. killing* is never permissible. Thus, the constraints of DDA and Thomson's PCC together leave a narrow (or worse, nonexistent) set of cases to which Thomson's solution could actually apply. Indeed, how can an agent be responsible for an act such that, though its consequences constitute killing, it is not the result of the agent's past wrong, thereby permitting the agent to divert the threat and diminish the harm? I contend that if any such cases do exist, DDA will not aid in illuminating them.

In fact, Thomson's requirement that the threat to the one be quantitatively identical to the threat to the five is able to prohibit the actions of Thomson's would-be organ-stealing Surgeon. In *Original Surgeon*, the transplant is prohibited by the fact that Surgeon would be creating a new threat rather than diverting one. Even if the condition were eased to require only qualitative similarity, so that Surgeon could extract the other healthy organs from a patient dying of, say, liver failure, Thomson's PCC is strong enough to block the transplant. Recall, a consequence of PCC is that *no one* may divert a threat, not even a surgeon in such a case.

Conclusion

Thomson must concede that a trolley driver should no more be permitted to turn the trolley than a bystander should, and no more permitted to kill the one than a surgeon should. There simply is no morally relevant difference that can distinguish between doing and allowing in a way that would clearly separate the acts of the various agents along the lines of killing versus allowing to die. Attempts to identify such a difference either raise more similarities between Driver and Bystander, and thereby result in an application of DDA that gets the wrong result in paradigm cases, or allow the commission of present bad acts designed to lessen the harm of past bad acts whose results have not fully come to fruition.

Unfortunately, this renders the explanatory power of DDA in Thomson's account virtually inert. As stated earlier, it may not be so bad for Thomson to dismiss our intuitions about the driver and accept that he is not permitted to turn the trolley. However, if she takes this route, the problem still arises that there are few (if any) cases in which anyone is ever permitted to divert a threat. Given that DDA leads to the conclusion that even the driver of a trolley is not permitted to divert a threat, it appears that *no one* can really ever be permitted to divert a threat, forcing Thomson to look elsewhere in order to account for strong intuitions to the contrary. If instead we opt to dismiss those intuitions and embrace the logical conclusions of Thomson's application of

DDA, then as A. W. Friedman rightly noted,²⁴ the trolley case becomes an interesting and provocative non-problem.²⁵

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Bibliography

- Foot, Philippa. 'The Problem of Abortion and the Doctrine of Double Effect', in Philippa Foot, *Virtues and Vices and Other Essays in Moral Philosophy*, Berkeley: University of California Press, 1978, pp. 19-32.
- Friedman, A. W. *Minimizing Harm: Three Problems in Moral Theory*. Massachusetts Institute of Technology (PhD diss.), 2002.
- Frowe, Helen. 'Equating Innocent Threats and Bystanders', *Journal of Applied Philosophy*, 25:4 (2008), pp. 277-290.
- Hanna, Jason. 'Doing, Allowing, and the Moral Relevance of the Past', *Journal of Moral Philosophy*, (2014), online.
- Thomson, Judith Jarvis. 'Killing, Letting Die, and The Trolley Problem', *The Monist*, 59:2 (1976), pp. 204-217.
- Thomson, Judith Jarvis. 'The Trolley Problem', *The Yale Law Journal*, 94:6 (1985), pp. 1395-1415.
- Thomson, Judith Jarvis. 'Self-Defense', *Philosophy and Public Affairs*, 20:4 (1991), pp. 283-310.
- Thomson, Judith Jarvis. 'Turning the Trolley', *Philosophy & Public Affairs*, 36:4 (2008), pp. 359-374.

²⁴ Thomson, 'Turning the Trolley', p. 364.

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