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Caspar Hare

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Torture – Does Timing Matter?

Torture – is it ever, morally speaking, the thing to do? ‘Of course!’ many philosophers eagerly answer. ‘Just make the stakes big enough: Suppose you know you can save the lives of thirty children by, and only by, beating up a captive terrorist. Isn’t that the thing to do? If you don’t yield to the force of this example, then we can make it a hundred children, we can make it a thousand children, we can make it the population of Belgium, we can make it the human race, we can make it all sentient life in the universe. If you still don’t yield then.... well, you are beyond help.’

Fair enough. But what if we go in the other direction? What if we make the stakes smaller? What if, say, we make it not thirty children, but five adults? In the first chapter of her very interesting book, *Ethics for Enemies*: Frances Kamm argues that in a class of such situations it is morally permissible to torture. Her basic strategy is to say that in these situations it is permissible to *kill* people so as to prevent harm coming to other people, and then say that, because it is permissible to kill people so as to prevent harm coming to other people, it is permissible to torture people as to prevent harm coming to other people – after all, they are better off tortured than killed!

She first has in mind situations in which we can cause people pain so as to prevent them from doing things that will harm others. She is more cautious about extending her arguments to what she calls ‘ex post’ cases – cases in which there is some time delay between what is naturally described as ‘the malicious action’ (e.g. *the terrorist setting a bomb*), and what are naturally described as ‘its bad effects’ (e.g. *the explosion and its aftermath*), and, during that time, we are in a position to prevent the bad effects from coming about (e.g. by *inducing the terrorist, through torture, to reveal the location of the bomb.*)

So, can we apply this strategy to 'ex post' cases? I would like to use my space here to investigate this question. And I would like to do it in a way that I take to be true to the spirit of Frances Kamm's project. I will suppose, with her, that the interesting question in this area of moral theory concerns the *permissibility* of actions. I will suppose, with her, that act consequentialist moral theories are incorrect. Generally: the permissibility of an action is not determined by the value of its outcome, relative to the value of the outcomes of the alternatives available to the agent. More specifically: the celebrated 'counterexamples' to act consequentialism involving rights violation really are counterexamples to act consequentialism. It is not permissible to kill an innocent, uncooperative person so as to distribute his organs to five others in desperate need, not permissible to kill an innocent, uncooperative person so as to block a trolley that will otherwise crush five others... etc. And I will try, as far as possible, to use suitably Kammian methods of moral enquiry. I will focus on some macabre imaginary cases. I will forcefully state my convictions concerning moral permissibility in these cases. I will emphasize the strength of my convictions, and the fact that I have no particular argument to support them, by saying '*Surely...*'. I will treat these convictions as data that a good moral theory must accommodate. None of what follows will seem very interesting to you if you do not share the convictions. But I expect, based on conversations with a seemingly-representative sample of philosophers, that you will share them.

2. Killing Evil-Doers

Let's start on what seems to me to be solid ground.

Evil-Doer on the Footbridge

As in the classic Judy Thomson case,¹ a trolley is careering toward five innocent, immobile people. The only way you can save the five is by pushing a guy off a footbridge into the path of the trolley, stopping it and killing him. But (and here we depart from the classic Thomson Case) this is not just any guy. He tied the five to the track, aimed the trolley at them and set it in motion! He is rubbing his hands and cackling with villainous glee. He wants to watch them die.

I say that, in this particular case, it is permissible for you to push the evil-doer off the footbridge. *Surely* it is permissible for you to do it.

If you are initially reluctant to agree then I encourage you to do a couple of things. First consider the narrowness of the claim. I am not saying that, once the evil-doer has tied the five to the track and set the trolley in motion, it is fine for you to do just anything to him that serves the greater good. Maybe it is not fine for you to chop him up and distribute his organs to the distant organ-needy. Nor am I even saying that it is fine for you to do anything to him that will save the lives of these five people. Maybe, if these five people are organ-needy, it is not fine for you to remove his organs (you are a skillful, speedy surgeon) before pushing what remains of his body in front of the trolley. I am just saying that in this particular case it is fine for you to push the evil-doer off the footbridge, into the path of the trolley.

Second, imagine that you have pushed the evil-doer down onto the track and, in the split second before he is hit by the trolley, he looks back up at you. Ask yourself: can he muster anything like righteous outrage? *Surely* he cannot. Any objection he might have had

¹ See Thomson (1985).

to being pushed in front of the trolley and crushed in order to save the five people withers in light of the fact that he set that trolley in motion in order to crush them.

If you are still reluctant to agree then I have nothing further to say. Let's move on.

3. Torturing Evil-Doers

What, then, should we think about a quite similar case, where you can stop the trolley not by killing the evil-doer, but by torturing him?

Evil-Doer with the Brake-Code

As above, but this time the only way you can save the five is by broadcasting a coded message that will activate the trolley's brakes. You don't know the brake code. The guy does. The only way you can get it is by torturing it from him.

One method Frances Kamm uses to get traction on pairs of cases like Evil-Doer on the Footbridge and Evil-Doer with the Brake-Code is to consider a third case in which both options are open to you:

Evil-Doer on the Footbridge with the Brake-Code

As above, but this time you have two ways of saving the five. You can stop the trolley by pushing the guy off the bridge, and you can stop the trolley by torturing the brake-code from him.

Maybe it is fine if, out of concern for the guy, you choose to torture him rather than kill him.

He is better off tortured than dead.

Does it follow that it is permissible to torture the guy in Evil-Doer with the Brake Code? Not immediately. Maybe it is permissible to torture him when the killing-him option is there, impermissible when it isn't. Frances Kamm draws our attention to a case in which one might think it permissible to cause someone harm in a certain way when the option of causing them worse harm in a permissible way is open to you, impermissible when that option is not open to you:

Bystander at the Footbridge

An innocent person is standing on the bridge. You can save the five only by pushing him onto the track – in which case he will be *paralyzed*, or by diverting the trolley – in which case it will bend around and over the bridge, and he will be *killed* (embellish the story to make this true).

Maybe it is fine if, out of concern for the guy, you choose to paralyze-him-by-pushing rather than kill-him-by-switching in this case. But it does not follow that it is fine to paralyze-him-by-pushing when the kill-him-by-switching option is not open to you.

If we take rights seriously then we may well think that there are many cases with this basic structure. Here's one that involves property rights:

Your Crate or Mine?

You and I are hungry. You come across two crates of Weetabix beside my house. One was dropped by a relief plane – first come first served. The other is mine. The relief crate contains more, fresher Weetabix than my crate. You can take either crate.

Maybe it is fine for you to take my crate, leaving me the relief crate, when the option of taking the relief crate is open to you (after all it is fine for you to take the relief crate, and

better for me that you take my crate instead of the relief crate). But it certainly is not fine for you to take my crate when the option of taking the relief crate is not open to you.

The useful thing that the footbridge cases do is to make it clear that it is better for the evil-doer to be tortured than killed, and to make it clear that, if we think it is impermissible to torture him in Evil-Doer with the Brake Code, then we cannot explain why it is impermissible just by pointing to ways in which it is bad for him to be tortured. It would be permissible for you to do some much worse things to him, for the sake of saving the five.

So, why might it be impermissible to torture the guy in Evil-Doer with the Brake Code, yet permissible to kill him in Evil-Doer on the Footbridge? Let's go through some differences between the cases, and see if the differences matter.

3. Differences Between Torturing and Killing-by-Pushing I: *Degrees of Implication*

When you act in a way that brings harm to one person and benefit to some others, say that the harm is *maximally implicated in the benefit* when every chain of sufficient causes from the act to the benefit includes the harm. When the harm is not maximally implicated in the benefit, say that it is *implicated to a low degree in the benefit* when there is a chain of sufficient causes from the act to the benefit such that the harm is a distant effect of events in that chain, say that it is *implicated to a high degree in the benefit* when there is no such chain.

In a classic Thomson Bystander case (in which you can save the five from being crushed by a trolley only by switching it onto a siding, where it will crush one unfortunate person) the harm to the one (supposing you switch) is implicated in the benefit to the five to a relatively low degree. There is a sufficient causal chain from your act to the benefit to the five such that the harm to the one is a relatively distant effect of events in that chain. How

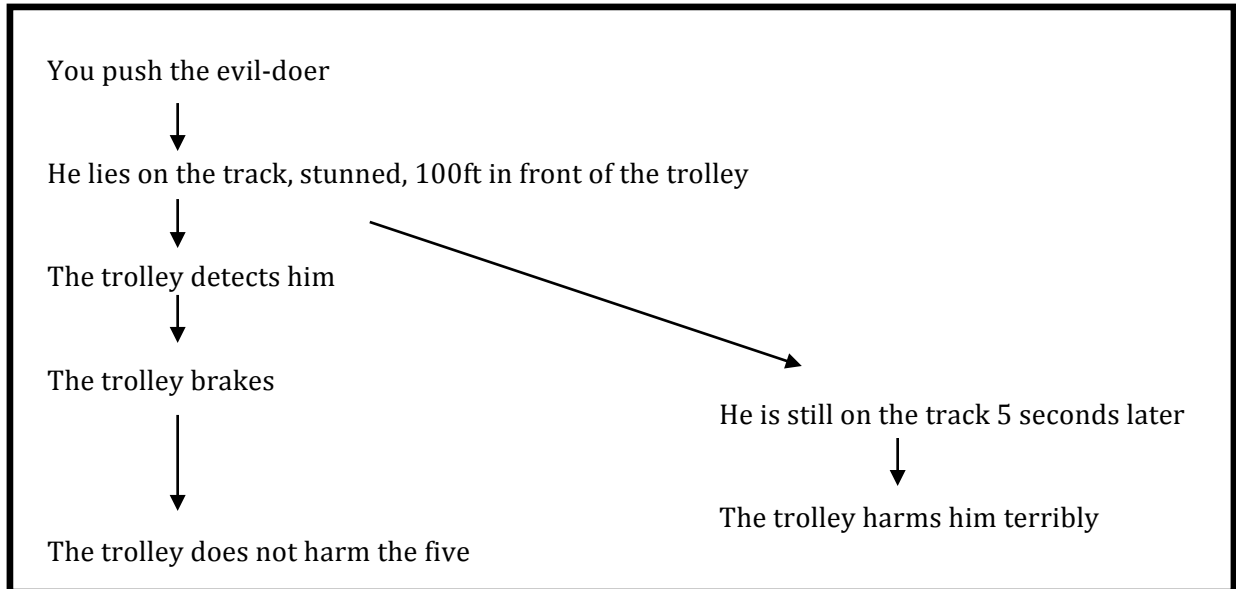
about in Evil-Doer on the Footbridge? Well, that depends on exactly what stops the trolley in that case. One way of filling in the details:

Evil-Doer on the Footbridge – Precisification I

Why will the trolley stop if you push the evil-doer in front of it? It has a sophisticated automatic cruise control system that makes use of radar with a range of 100ft. If the system detects a large object on the track 100ft ahead then it activates the trolley's brakes. Sadly, at the speed the trolley is traveling, it takes 150ft to stop.

Put in a diagram (the arrows represent causal relations between events) here is what will happen if you push him:

Effects of your Pushing the Evil-Doer



In this case the harm to the one is implicated in the benefit to the five to a higher degree than in a Thomson Bystander case. There is no chain of sufficient causes from your act to

the benefit to the five such that the harm to the one is a very distant effect of events in that chain.

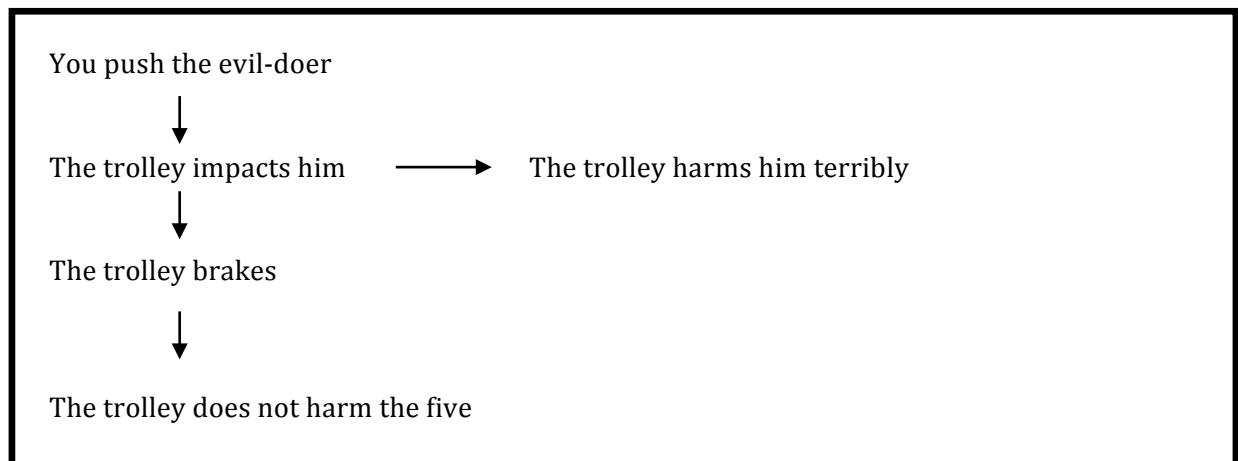
Another way of filling in the details:

Evil-Doer on the Footbridge – Precisification II

Why will the trolley stop if you push the evil-doer in front of it? It has an unsophisticated automatic cruise control system, sensitive only to impacts. If the system detects an impact then it activates the trolley's brakes.

Put in a diagram:

Effects of your Pushing the Evil-Doer



In this case the harm is implicated in the benefit to yet-higher degree, but it is not maximally implicated in the benefit. There remains a chain of sufficient causes from act to benefit (on the left, in the diagram) that does not include the harm.

But in Evil-Doer with a Brake-Code the harm you do to the evil-doer by torturing him is maximally implicated in the benefit to the five. The event of him suffering pain is part of every chain of sufficient causes from your torturing him to the five being saved. Does this

difference matter? By pointing it out, can we explain why it is impermissible to torture in Evil-Doer with a Brake-Code?

The background idea would be broadly Kantian. In cases where you harm one, save five, and the harm to the one is maximally implicated in the benefit to the five, you are, no bones about it, using the harm to the one as a means to the saving of the five. And it is not morally permissible to use people, guilty or innocent, in this way. In a nutshell: the prohibition against your harming one person cannot be over-ridden by the consideration that you are benefiting others when the harm to the one is maximally implicated in the benefit to the others.

But I do not find the idea very promising. It is trampled beneath my convictions. Consider:

Evil-Doer on the Footbridge – Precisification III

Why will the trolley stop if you push the evil-doer in front of it? It has an ultra-sophisticated automatic cruise control system, sensitive only to *terrible harm in the vicinity of the trolley*. If the system detects terrible harm in the vicinity of the trolley then it activates the trolley's brakes.

I say it is still fine to push the evil-doer in front of the trolley in this case. *Surely* it is fine to do it. But the harm you do to him is now maximally implicated in the benefit you bring to the five.

4. Differences Between Torturing and Killing-by-Pushing II – Agential Involvement

Torturing an evil-doer typically requires some effort, some determination on your part. To torture him effectively you really have to be focused on causing him pain. Pushing an evil-doer off a footbridge (even in Evil-Doer on the Footbridge – Precisification III) does

not. You can (if the case is understood in the natural way) sidle up to him, give him a shove, then walk away with your hands in your pockets, whistling. Might this somehow explain why it is impermissible to torture in Evil-Doer with the Brake Code?

I do not find this idea very promising either. Consider:

Evil-Doer on the Footbridge – the Effortful Variant

As above the trolley has an ultra-sophisticated automatic cruise control system, sensitive only to *terrible harm in its near vicinity*. But this time a simple push will not do the job. You have to push the evil-doer off the footbridge, jump down and hold him there while he thrashes about, right up to the instant before the trolley hits him.

Surely it is fine to do this, though to do it effectively you really have to be focused on causing the evil-doer harm. As an exercise: Imagine that, towards the end of a movie, the hero does this to the villain. Should you think worse of the hero? Is there any reasonable objection that the villain could have to his being crushed by the trolley? I say no and no. If the villain did not want to be crushed by the trolley then he should not have engineered this situation – in which his being crushed by the trolley is the only way to prevent his victims being crushed by the trolley.

5. Differences Between Torturing and Killing-by-Pushing III – Divisive Coercion

As David Sussman has pointed out,² when you torture the evil-doer in a case like Evil-Doer with the Brake Code you coerce him in a peculiar way. It is not that you change the pay-offs associated with talking and not-talking, so that he now has an all things considered preference for talking. Nor do you just cause him to behave in a way that he

² See Sussman 2005.

would rather not behave in a manner that is unmediated by his cognition. Rather, you make it the case that different parts of him are at odds. One part of him would rather talk-and-not-suffer than not-talk-and-suffer. Another part would rather not-talk-and-suffer than talk-and-not-suffer. You *divide* him.

Might this explain why torturing the evil-doer is not impermissible? Once again the idea does not look promising to me. It seems to be pointing to another way in which being tortured is bad for him, but we have already seen that we will not explain why the torturing is impermissible just by pointing to ways in which it is bad for him.

6. Differences Between Torturing and Killing-by-Pushing IV – New Threats

And so to what seems to me to be the last, best hope for making a case that it is impermissible to torture in Evil-Doer with the Brake Code. In that case the harm that comes to him if you intervene (being tortured), is very unlike the harm that he would otherwise inflict on the five (being crushed by the trolley). In Evil-Doer on the Footbridge, on the other hand, the harm that comes to him if you intervene (being crushed by the trolley) is just like the harm that he would otherwise inflict on the five (being crushed by the very same trolley). Maybe this matters. Maybe something like this is true: Other things being equal, it is permissible to harm a person so as to prevent him or her from harming five others only when the harms are relevantly similar.

Let me say a couple of things about this idea. First, if the idea is right then it remains okay to torture one so as to save five in some rather unusual cases. For example:

The Pain Machine

You are in a room with the evil-doer, a pain machine and his five victims. He has padlocked them to the machine. They are in agony. The machine has a keypad and

shut-down code. You don't know the code. The only way (fill in the details of the story to make this true) you can stop the machine is by forcibly padlocking the evil-doer to it too. Then, in agony himself, he will tell you the code.

Here it remains okay to torture the one so as to save the five, because the harm you do to the one is just the same as the harm he would otherwise inflict on the five.

Second, in order to apply the idea we need some sense of what relevant similarity amounts to. Clearly we are supposed to regard *being crushed by the trolley right beneath this footbridge* (the harm that comes to the evil-doer if you intervene) as relevantly similar to *being crushed by the same trolley two hundred yards down the track* (the harm that will otherwise come to the five). But what about a case like this:

Evil-Doer on the Footbridge – the Two Track Variant

Once again the trolley, call it trolley A, is steaming toward the five, set in motion by the evil-doer. But this time you and he are on a footbridge over a different track.

Another trolley, call it trolley B, is steaming down this track towards the footbridge. Fortunately the trolleys are fitted with networked automatic cruise control systems. When one brakes, they all brake. So, by pushing the evil-doer off the footbridge into the path of trolley B, you can stop trolley A and save the five.

Is being crushed by trolley B appropriately similar to being crushed by trolley A? I do not have a good sense of how to answer this question. And there's a reason for this. To answer the question of what sorts of similarity are relevant we would need to have some explanation of why it *matters* that the harm to the one is in some ways similar to the harm he would otherwise inflict on the five. And I see no explanation forthcoming .

6. Conclusion

So I do not yet see a difference between the Evil-Doer on the Footbridge and Evil-Doer with the Brake Code cases that would explain why it is permissible to push the evil-doer in the one case, impermissible to torture the evil-doer in the other. This suggests to me that there is no such difference. It is permissible to torture in Evil-Doer with the Brake Code. Sometimes it is permissible to torture when the stakes are quite small.

I should end with a disclaimer (just in case somebody with power over public policy reads this – unlikely, but you never know): It does not immediately follow from torture being morally permissible in certain less-than-catastrophic circumstances that torture should be legal in these circumstances. The case for upholding an exception-less ban on torture, extending through law into military policy, is strong. Indeed the case for us, as individuals, refusing to acknowledge that torture is sometimes the thing to do, is strong. My conclusion here may be one of those truths that should be murmured once and then forgotten.

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