

Contrastive consent and secondary permissibility

Theron Pummer

University of St Andrews

Correspondence

Theron Pummer, University of St Andrews.

Email: tgp4@st-andrews.ac.uk

Abstract

Consider three cases:

Turn: A trolley is about to kill five innocent strangers. You can turn the trolley onto me, saving the five and killing me.

Hurl: A trolley is about to kill five innocent strangers. You can hurl me at the trolley, saving the five and paralyzing me.

TurnHurl: A trolley is about to kill five innocent strangers. You can turn the trolley onto me, saving the five and killing me. You can instead hurl me at the trolley, saving the five and paralyzing me.

Most find the following four claims intuitively plausible:

- (1) It is permissible to turn the trolley onto me in *Turn*.
- (2) It is impermissible to hurl me at the trolley in *Hurl*.
- (3) It is impermissible to turn the trolley onto me in *TurnHurl*.
- (4) It is permissible to hurl me at the trolley in *TurnHurl*.

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But how does turning go from permissible to impermissible, and hurling from impermissible to permissible, when both alternatives are available? I argue that such “secondary permissibility” claims are explained by *contrastive consent*. Even if I do not consent to being harmed, it is likely I’ll consent to being hurled at the trolley *rather than* being turned onto.

1 | THE PROBLEM OF SECONDARY PERMISSIBILITY

Consider three cases:

Turn: A trolley is about to kill five innocent strangers. You can turn the trolley onto me, saving the five and killing me.

Hurl: A trolley is about to kill five innocent strangers. You can hurl me at the trolley, saving the five and permanently paralyzing me from the waist down.

TurnHurl: A trolley is about to kill five innocent strangers. You can turn the trolley onto me, saving the five and killing me. You can instead hurl me at the trolley, saving the five and permanently paralyzing me from the waist down.¹

Most find the following four claims intuitively plausible:

- (1) It is permissible to turn the trolley onto me in *Turn*.
- (2) It is impermissible to hurl me at the trolley in *Hurl*.
- (3) It is impermissible to turn the trolley onto me in *TurnHurl*.
- (4) It is permissible to hurl me at the trolley in *TurnHurl*.

Together these four claims are an instance of the *problem of secondary permissibility*, owed to Frances Kamm.² The problem is how to explain the conjunction of these four claims—in particular, how it is that turning the trolley onto me goes from permissible to impermissible and hurling me at the trolley goes from impermissible to permissible, when both alternatives are available. I take it that the explanation of (1) and (2) is that, while turning the trolley onto me involves harming me as a side effect, hurling me at the trolley involves harming me as a means.³ The challenge is to explain (3) and (4) in a way that retains (1) and (2).

¹ There’s not enough time to turn the trolley and then move me to safety. I will assume that being killed is a significantly greater harm than being permanently paralyzed from the waist down; we could instead tell the case so that turning the trolley kills me in some painful way whereas hurling me kills me painlessly.

² This statement of the problem of secondary permissibility is based on Graham 2021, but the core phenomenon as well as cases like *TurnHurl* come from Kamm 1996 (198–201) and Kamm 2007 (169–173). For further discussion, see Schwartz 2016, Øverland 2016, and Gordon-Solmon ms.

³ For discussions of this sort of explanation, see Kamm 2016 (Lecture II, section 3), Ramakrishnan 2016, and Quong 2020 (chapter 7).

The term “secondary permissibility” comes from Kamm. She says “... we may do secondarily, as a substitute for what we may permissibly do and could do, something that we would not be permitted to do if it were our only option, when doing this is in the best interests of the person who will be harmed.”⁴ Hurling me at the trolley is “primarily impermissible” in that it is impermissible when it’s the only way to save the five (as in *Hurl*), but “secondarily permissible” in that it is permissible when you also have the alternative of saving the five by turning the trolley onto me, causing me more harm rather than less (as in *TurnHurl*).

The claim that in *TurnHurl* it is permissible to hurl me at the trolley “as a substitute for what [you] may permissibly do and could do” suggests that it is *permissible* to turn the trolley onto me in *TurnHurl*. But this is at odds with (3), which is intuitively compelling as long as (4) holds. If it is permissible to save the five by hurling me, then it seems impermissible to save the five by turning the trolley onto me, as that would harm me to a greater extent to achieve only the same good.⁵

According to an alternative explanation, hurling me at the trolley in *TurnHurl* is secondarily permissible in that it is permissible when there is a “primarily permissible” way to save the five that harms me more, and turning the trolley onto me is primarily permissible in that it is permissible when it’s the only way to save the five (as in *Turn*). In other words, since turning the trolley onto me *would have been permissible* if hurling me were not an available alternative, and since hurling me harms me less, it is permissible to hurl me.

As Peter Graham shows, this “counterfactual permissibility explanation” cannot be correct.⁶ Suppose you can save the five either by killing me as a means or by paralyzing me as a means, and that I’d consent to your killing me as a means if and only if this were the only way to save the five. It would have been permissible to kill me as a means if paralyzing me as a means were not an available alternative, because I would have consented. But the fact that it would have been permissible to kill me as a means if paralyzing me as a means were not an available alternative does not, together with the fact that paralyzing me harms me less, make it permissible to paralyze me as a means when you can save the five either by killing me as a means or by paralyzing me as a means.

Graham offers a more plausible interpretation of Kamm’s idea, appealing not to counterfactual permissibility, but to conditions on the permissible infliction of a harm.⁷ Here are two.

Proportionality: The harm is not too large, considering only the good that inflicting it would achieve, and the causal relation between the harm and the good.⁸

Necessity: There is no alternative that achieves the same good that (i) is less harmful and (ii) is not ruled out as impermissible for not satisfying Proportionality.

In *Turn*, turning the trolley onto me inflicts the harm of death, the good achieved is five lives saved, and the infliction of the harm is a side effect of achieving the good. This harm is not too

⁴ This is Kamm’s 1996 (198) *Principle of Secondary Permissibility*.

⁵ Kamm herself writes, “It may be that when the victim would be better off, we could be obligated to do what is secondarily permissible...” Kamm 2007 (170). But we couldn’t be obligated to hurl me at the trolley if it remains permissible to turn the trolley onto me.

⁶ Graham 2021 (158-60).

⁷ Graham’s 2021 (166-67) “rights explanation” appeals to conditions on the permissible infringement of rights. For simplicity, I focus on conditions on the permissible infringement of the right not to be harmed, but what I argue below generalizes to other rights.

⁸ I take it that Proportionality includes Graham’s “threshold” and “causal” conditions (163-4).

large, given the good achieved and the causal relation between the harm and the good. So, Proportionality is satisfied. (This harm would be too large if the good achieved were saving only one life.) Turning the trolley also satisfies Necessity, as it's the only way to save the five. Absent further conditions on the permissible infliction of a harm, turning the trolley is permissible. If you could save the five either by killing me as a side effect or by permanently paralyzing me from the waist down as a side effect, both ways of saving me would satisfy Proportionality, but paralyzing me is the only alternative that would satisfy Necessity. Unlike Necessity, Proportionality compares each harm infliction with the good it achieves in isolation from alternatives which may also achieve the good.

In *Hurl*, hurling me at the trolley inflicts the harm of being permanently paralyzed from the waist down, the good achieved is five lives saved, and the infliction of the harm is a means of achieving the good. This harm is too large, given the good achieved and the causal relation between the harm and the good. Absent further conditions on the permissible infliction of a harm, the fact that hurling me does not satisfy Proportionality makes it impermissible.

The more plausible interpretation of Kamm's idea, then, is that inflicting a harm on me to achieve a good isn't ruled out as impermissible for not satisfying Proportionality, if there is an alternative that achieves the same good (or a proper part of it), harms me more, and satisfies Proportionality. Although hurling me in *TurnHurl* does not satisfy Proportionality (hurling me is in this way "primarily impermissible"), it is nonetheless permissible given that turning the trolley onto me achieves the same good, harms me more, and satisfies Proportionality (hurling me is in this way "secondarily permissible"). That is, (4) holds. And turning the trolley onto me does not satisfy Necessity, since hurling me achieves the same good, is less harmful, and is not ruled out as impermissible for not satisfying Proportionality. Therefore, it is impermissible to turn the trolley onto me. That is, (3) holds too. This is one possible solution to the problem of secondary permissibility.

In this paper, I develop an alternative solution to the problem of secondary permissibility. By appealing to the morally transformative power of *contrastive consent*—to your hurling me at the trolley *rather than* turning the trolley onto me—we can provide a deeper explanation of (1) through (4), and account for unusual circumstances in which (3) and (4) fail to hold. Not only does this moral power illuminate the phenomenon of secondary permissibility, but secondary permissibility reveals its limits. In a range of cases, contrastive duties provide the relevant explanations, instead of contrastive consent.

2 | THE CONTRASTIVE CONSENT SOLUTION

Consent is a morally transformative power. It can turn an otherwise impermissible act into a permissible one. Take *Hurl*. If I do not consent to being hurled at the trolley, it is impermissible to hurl me. But I assume consent is sufficiently powerful to make it permissible to hurl me if I do consent, even though hurling me does not satisfy Proportionality (that is, even though the harm is too large, considering only the good achieved and the causal relation between the harm and the good). Of course, this doesn't mean my consent makes it permissible to hurl me when this achieves no good at all.

My solution to the problem of secondary permissibility appeals to the morally transformative power of contrastive consent.⁹ I claim that, when in the absence of contrastive consent X is impermissible and Y is permissible, contrastive consent to X rather than Y can make X permissible. If in *TurnHurl* I give contrastive consent to your hurling me at the trolley rather than turning the trolley onto me, my contrastive consent makes hurling me permissible. Turning onto me does not satisfy Necessity, since hurling me is a smaller harm that is not ruled out for not satisfying Proportionality that achieves the good of saving the five. So, it is permissible to hurl me at the trolley and impermissible to turn the trolley onto me. This, in a nutshell, is the *contrastive consent solution* to the problem of secondary permissibility. In this section, I develop and defend it.

The first thing to appreciate about contrastive consent to being hurled rather than turned onto is that it is not consent to being hurled. Thus, I am not defending the “consent explanation” that Graham considers and rejects.¹⁰ According to this explanation, it is permissible to hurl me in *TurnHurl* because I consent to being hurled. The problem is that it can be permissible to hurl me in *TurnHurl* even when I do not consent to being hurled. From here onwards I’ll assume that, in *TurnHurl*, I do not consent to being hurled and would not consent to it under any condition. “Don’t harm me,” I say. I might nonetheless add, “But if you’re gonna harm me in either way, hurl me.” In this case, I refuse consent to being hurled but give contrastive consent to being hurled rather than turned onto.

The next thing to appreciate about contrastive consent is that it is not *conditional consent*. Conditional consent is consent that is given under certain conditions. For example, I might consent to your entering my house on the condition that you take off your shoes. When the condition isn’t satisfied, no consent to enter is given. When the condition is satisfied, plain old consent to enter is given. Contrastive consent is different. It isn’t conditional in terms of whether any consent is given; it is just given. But the consent given is restricted in its scope.¹¹ Suppose I say, “Don’t enter my house, but if you’re gonna enter, at least take off your shoes.” The sort of consent given is scope-restricted: while I consent to your entering with your shoes off rather than entering with your shoes on, I do not consent to your entering. I waive my right that you not enter shoes-off rather than enter shoes-on, but I retain my right that you not enter. I would have a complaint if you entered my house. But while I wouldn’t have any *additional* complaint if you entered with your shoes off, I would if you entered with your shoes on. Although it can include conditional content (“...but if you’re gonna enter, at least take off your shoes”), contrastive consent isn’t to be confused with conditional consent. My contrastive consent to your entering with your shoes off rather than on does not, together with the fact that you’ve entered my house, entail that I’ve plain old consented to your entering with your shoes off. You’d have seriously misunderstood my speech if you thought that, by entering with your shoes off, you have my consent to enter.¹²

Similarly, “if you’re gonna murder, you must do it gently,” is not plausibly the kind of conditional duty that would generate a plain old duty to murder gently, once you satisfy the murdering condition. Instead of “if you are going to murder, you are required to murder gently,” we need to interpret the conditional duty as something like “you are required to see to it that (if you are going to murder, you murder gently)” or “you are required to (murder gently, given that you are

⁹ Contrastive consent is relatively unexplored, though it has made some appearances in recent literature. See Enoch 2020 (204-5), Tadros 2020 (243-45), Liberto 2021 (225-6), Chadha 2021, and Enoch *ms*. It may be that consent is by its nature always contrastive, but that’s not necessary for my purposes.

¹⁰ Graham 2021 (161).

¹¹ For discussion of the distinction between conditionally tokened consent and scope-restricted consent, see Chadha 2021.

¹² I’m grateful to Daniel Muñoz for helpful discussion of these issues.

going to murder).” Neither of the latter two interpretations of the conditional duty to murder gently generates a plain old duty to murder gently, even if you are in fact going to murder. For the purposes of this paper, I’ll understand such conditional duties as *contrastive duties*. So interpreted, the conditional duty to murder gently is the contrastive duty to murder gently rather than murder brutally.¹³

As it happens, contrastive duties also illustrate one of the morally transformative powers of contrastive consent. Suppose you—evidently a bad person—are deciding which way to gratuitously kill me: by freezing or burning. I say, “Don’t kill me, but if you’re gonna kill me, freeze me.” I give contrastive consent to freezing rather than burning. While I waive the right not to be killed gratuitously by freezing rather than burning, I retain the right not to be killed gratuitously. It remains impermissible to kill me in either way. But my contrastive consent changes what contrastive duties you are under. Given that I contrastively consent to freezing rather than burning, and not to burning rather than freezing, it seems you must freeze me rather than burn me. Without my contrastive consent, you might not be under this contrastive duty. Were they equally harmful, you would lack a contrastive duty to kill me in either way rather than the other. Were freezing significantly more harmful, you’d have a contrastive duty to burn me rather than freeze me. But if I contrastively consent to freezing rather than burning, you must freeze me rather than burn me, even when freezing is significantly more harmful.

Take two acts that harm me, X and Y. When in the absence of my contrastive consent X and Y are both impermissible, my contrastive consent to X rather than Y lacks the power to make X permissible. It can generate only a contrastive duty or permission to do X rather than Y. However, when in the absence of contrastive consent X is impermissible and Y is permissible, contrastive consent to X rather than Y can generate a plain old duty or permission to do X. Contrastive consent can in this way make X “secondarily” permissible. As I argue below, this is what happens in *TurnHurl*. In the absence of contrastive consent, hurling me at the trolley is impermissible and turning the trolley onto me is permissible. When I give contrastive consent to your hurling me at the trolley rather than turning the trolley onto me, not only do I make it the case that you must hurl me rather than turn onto me, but I also make it the case that hurling me is permissible and turning onto me is impermissible.

In *TurnHurl*, in the absence of contrastive consent, the barrier against being hurled (harmed as a means) is stronger than the barrier against being turned onto (harmed as a side effect). But if I contrastively consent to being hurled rather than turned onto, this is no longer the case. I don’t waive my right not to be harmed, but I waive my right not to be harmed in one way rather than another—while I can still complain about the fact that you harmed me, I can’t now complain about the fact that you hurled me rather than turned onto me. My contrastive consent makes it the case that the barrier against being hurled is weaker than the barrier against being turned onto. Since the barrier against being turned onto is in the absence of my contrastive consent weak enough that turning onto me is permissible (given that this would achieve the good of saving the five), in the presence of my contrastive consent the barrier against hurling me is weak enough that hurling me is permissible (given that this would achieve the good of saving the five). By contrast, in the freezing or burning case, contrastively consenting to freezing rather than burning doesn’t make the barrier against being frozen weak enough that freezing me is permissible. This is because the barrier against being burned is in the absence of my contrastive consent strong enough that burning me is impermissible. Contrastive consent to X rather than Y can make X permissible *when*

¹³ See Chisholm 1963 for a classic discussion of conditional duties and see Comesañá 2015 and Muñoz and Pummer 2021 for more recent ones.

Y is permissible in the absence of contrastive consent. Turning onto me is permissible in the absence of contrastive consent; burning me isn't.

So far I have focused on what happens when I give you my contrastive consent to hurling me at the trolley rather than turning the trolley onto me. What happens when I refuse contrastive consent? Suppose that, in *TurnHurl*, I make the following speech: "I know that hurling me harms me less than turning the trolley onto me, but I'm indifferent between these two harms. You may not harm me at all, and I'm not saying you may hurl me rather than turn onto me. Not only do I retain my right not to be harmed, but I also retain my right not to be hurled rather than turned onto." Let us grant that my refusal of contrastive consent to hurling rather than turning isn't irrational in any way that would invalidate it.

According to the solution to the problem of secondary permissibility presented at the end of the previous section, the fact that hurling me at the trolley harms me less than an alternative that both achieves the same good and satisfies Proportionality is enough to make hurling me at the trolley permissible. Thus, it is permissible to hurl me at the trolley in *TurnHurl* even when I do not contrastively consent to being hurled rather than turned onto.

This solution is sensitive to the fact that hurling me at the trolley harms me less than turning the trolley onto me, but it is not adequately sensitive to the fact that hurling me at the trolley harms me as a means whereas turning the trolley onto me harms me as a side effect. In cases like *Hurl* and *TurnHurl*, hurling me harmfully uses my body as a trolley-stopper. These two cases differ in that in *TurnHurl* hurling me harms me less than an alternative that satisfies Proportionality and achieves the same good, but (assuming I refuse full consent) you still need my contrastive consent to harm me in a way that uses me rather than harm me in a way that doesn't use me. You would need at least this scope-restricted consent, to harmfully use my body as an instrument. When I refuse contrastive consent, I can complain about the fact that you harmed me as a means rather than as a side effect, and the barrier against being harmed as a means remains stronger than the barrier against being harmed as a side effect.¹⁴

When in *TurnHurl* I refuse contrastive consent to being hurled rather than turned onto, it is impermissible to hurl me. That is, (4) fails to hold. Since turning onto me is the only way to save the five that is not ruled out for not satisfying Proportionality, it satisfies Necessity. So, turning onto me is permissible. That is, (3) fails to hold too. It is intuitively plausible that, when (4) fails to hold, (3) fails to hold too. After all, it is permissible to turn onto me in *Turn*, and the addition of the less harmful but impermissible alternative of hurling me cannot plausibly make it impermissible to turn onto me.

According to the contrastive consent solution, (1)-(4) hold when I give contrastive consent to being hurled rather than turned onto, but (3) and (4) fail to hold when I refuse contrastive consent. I suspect that (3) and (4) may seem to hold universally because the circumstances in which they don't hold are so unusual. Presumably you'd be surprised to hear me say, "No, I'm not saying you may hurl me rather than turn onto me. I retain my right not to be hurled rather than turned onto." You'd expect me to give contrastive consent to being hurled rather than turned onto, and nothing in the initial description of *TurnHurl* suggests I wouldn't. Indeed, it is because hurling me

¹⁴ Also notice that the impermissibility of harmfully using me as a means isn't explained by my actively prohibiting you from harmfully using me (cf. Graham 2021, 162-3). It would still seem impermissible to seriously harmfully use me even if I offered the following clarificatory speech: "I am not saying that you may harm me as a means rather than as a side effect, but nor am I saying that you must not harm me as a means rather than as a side effect." The same goes for "non-contrastive" cases: it is not permissible to seriously harmfully use me to save others if I do not consent to this, even if I also do not actively prohibit it.

at the trolley harms me less than turning the trolley onto me that you'd expect me to contrastively consent to being hurled rather than turned onto; contrastive consent is very likely to come along with this difference in harm. But, *without contrastive consent*, the fact that hurling me harms me less than an alternative that satisfies Proportionality and achieves the same good does not make hurling me permissible.

This debunking story won't persuade everyone. Some will maintain that, when they imagine the (admittedly unusual) circumstances in which I refuse contrastive consent to being hurled rather than turned onto, they find it intuitive that you may nonetheless hurl me at the trolley. Others like myself have the opposite intuition. This paper can be viewed as an attempt to develop a solution to the problem of secondary permissibility for those who share the core intuition that, when I refuse contrastive consent, the barrier against being harmed as a means remains stronger than the barrier against being harmed as a side effect, and it accordingly remains impermissible to hurl me.

I have considered cases in which I fail to give contrastive consent by *refusing* to do so. What about cases in which, because I am unconscious or otherwise unable to respond, I fail to give contrastive consent? This raises notoriously difficult issues concerning hypothetical consent, which are not my topic here.¹⁵ Nonetheless, I find it plausible that hurling me is permissible if (you reasonably believe that) I would have given contrastive consent to hurling rather than turning, were I conscious and able to respond.¹⁶ We need not claim that hypothetical contrastive consent is a perfect surrogate for actual contrastive consent. We need only claim that, when I cannot give or refuse actual contrastive consent, the fact that I would give contrastive consent were I able to respond weakens the barrier against being hurled enough to make it permissible to hurl me, given that doing so would save five lives. Even if it isn't hypothetical consent as such, something broadly consentish is needed to relevantly weaken the barrier against harming me as a means to make it permissible to hurl me. The fact that hurling me harms me less than turning onto me isn't enough.

There are limits on the transformative power of contrastive consent. Contrastive consent to X rather than Y doesn't always make X permissible when in the absence of contrastive consent X is impermissible and Y is permissible. Consider the following case.¹⁷ A boulder is about to crush both my arms. You can at great cost to yourself save my left arm only. You can instead at the same great cost to yourself save both of my arms. The cost to you is great enough that it is permissible for you to save neither of my arms. In the absence of contrastive consent, it is impermissible to save my left arm only and permissible to save neither of my arms. Yet it remains impermissible to save my left arm only even if I give contrastive consent to your saving my left arm only rather than saving neither of my arms. This marks a limit on the morally transformative power of contrastive consent.

¹⁵ For example, suppose someone needs a blood transfusion to live, but, because they are unconscious, you cannot obtain their consent to proceed. Is it permissible to proceed with the transfusion anyway, since they (almost certainly) would have consented were they able to? See Enoch 2017 for discussion.

¹⁶ Hypothetical contrastive consent is contrastive consent given under certain conditions, and is in this way a kind of conditional consent. But it is scope-restricted consent that is given under certain conditions. For example, were I conscious and able to respond, I would have said, "Don't harm me, but if you're gonna harm me, hurl me," waiving my right not to be harmed in one way rather than another while retaining my right not to be harmed.

¹⁷ This is a variant of the arms example in Parfit 1982 (131).

It does not hold universally that, when in the absence of contrastive consent X is impermissible and Y is permissible, contrastive consent to X rather than Y makes X permissible. While this claim serves to illustrate the power of contrastive consent, the contrastive consent solution appeals to the narrower claim that, when X and Y are acts that harm me, where X does not satisfy Proportionality and Y does, my contrastive consent to X rather than Y can prevent X from being ruled out as impermissible for not satisfying Proportionality.¹⁸ When I contrastively consent to being hurled rather than turned onto, I make it that the barrier against being hurled is weaker than the barrier against being turned onto. Since the barrier against being turned onto is weak enough that turning onto me satisfies Proportionality (given that this would achieve the good of saving the five), in the presence of my contrastive consent the barrier against hurling me is weak enough that hurling me is not ruled out as impermissible for not satisfying Proportionality (given that this would achieve the good of saving the five). Moreover, hurling me satisfies Necessity, while turning onto me doesn't. So, when I give contrastive consent, (3) and (4) hold. When I do not contrastively consent to being hurled rather than turned onto, hurling me is ruled out as impermissible for not satisfying Proportionality but turning onto me satisfies Proportionality. Since turning onto me is the only way to save the five that is not ruled out for not satisfying Proportionality, it satisfies Necessity. So, hurling me at the trolley is impermissible and turning the trolley onto me is permissible. When I refuse contrastive consent, neither (3) nor (4) holds.

Here is another possible limit. Suppose that in *TurnHurl*, if you don't harm me as a means of saving the five, you'd leave me entirely unharmed. What if I nonetheless gave contrastive consent to being hurled rather than turned onto? Arguably my contrastive consent wouldn't make it permissible for you to hurl me in this case. After all, you'd leave me unharmed if you don't hurl me, and I'm refusing contrastive consent to being hurled rather than being left unharmed (I'm refusing consent to being harmed). This suggests the contrastive consent solution needs a narrower claim, like the following: when X does not satisfy Proportionality and Y satisfies Proportionality, *and you'd do one if not the other*, my contrastive consent to X rather than Y can prevent X from being ruled out as impermissible for not satisfying Proportionality.¹⁹

¹⁸ It is also plausible that contrastive consent to X rather than Y can under certain conditions prevent the fact that X doesn't satisfy Necessity from making X impermissible. However, moral transformations with respect to Proportionality are sufficient for my purposes here.

¹⁹ This limit is inspired by Gordon-Solmon's (ms) novel account of secondary permissibility. Both her account and the contrastive consent solution so limited hold, contrary to Kamm's (2007) *Extension of the Principle of Secondary Permissibility*, that secondary permissibility depends on "what we or others would actually otherwise do" (171) and not merely on what we or others can do. For further evidence that we should accept a limit of this sort, consider the following case (from an exchange with Peter Graham):

DoubleTurnHurl: A trolley is about to kill five innocent strangers. There are four ways to save the five. First, you can turn the trolley onto A, saving the five and killing A. Second, you can hurl A at the trolley, saving the five and permanently paralyzing A from the waist down. Third, you can turn the trolley onto B, saving the five and killing B. Fourth, you can hurl B at the trolley, saving the five and permanently paralyzing B from the waist down. Now for the twist: A says, "You may not harm me at all, but you may hurl me rather than turn onto me" (giving contrastive consent) whereas B says, "You may not harm me at all, and I'm not saying you may hurl me rather than turn onto me" (refusing contrastive consent).

We might worry about the possible implication that, while if both A and B refused contrastive consent it'd be permissible to turn onto either and impermissible to hurl either, A's contrastive consent would make it that hurling A is the only permissible way to save the five, even if you'd turn onto B if not hurl A. We can avoid this implication if we accept the above limit.

Finally, cases like the following may reveal a further limit on the transformative power of contrastive consent.

Different5TurnHurl: A trolley is about to kill ten innocent strangers. You can turn the trolley onto me, saving five of them and killing me. You can instead hurl me at the trolley, saving only the *other* five and permanently paralyzing me from the waist down.²⁰

Hurling me doesn't satisfy Proportionality but turning onto me does. If I do not contrastively consent to being hurled rather than turned onto, hurling me remains ruled out for not satisfying Proportionality. Since turning onto me is the only way to achieve any good that is not ruled out for not satisfying Proportionality, it satisfies Necessity. So, turning onto me is permissible and hurling me is impermissible. But suppose I do contrastively consent to being hurled rather than turned onto. As argued above, this makes it the case that hurling me is not ruled out for not satisfying Proportionality. Whether hurling me or turning onto me satisfies Necessity depends on whether saving the five by turning onto me achieves *the same good* as saving the other five by hurling me. If they achieve the same good, then only hurling me satisfies Necessity, so that hurling me is permissible and turning onto me is impermissible. But it seems plausible that, since these acts save entirely different people, they do not achieve the same good, even if they achieve the same *amount* of good.²¹ In this case, both hurling me and turning onto me satisfy Necessity, and both are permissible.

Either way, we might find it objectionable that my contrastive consent could make hurling me permissible in *Different5TurnHurl*. We might think that someone's own good cannot ground a moral justification to save others instead, when doing so would otherwise be impermissible. Morality cannot use someone's own good against them in this way. Such a structural constraint on moral justification would be violated if my contrastive consent could make hurling me permissible. Think about the five people who would be saved if you turned the trolley onto me: it's the fact that they would be saved by turning onto me that would make turning onto me satisfy Proportionality in the absence of my contrastive consent. And it's the fact that turning onto me satisfies Proportionality in the absence of my contrastive consent that enables my contrastive consent to make it that hurling me isn't ruled out for not satisfying Proportionality, making hurling me permissible (as hurling me would then also satisfy Necessity). In short, the good of the five who would be saved by turning onto me grounds a moral justification to save the *other five* instead, which would otherwise be impermissible. This violates the structural constraint in question.²²

I am not sure there really is such a structural constraint on moral justification. But if there is, it reveals a further limit on the transformative power of contrastive consent. For contrastive consent to X rather than Y to make X permissible when X would otherwise be impermissible, it must be that in the absence of contrastive consent Y satisfies Proportionality (and you'd do one if not the other). According to the further limit, it must be that those whose good makes Y satisfy

²⁰ For concreteness, we can suppose that turning the trolley will send it down a sidetrack where it will miss the first five but kill me, after which it will reconnect with the main track and kill the other five. Meanwhile, hurling me at the trolley won't stop the trolley in time to save the first five but will stop it in time to save the other five.

²¹ For discussion of how to interpret the good achieved for the purposes of satisfying necessity conditions, see Oberman 2020.

²² I'm grateful to Peter Graham for helpful discussion of these issues.

Proportionality in the absence of contrastive consent are not worse off if X is performed than they are if Y is performed.

Let us take stock. In this section, I have presented the contrastive consent solution to the problem of secondary permissibility. According to this solution, if in *TurnHurl* I give contrastive consent to being hurled rather than turned onto—as you’d expect me to—then I make it that hurling me is not ruled out for not satisfying Proportionality. Since hurling me satisfies Necessity, but turning onto me doesn’t, hurling me is permissible and turning onto me isn’t. In the surprising circumstances in which I refuse contrastive consent, hurling me is ruled out for not satisfying Proportionality but turning onto me satisfies both Proportionality and Necessity. So hurling me is impermissible and turning onto me is permissible. The contrastive consent solution provides an explanation of (3) and (4) that is compatible with (1) and (2), and accounts for unusual circumstances in which (3) and (4) fail to hold.

3 | THE CONTRASTIVE DUTY SOLUTION

Even if the contrastive consent solution solves the problem of secondary permissibility as formulated in terms of cases like *TurnHurl*, it fails to have plausible implications about cases like the following:

Turn2Hurl1: A trolley is about to kill ten innocent strangers. You can turn the trolley onto A and B, killing both and saving the ten. You can instead hurl just A at the trolley, permanently paralyzing A from the waist down and saving the ten. A refuses contrastive consent to being hurled rather than turned onto.²³

The contrastive consent solution fails to imply the intuitively plausible secondary permissibility claim that it is permissible to hurl A in *Turn2Hurl1*. But according to the solution to the problem of secondary permissibility presented at the end of section 1, the fact that hurling A at the trolley harms A less than an alternative that both achieves the same good and satisfies Proportionality is enough to make hurling A at the trolley permissible. This view has the plausible implication that it is permissible to hurl A at the trolley in *Turn2Hurl1* even though A does not consent to being hurled rather than turned onto.

However, it is not the fact that hurling A at the trolley harms A less than an alternative that both achieves the same good and satisfies Proportionality that makes hurling A at the trolley permissible. What makes hurling A permissible is instead the fact that, first, A would be under an enforceable contrastive duty to hurl A rather than turn the trolley, were it up to A what happens, and second, in the absence of this contrastive duty, turning the trolley satisfies Proportionality. This, in a nutshell, is the *contrastive duty solution*; it explains intuitively plausible secondary permissibility claims about cases like *Turn2Hurl1*. In this section, I develop and defend it. I take it all the relevant (contrastive) duties mentioned are enforceable.

First, in *Turn2Hurl1*, A would be under a contrastive duty to hurl A rather than turn the trolley because hurling is no costlier to A than turning, and hurling doesn’t involve killing B whereas turning does. The same holds in a variant of the case in which hurling is as harmful to A as turning. The contrastive duty solution will not apply to cases like *TurnHurl*, as in that sort of case I would be under no contrastive duty to hurl rather than turn (assuming I do not have a contrastive duty

²³ This is a variant of a case given by Kamm 2007 (170).

to choose a smaller rather than larger harm for myself; if I do have such duties to myself, then the contrastive duty solution would apply to cases like *TurnHurl*, potentially making the contrastive consent solution superfluous).²⁴ Nor will the contrastive duty solution apply to cases like *Hurl*, as given the large cost involved I would not be under a duty to save the five rather than do nothing.

Second, the fact that [in *Turn2Hurl1*, A would be under a contrastive duty to hurl rather than turn] and the fact that [in *TurnHurl*, I contrastively consent to hurl rather than turn] are morally transformative in structurally similar ways. Just as the fact that I have (contrastively) consented can weaken the barrier against being harmed as a means, as compared to the barrier against being harmed as a side effect, so too can the fact that A would be under a (contrastive) duty.²⁵ When in the absence of contrastive consent to X rather than Y it is the case that Y satisfies Proportionality and X doesn't, contrastive consent to X rather than Y can make it that X is not ruled out for not satisfying Proportionality. Likewise, when in the counterpossible scenario in which A wouldn't be under a contrastive duty to do X rather than Y it is the case that Y satisfies Proportionality and X doesn't, the fact that A would be under a contrastive duty to do X rather than Y can make it that X is not ruled out for not satisfying Proportionality. In other words, the contrastive duty to do X rather than Y can be relevantly morally transformative if Y satisfies Proportionality in the absence of such a contrastive duty. As with contrastive consent, there are limits on the transformative power of contrastive duties. Consider a variant of *Turn2Hurl1* in which the trolley isn't about to harm anyone, but turning still kills A and B and hurling still paralyzes A. Here, turning does not satisfy Proportionality, even if, counterpossibly, A wouldn't be under a contrastive duty to hurl rather than turn. Here, the fact that A would be under a contrastive duty to hurl rather than turn fails to make it that hurling is not ruled out for not satisfying Proportionality. In this variant, hurling A is impermissible.

The contrastive duty solution delivers the plausible claim that it is permissible to hurl A and impermissible to turn the trolley in *Turn2Hurl1*. A would be under a contrastive duty to hurl A rather than turn the trolley, were it up to A what happens. But in the counterpossible scenario in which A would not be under such a contrastive duty, turning satisfies Proportionality. So, the fact that A would be under such a contrastive duty makes it that hurling is not ruled out for not satisfying Proportionality. Since hurling A satisfies Necessity but turning onto A and B doesn't, hurling A is permissible and turning onto A and B is impermissible. This contrastive duty explanation of intuitively plausible secondary permissibility claims about cases like *Turn2Hurl1* is structurally like the contrastive consent explanation of intuitively plausible secondary permissibility claims about cases like *TurnHurl*.

The contrastive duty solution applies to further cases. Consider the following.

TurnHurl5v6: A trolley is about to kill six innocent strangers. You can turn the trolley onto me, saving five of them and killing me. You can instead hurl me at the trolley, saving all six and permanently paralyzing me from the waist down. I refuse contrastive consent to hurling rather than turning.

²⁴ I leave it unanswered what needs to be at stake for others for me to be under a contrastive duty. For example, would I be under a contrastive duty to be killed as a means of saving five lives and prevent a sixth person from stubbing their toe rather than be killed as a side effect of saving the same five (and not prevent the stubbed toe)?

²⁵ See Quong's 2020 (chapter 7) means principle, which morally prohibits harmfully using others unless they have consented to this harm or are duty-bound to suffer it.

In this case, I would be under a contrastive duty to hurl rather than turn, were it up to me what happens. This is because hurling is no costlier to me than turning, and hurling involves saving an additional life. As above, this fact makes it the case that hurling is not ruled out for not satisfying Proportionality. Hurling satisfies Necessity while turning doesn't (taking "the same good" in Necessity to be the same five lives saved). So hurling is permissible but turning is impermissible. Indeed, the contrastive duty solution would yield the same plausible results even if in *TurnHurl5v6* hurling were slightly costlier to me than turning, assuming (as seems plausible) that I would be under a contrastive duty to incur a slightly greater cost to save an additional life. But now consider the following variant.

HeroicTurnHurl5v6: A trolley is about to kill six innocent strangers. You can turn the trolley onto me, saving five of them and permanently paralyzing me from the waist down. You can instead hurl me at the trolley, saving all six and killing me. I refuse contrastive consent to hurling rather than turning.

This case is just like *TurnHurl5v6* except that turning paralyzes me and hurling kills me. Presumably now I would not be under a contrastive duty to hurl rather than turn. Death is considerably costlier to me than being permanently paralyzed from the waist down, and I would not be required to incur this additional cost to save the sixth stranger's life. Neither the contrastive consent solution nor the contrastive duty solution applies to *HeroicTurnHurl5v6*. Turning is permissible and hurling is impermissible.

Finally, suppose that in a variant—call it *HeroicTurnHurl5v6**—I *do* contrastively consent to being hurled (being killed) rather than being turned onto (being permanently paralyzed from the waist down). This makes it that hurling is not ruled out for not satisfying Proportionality, given that turning satisfies Proportionality in the absence of my contrastive consent. Given my contrastive consent, neither turning nor hurling is ruled out for not satisfying Proportionality. And both satisfy Necessity, as turning is the least harmful alternative (not ruled out for not satisfying Proportionality) that would save five lives and hurling is the least harmful alternative (not ruled out for not satisfying Proportionality) that would save all six lives. Therefore, in *HeroicTurnHurl5v6** both turning and hurling are permissible.

This strikes me as a plausible result, but some may hold that in *HeroicTurnHurl5v6** it is impermissible to turn the trolley onto me. They might believe that, given that neither alternative is ruled out for not satisfying Proportionality, and given that both satisfy Necessity, the fact that hurling achieves additional good (prevents additional serious harm) makes it impermissible for you to turn. The contrastive consent solution can be formulated in a way that implies this claim, by adding a further condition on permissibility, in addition to Proportionality and Necessity.²⁶ Doing so would not affect the success of the contrastive consent solution for cases like *TurnHurl*, and it would not affect the success of the contrastive duty solution for cases like *TurnHurl5v6* and *Turn2Hurl1*.

²⁶ For example, according to Frowe's 2018 principle *Preventing Harm*, "One has a duty to prevent harm to others when one can do so without violating anyone's rights, and without bearing an unreasonable cost" (463). If I am right that in *HeroicTurnHurl5v6** neither alternative is ruled out for not satisfying Proportionality, and that both satisfy Necessity, Frowe's view would seem to imply that you mustn't turn (and that you must hurl). For a reply to Frowe, see Gordon-Solmon and Pummer (forthcoming).

4 | CONCLUSION

Many find the following four claims intuitive:

- (1) It is permissible to turn the trolley onto me in *Turn*.
- (2) It is impermissible to hurl me at the trolley in *Hurl*.
- (3) It is impermissible to turn the trolley onto me in *TurnHurl*.
- (4) It is permissible to hurl me at the trolley in *TurnHurl*.

The problem of secondary permissibility is how to explain the conjunction of these four claims—in particular, how it is that turning the trolley onto me goes from permissible to impermissible and hurling me at the trolley goes from impermissible to permissible, when both alternatives are available. I have here offered the contrastive consent solution, according to which the explanation is provided by the morally transformative power of contrastive consent. This solution explains the compatibility of (1) through (4) when contrastive consent is given. When contrastive consent is not given, (3) and (4) lose their plausibility. And, while the contrastive consent solution does not apply to cases like *Turn2Hurl1*, the structurally similar contrastive duty solution delivers plausible claims about those cases.

Is there no more unified solution, covering all cases? It would seem not, as the permissibility of harming as a means in cases like *TurnHurl* and in cases like *Turn2Hurl1* correspond to two *distinct* exceptions to the prohibition on harming as a means—respectively, to having consented to harm and being under a duty to suffer harm. It is relatively uncontroversial that [having consented to harm] and [being under a duty to suffer harm] each has the morally transformative power to weaken the otherwise particularly strong barrier against being harmed as a means.²⁷ I have argued that [having contrastively consented to being harmed as a means rather than as a side effect] and [being under a contrastive duty to suffer harm as a means rather than as a side effect] each has the *contrastive* morally transformative power to weaken the barrier against being harmed as a means, as compared to the barrier against being harmed as a side effect. Each can make it the case that harming as a means is permissible when harming as a side effect satisfies Proportionality in their absence. The contrastive consent solution and the contrastive duty solution provide structurally similar explanations of intuitively plausible secondary permissibility claims that would otherwise appear to be *sui generis*. At the same time, secondary permissibility reveals limits of powers like contrastive consent.

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²⁷ Again, see Quong 2020 (chapter 7).

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