Risk, Rights, and Restitution

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Abstract:
In "Imposing Risks," Judith Thomson gives a case in which, by turning on her stove, she accidentally causes her neighbor's death. She claims that both the following are true: (1) she ought not to have caused her neighbor's death; (2) it was permissible for her to turn her stove on. In this paper it is argued that it cannot be that both (1) and (2) are true, that (2) is true, and that therefore (1) is false. How this is so is explained, and the implications of this position regarding the relation between rights and duties is explored.

Article:
In "Imposing Risks," the article that constitutes Chapter 11 of her *Rights, Restitution, and Risk*, Judith Thomson poses the following problem:

[M]y neighbor is not now coming at me with a knife. (It is early morning, and he is still asleep.) Nor is there anybody whose life or limb I can save by causing my neighbor a harm. It certainly seems plausible to think that the circumstances which now obtain just are not circumstances in which it would be permissible for me to cause my neighbor any harm at all — *a fortiori*, it seems plausible to think that if anyone said to me now,

(1) You ought not cause your neighbor's death,

he would be speaking truly. So far so good. In fact I want some coffee now, and must turn my stove on if I am to have some. If I turn my stove on, I impose a risk of death on my neighbor — it is a gas stove, and my turning it on *may* cause gas to leak into his apartment, or it *may* cause an explosion, etc. Feeling a surge of moral anxiety, I ask your advice. You say: Absurd. That's a fine stove, in mint condition, and the risk is utterly trivial. So it's *not* the case that you ought not turn your stove on; that is,

(2) It is permissible for you to turn your stove on.

It is very plausible to think that (1) and (2) are both true ...

Suppose that, feeling reassured, I turn my stove on. Lo — astonishingly, amazingly — my doing so causes an explosion in my neighbor's apartment, and thereby causes his death. Question: does this show that you spoke falsely when you said (2)?[1]

It is, as Thomson herself might say, a nice problem, one that raises in sharp relief the question of the relevance of risk to moral right and wrong. Toward answering that question, in this paper I will discuss various solutions to the problem that Thomson herself discusses, argue against the solution she favors, argue in support of a solution she rejects, pursue the implications of this solution for the relation between rights and duties, and conclude with some remarks regarding whether the infringement of rights requires restitution.

Part I

The first solution to the problem is one provided by G.E. Moore.[2] Moore would say that you did indeed speak falsely when you said (2). In light of the surprising turn of events, it was in fact wrong of Thomson to turn on her stove. Because of the triviality of the risk she ran, however, she is not to blame for turning on her stove or for her neighbor's consequent death.

This is an attractive solution. We should presumably agree that Thomson is not to blame for anything that happened, since she acted without malice, she knew that the risk of harm she ran was minimal, and so on.[3] Once that is acknowledged, though, much of the sting may seem to be drawn from the claim that, because the risk was unluckily realized, she nevertheless acted wrongly in turning on her stove. The sting is reduced still further by the observation that, although you spoke falsely in saying (2), your saying it was nonetheless perfectly appropriate, insofar as the evidence available to you at the time rendered your saying it epistemically justified. On Moore's view, then, the case is just one of many in which an agent has an *excuse* for her action.

Moore's view also provides for the possibility, which many have overlooked but which Moore himself explicitly recognizes, that an agent have what I have elsewhere called an *accuse* for her action. An accuse is the mirror-image of an excuse; it consists in an agent's being to blame despite doing no wrong.[4] Moore would diagnose an accuse in certain cases in which a high risk of harm is luckily unrealized, as in this case provided by Thomson:

> A is about to play Russian roulette on B — six chambers, one bullet ... [T]he specially made "roulette gun" with which A is about to play the game works like this: you aim the gun, you press a button on the handle, that starts the cylinder spinning, and if there is a bullet under the firing pin when the cylinder stops spinning, it is fired in the direction of aim. B**,** let us suppose, is asleep; he is no threat to anyone, and there is no great good which might be accomplished by his death. So we say to A:
>
> (3) You ought not press that button.
>
> Let us suppose that A cares nothing for that, and proceeds to press the button. The cylinder spins; and when it stops spinning, the bullet is not under the firing pin, so the bullet is not fired. B is not killed; he is in no way harmed; let us suppose he is not even awakened by the small click which the cylinder made when it stopped spinning. Does that show that we spoke falsely when we said (3)?[5]

On the supposition that on balance at least as much good comes from pressing the button as would have come from not pressing it, Moore is committed to saying that we did speak falsely in saying (3). Again, much of the sting may seem to be drawn from this claim when it is added that A is nonetheless to blame for pressing the button, and when it is further observed that the falsity of (3) is quite consistent with our having been epistemically justified in asserting it at the time.[6]

Despite the attractiveness of Moore's solution, Thomson is reluctant to accept it. She finds the claim that (2) and (3) are false too tough to swallow. "We do not think," she says, "that the permissibility of acting under uncertainty is to be settled only later, when uncertainty has yielded to certainty."[7] At this point some might seek to effect a reconciliation between Moore and Thomson by drawing a distinction between two senses of "ought," one objective and the other subjective, the former having to do with the situation that the agent is actually in, the latter having to do with the situation that the agent believes herself to be in.[8] It might then be claimed that, as Moore would have it, Thomson ought objectively not to turn her stove on but, as Thomson would have it, it is nonetheless subjectively permissible for her to turn it on.

This won't do, for two reasons. First, despite the popularity of the appeal to two such senses of "ought," it is not clear that it is well founded. Thomson herself rejects the appeal, saying:

> ... I greatly doubt that there is such a subjective sense of "ought." On those rare occasions on which someone conceives the idea of asking my advice on a moral matter, I do not take my field work to be

> limited to a study of what he believes is the case: I take it to be incumbent on me to find out what *is* the case. And if both of us have the facts wrong, and I therefore advise him to do what turns out a disaster, I do not insist that in one sense my moral advice was all the same true, though in another sense it was false.[9]

This is an important observation that casts serious doubt on there being a subjective sense of "ought." Regardless of the merits of this observation, however, the second point is simply that Thomson, in insisting that she is concerned only with an objective sense of "ought," would herself resist the proffered reconciliation and stress that she takes it to be the case that it was objectively permissible for her to turn her stove on and objectively wrong for A to press the button. When she says that we do not think that the permissibility of acting under uncertainty is to be settled only once uncertainty has yielded to certainty, it is about objective permissibility that she is talking, and she is rejecting Moore's position.

I think that Thomson is quite right to oppose Moore on this issue. The concepts of an excuse and an accuse, though perfectly cogent, cannot do the job Moore requires of them. The following case, provided by Frank Jackson, establishes this point:

> Jill is a physician who has to decide on the correct treatment for her patient, John, who has a minor but not trivial skin complaint. She has three drugs to choose from: drug A, drug B**,** and drug C. Careful consideration of the literature has led her to the following opinions. Drug A is very likely to relieve the condition but will not completely cure it. One of drugs B and C will completely cure the skin condition; the other though will kill the patient, and there is no way that she can tell which of the two is the perfect cure and which the killer drug. What should Jill do?[10]

The answer seems plain: Jill ought to give John drug A; giving him either of the others is just too risky. But this is not Moore's answer. He is committed to saying that, in the absence of any further features of the case that have any moral significance, it is wrong for Jill to give John drug A; either she ought to give him drug B or she ought to give him drug C. This is unacceptable.

Let me stress again that it is with an objective sense of "ought" that I am concerned, as are Moore, Thomson, and Jackson. It might be objected that the term "objective" is inappropriate, since the verdict that Jill ought to give John drug A is one that reflects her limited awareness of what is, in some sense, her "actual situation." (Of course, in another sense, her "actual situation" is such that she is not fully aware of what will happen if she gives John drug B or of what will happen if she gives him drug C.) But notice that this verdict is based on what *is* evident to Jill, not on what she *finds* evident; it has to do with the evidence that is *available* to her, not simply with the evidence of which she actually *avails* herself. Moreover, the verdict is based on what *is* an acceptable risk, not on what Jill might happen to *believe* is an acceptable risk. Thus, use of the term "objective" here seems to me appropriate.

In the end, though, what matters is not what terminology we adopt to express a certain concept but that we successfully isolate that concept. Regardless of whether we use or shun the term "objective," perhaps the best way to fix on the pertinent sense of "ought" is to note that it is with what she ought to do in this sense that a *conscientious person* is primarily concerned."Suppose that Jill is such a person but that, for some reason, it is not clear to her what she ought to do. So she comes to you for advice and asks, "What ought Ito do?" Surely you will tell her that she ought to give John drug A.[12] Moore's position precludes such an answer, since on his view it is not only false but epistemically unjustified. So much the worse for his position.

Part II

The second solution to our problem rests on noting that Moore's rejection of

> (2) It is permissible for you to turn your stove on

presupposes that, at the time at which (2) was uttered, it was true that, if Thomson turned her stove on, she would thereby cause her neighbor's death. Now, she *did* turn her stove on and she *did* thereby cause her neighbor's death, but one might nonetheless try resisting the presupposition in question. Thomson, however, thinks this a dismal idea and suggests passing it by,[13] as do I. In so doing, I do not mean to presume the truth of causal determinism. Perhaps, as the libertarian would say, Thomson's turning on her stove, given that it was freely performed, was itself something that was not causally determined. But this of course does nothing to impugn the claim that her turning on the stove was, under the circumstances, causally sufficient for her neighbor's death, and it is surely safe to assume, for present purposes, that it was sufficient. One could still insist, of course, that the proposition that it would be sufficient was not true (or false) before Thomson turned her stove on, but, like Thomson, I will not pursue this Aristotelian idea.

Part III

The third solution rests on noting that Moore's rejection of (2) presupposes the truth of what Thomson calls an "inheritance principle." The basic principle she has in mind is this:

> (IP_1) If A ought not X, then if it is the case that if A Y-s, he will thereby X, then A ought not Y.[14]

This principle clearly warrants inferring the falsity of (2) from the truth of (1). (Let A be Thomson, Xing be her causing her neighbor's death, and Y-ing be her turning on her stove.) Declaring abstract principles in moral theory always suspect, Thomson advocates rejecting (IP_1) in order to solve our problem.[15] I think she is quite right to reject (IP_1), but that doesn't in fact solve the problem.

Suppose that I am the sort of snob that oozes condescension. When I lend someone a helping hand, I always manage thereby to humiliate the person I am "helping." Let us suppose that I ought never to humiliate anyone. Does it follow that I ought never to lend anyone a helping hand? Surely not. (IP_1) is therefore false.

The fact is, although I always *do* humiliate the people I help, I *needn't.* I could avoid the humiliation altogether. But what about cases in which the undesirable consequence is unavoidable?[16] Suppose, for example, that if I were to help you cross the street at this moment I would thereby cause a traffic accident, and that this is something that under the circumstances I could not avoid doing. If we assume that I ought not to cause the accident, doesn't it follow that I ought not to help you? So it would seem. In saying this, I am appealing, not to (IP_1), but to

> (IP_2) If A ought not X, then if A cannot avoid its being the case that if A Y-s, he will thereby X, then A ought not Y.

Notice that this principle also clearly warrants inferring the falsity of (2) from the truth of (1), since it is obviously implicit in Thomson's case that she cannot avoid its being the case that she will cause her neighbor's death if she turns on her stove. Hence rejection of (IP_1) does not itself suffice to solve our problem (as Thomson is herself aware; she is skeptical of all forms of inheritance principle that render (1) and (2) incompatible).

Perhaps Thomson is right always to be suspicious of abstract moral principles; nonetheless, (IP_2) strikes me as exceptionally plausible. In fact, what is perhaps a slightly broader principle would also seem true, namely,

> (IP_3) If A ought not X, then if A cannot avoid its being the case that if A Y-s, he X-s, then A ought not Y.

Many cases confirm this principle. For example, I cannot avoid its being the case that if I travel to Boston, I travel to Massachusetts; suppose that for some reason I ought not to travel to Massachusetts; surely, then, I ought not to travel to Boston. (Note that this case may not confirm (IP_2). It seems somewhat odd to say that if I

travel to Boston, I will *thereby* travel to Massachusetts; certainly travelling to Boston isn't a *means,* in any ordinary sense of that word, of travelling to Massachusetts.)

Although many cases confirm (IP_3), might not others tell against it? Variations on the Good Samaritan Paradox might seem to pose the strongest challenge.[17] Suppose that it is Greg's duty, as a security guard, to provide a truthful report of anything important that happens on his watch. Assume that Greg ought not to steal any item that is under his care, but that one night he nonetheless walks off with a valuable painting. Since Greg cannot avoid its being the case that, if he provides a truthful report of what happens on his watch, he steals the painting (for he cannot truthfully report his stealing it — clearly an important event — without actually stealing it), (IP_3) apparently implies that Greg ought not to report the theft. But surely he ought to report it.

Making certain distinctions will allow us to deal with this case (and other cases like it). First, we should note that Greg's general duty to report important matters is a *conditional* one: *if* something important occurs, he ought to provide a truthful report of it. Thus we may say, in particular, *if* Greg steals the painting, he ought to provide a truthful report of his doing so. It is a mistake, however, to think that such a conditional obligation is transformed into an unconditional one simply by virtue of its condition's being satisfied." Suppose that it is Monday, and Greg is planning to steal the painting on Tuesday. We may say, as of Monday, that Greg ought not to steal the painting on Tuesday; that he ought to provide a truthful report on Wednesday of his stealing it on Tuesday, if he does steal it then; and (let us assume) that he will steal it on Tuesday. But this does not warrant our saying, as of Monday, that Greg ought to provide a truthful report on Wednesday of his stealing the painting on Tuesday. On the contrary, since he ought not to steal the painting, he ought as of Monday so to act that the truthful report he provides on Wednesday is one that reveals that he did *not* steal the painting on Tuesday. This is of course compatible with its being the case that, having stolen the painting on Tuesday, Greg ought *on Wednesday* to provide a truthful report at that time of the theft. But this does not imply that he then has an obligation to steal the painting, since obligations can only be prospective. To insulate the inheritance principle from the present objection, it suffices to render explicit time-indices that are implicit in it, as follows (where T_1 is no later than either T_2 or T_3):

> (IP_4) If A ought at T_1 not X at T_3, then if A cannot at T_1 avoid its being the case that if A Y-s at T_2, he X-s at T_3, then A ought at T_1 not Y at T_2.

Defending the pertinent inheritance principle in this way does not of course constitute providing a positive argument for it, and so Thomson (or someone else) might still declare it dubious.[19] The best way that I know of to provide such an argument is to give a general account of the concept of moral obligation, one which is otherwise acceptable and which implies the truth of (IN. This is not the place to undertake such a task.[20] I must therefore rest content with what I have already tried to do: identify the pertinent inheritance principle; note its considerable intuitive plausibility; and defend it against what seems to be the strongest sort of objection to it. In a review of Thomson's book, Holly Smith maintains that "the inheritance principle is so central that giving it up would be a disaster for ethical theory."[21] Insofar as it is (IP_4) that is at issue, I fully agree.

Part IV

If, then, we cannot say that you spoke truly when you said both

> (1) You ought not cause your neighbor's death
>
> and
>
> (2) It is permissible for you to turn your stove on,

and if we should accept (2), then we must reject (1). Thomson strenuously resists doing so, however. She says that rejecting (1) "sounds a very odd idea, in light of the fact that there was nothing in the circumstances in

which I was then placed which would have justified my causing my neighbor's death."[22] But this reasoning is circular. *If* nothing justified Thomson's causing her neighbor's death, then of course you spoke truly when you said (1). But that's just what is at issue. *Did* nothing in fact justify Thomson's causing her neighbor's death? Wasn't she, on the contrary, perfectly justified in causing it in the way that she did, namely, by turning on her stove? That is, after all, what (IP_4) conjoined with (2) implies.

Suppose we say that, in general, one ought not to impose a high risk of death on someone else. (I think this must be too simple — surely there can be cases in which imposing such a risk is justifiable — but let that pass for the moment.) As Thomson in effect notes, this would not imply, in conjunction with (IP_4), that you spoke falsely when you said (2); for it was not true that if she turned on her stove, she would thereby impose a high risk of death on her neighbor. By contrast, we could infer that we spoke truly when we said to A,

> (3) You ought not press that button,

since (let us assume) pressing the button would, indeed did, impose a high risk of death on B.[23] Isn't this just the result we've been looking for?

Thomson thinks not, saying:

> Presumably we could still have it that a person ought not shoot a man in the head, or strangle him, and so on, for doing these things imposes a high risk of death on the victim. But we should be unable to say that a person ought not actually kill another; and that sounds quite unacceptable.[24]

This is puzzling. Why should accepting that one ought not impose a high risk of death on someone require denying that one not ought kill someone? Surely the opposite is true, since killing someone always imposes a high risk (a *very* high risk) of death.[25] So there's no need to think, as Thomson does, that accepting the former claim requires denying the latter.

This observation, however, leads us back to the problem with which we began. If it is wrong to impose a high risk of death, and killing (or, more generally, causing a death) constitutes imposing such a risk, then (1) would seem to be true after all. But how can this be, when (IP_4) and (2) both appear to be true and jointly imply that (1) is false?

Here is a solution. We should focus on the risks that we run when performing *intentional* actions. We should not say that, in general, one ought not to impose a high risk of death on someone else. We should rather say that, in general, one ought not *intentionally* act in such a way that one thereby imposes (whether intentionally or not) a high risk of death on someone else.[26] (This is surely still too simple, but, again, let that pass for the moment.) Unintentional causings of death, of the sort that occurs in Thomson's case, don't qualify, and thus (1) can be rejected, even though it would remain true that one ought not intentionally cause the death of someone else. We can thus avoid the view that Thomson finds quite unacceptable while affirming both (2) and (IP_4).

This solution is not *ad hoc.* There is good reason in general to focus on intentional actions when trying to determine what someone ought to do. Consider a variation on Jackson's case in which Jill knows that it is drug B that will prove fully effective, but this drug is locked in a safe whose combination no one knows. Strictly, Jill can open the safe, since all it takes to do so is a few flicks of the wrist, movements that she can easily perform. In this case, some consequentialists would say, as before, that it is wrong for Jill to give John drug A, since she can give him drug B and doing so would have better results.[27] But this again seems mistaken. Jill ought to give John drug A. Giving him drug B is not a "viable" option, in the sense that it is not something that she can intentionally do.[28]

Focusing on intentional actions may appear to neglect negligent actions. Not so. Consider Greg again. Suppose this time, not that he steals a painting, but simply that he fails to make his appointed rounds, thereby running a risk of someone else's stealing a painting. There are various ways in which such a failure may occur. Suppose that Greg turns on his TV to watch his favorite show, in the full knowledge that he ought to be making his rounds instead. In this case, Greg is intentionally neglecting his duties, and my proposal that we focus on intentional actions is clearly consistent with saying that he is acting wrongly in doing so. Suppose now that Greg watches his TV, simply forgetting about his duties rather than intentionally flouting them. In this case, my proposal is still perfectly consistent with saying that he is acting wrongly; for, even if Greg isn't intentionally running any risk of a painting's being stolen, his action of watching TV is itself intentional and does in fact constitute the running of such a risk.[29] Suppose, finally, that Greg doesn't watch TV but simply falls asleep. Falling asleep is not an intentional action, and so it may seem that my proposal cannot cover this case. In fact, such a case poses no problem at all. The point to note is that Greg's falling asleep is a consequence of some *earlier* intentional action or actions of his, and it is the risk associated with these actions that determines whether he has acted wrongly.[30]

Here, then, is what I would say in the cases that Thomson and Jackson have given us. First, you spoke falsely when you said,

(1) You ought not cause your neighbor's death.

However, you would have spoken truly had you said instead,

(1') You ought not intentionally cause your neighbor's death.

You spoke truly when you said,

(2) It is permissible for you to turn your stove on.

We spoke truly when we said to A,

(3) You ought not press that button.

Finally, Jill would have spoken truly had she said,

(4) I ought to give John drug A.

Part V

I said in the last section that it is surely too simple to say that, in general, one ought not intentionally act in such a way that one thereby imposes (whether intentionally or not) a high risk of death on someone else. It is too simple because there are cases in which it seems perfectly justifiable to act in just such a way. (Cases of self-defense come most readily to mind.)

Just as we cannot say that, in general, one ought not intentionally act in such a way that one thereby imposes a high risk of death, so too we cannot say that, in general, one ought not intentionally act in such a way that one thereby imposes a high risk of harm or of anything else that is undesirable. Whether one ought so to act depends not simply on how high the relevant risk is but on what other options one has and the risks that they involve. This is widely recognized. Let us talk, as is common, of the "expected value" of acts, such value being a function of both the desirability and the probability of outcomes that the acts may be expected to have.[31] Whether one ought to perform an act will depend not just on its expected value, but on how this value compares to that of other options one has.

Giving a full account of what an agent ought to do in light of the expected values of his options is no easy matter. It won't do, for example, to take Moore's consequentialist account and simply "probabilize" it as follows: one ought to perform an action if and only if performing it would have an expected value higher than that of any alternative (where expected value is to be computed in terms of the intrinsic values of consequences). First, this overlooks the significance of rights, which place a limit to the appeal to intrinsic value in the justification of actions. Expected value, then, must be computed differently. Second, Moore's account, whether probabilized or not, violates the inheritance principle (IP_4). This has been brought to light in recent discussions of "actualism" and "possibilism." (Very roughly, an actualist claims that whether one ought to perform an action is a function of what *would* happen if one performed the action, whereas a possibilist says that it is a function of what *could* happen if one performed the action.) Moore is an actualist, and actualism rejects (IP_4). Consider this case, provided by Frank Jackson and Robert Pargetter, who are unabashed proponents of actualism and, as such, brusquely brush (IP_4) aside:

> Perhaps an overweight Smith ought to stop smoking and eat less, but it may not be true that he ought to stop smoking. For it may be that were he to stop smoking he would compensate by eating more. It is clear to many smokers, and to their doctors, that they ought to stop smoking and eat less, while it is far from clear to them that they ought to stop smoking.[32]

As Jackson and Pargetter recognize, what would happen if Smith were to stop smoking can diverge from what would happen if he were to both stop smoking and eat less. But for this very reason, it is bizarre to declare that whether one ought to perform an action rides on what would happen if one were to perform it. Imagine this dialogue:

> "Doctor," says Smith, "tell me what I ought to do."
> "I should have thought that was obvious," replies his doctor. "You ought to stop smoking and eat less."
> "All right, then," says Smith, filled with new resolve. "As of this moment, I quit smoking!"
> "Oh, no!" says his doctor. "Whatever you do, don't do that!"

What on Earth is Smith to think? He would be well advised to seek a second opinion.[33]

Note that, since Smith of course cannot both stop smoking and eat less without stopping smoking, (IP_4) implies, contrary to what Jackson and Pargetter suggest, that if Smith ought to do the former, then he ought after all to do the latter and, equivalently, if it is not the case that he ought to do the latter, then it is not the case after all that he ought to do the former. In either case, it will allow Smith's doctor to give him advice with which he can fully comply. In my view, we should try to develop a possibilist account of moral obligation that both confirms the truth of (IP_4) and declares such obligation to be a suitable function of the expected values of the options that an agent faces. I cannot undertake this here.[34] Let us assume that we have such an account in hand. The question I now wish to address is this: how might this account be extended in order to accommodate moral rights?

Part VI

Many moral philosophers have applied Wesley Newcomb Hohfeld's seminal account of legal rights to moral rights.[35] At the heart of this account is a thesis that holds rights "in the strictest sense" — that is, claim-rights — to be correlative to duties. This correlativity thesis may be put as follows:

> (CT) A has a moral right against B that B X if and only if B has a moral duty to A to X,

where "A" and "B" are to be replaced by phrases designating persons and "X" by some verb-phrase. For example: Smith has a right against Jones that Jones pay Smith $10 if and only if Jones has a duty to Smith to pay Smith $10.

(CT) has had its detractors, but I think it is highly plausible.[36] Thomson herself subscribes to (CT).[37] Furthermore, according to her, moral rights are in principle subject to being overridden by countervailing moral considerations, so that it can be permissible, all things considered, for someone who is duty-bound by some right nonetheless to infringe the right.[38] (Exceptions to this general rule are rights that are maximally stringent.[39]) Thus the duties to which rights are correlative must also be in principle subject to being overridden by countervailing considerations; they are, in W.D. Ross's terminology, "prima facie duties."[40] This, too, is highly plausible; to hold that rights are correlative only to what Ross calls "duties proper" — those prima facie duties that prevail under the circumstances — would require that we radically revise our common way of talking about rights. (For example, we could not talk of a homeowner's having a right to privacy under those exceptional circumstances in which it is permissible, all things considered, to invade his privacy.)

It is with duties proper that we have been implicitly concerned up to this point. When I declared that you spoke falsely when you said,

(1) You ought not cause your neighbor's death,

I meant that Thomson had no duty proper not to cause her neighbor's death; that is, it was permissible, all things considered, for her to cause his death. When I declared that you spoke truly when you said,

(2) It is permissible for you to turn your stove on,

I meant that Thomson had no duty proper not to turn her stove on. If what one ought, in this sense, to do is, as I have argued, a function of the risks one faces, then, given the relations just noted between what one ought to do, what one has a prima facie duty to do, and what rights others have against one, it follows that these rights, also, are a function of the risks one faces.

Thomson resists this idea. She accepts what she calls the Harm Thesis,

(HT) We have claims against others that they not cause us harm,

but rejects what she calls the Risk Thesis,

(RT) We have claims against others that they not impose risks of harm on us.

(Claims can of course be lost — for example, by waiver or forfeiture — in which case (HT) is inapplicable.)[41] She finds (RT) too prolific, yielding an unacceptable profusion of rights. She considers a case in which someone, D, throws a log onto a nearby highway while clearing his land, thereby imposing a risk of harm on anyone who might pass by. "[I]s it the case," she asks, "that for everyone in the universe who could have got to the highway and tripped over that log, D infringed a claim of his or hers? We might well prefer that our theory of rights avoid saying this."[42] She then considers replacing (RT) with the High-Risk Thesis,

(HRT) We have claims against others that they not impose high risks of harm on us,

but finds this unpromising, too. She finds "high" vague, and she also says that in many cases there is no such thing as *the* risk of harm imposed, and hence no such thing as *the* size of the risk of harm imposed. She concludes that, although D may well have acted wrongly in risking harm to others when throwing the log onto the highway, he did not thereby infringe anyone's rights. So, too, with A when he played Russian roulette on B in her earlier example.

We could render what Thomson says about rights and risk consistent with what I have said about "ought" and risk either by rejecting Hohfeld's correlativity thesis, (CT), which connects rights and duties (i.e., prima facie

duties), or by rejecting Ross's account of the connection between prima facie duties and "ought" (i.e., duties proper).[43] I endorse neither move, for I do not find Thomson's reason for rejecting (RT) compelling. Why should we worry about the proliferation of rights? Thomson's own view implies that we have very many rights indeed. Suppose, as she does, that I have a right against you that you not harm me. Given what she calls the Means Principle for Claims, it follows that I have a right (against you) that you not stick a knife one inch into my back, a right that you not stick a knife two inches into my back, indeed an infinite number of such rights, corresponding to the infinite number of distances between one and two inches, let alone yet other rights having to do with other weapons and other parts of my body." These rights that you not stick a knife into my back are in a sense incidental (in that they bear a merely contingent relation to the right not to be harmed), but they are genuine rights all the same; and anyway, the Means Principle for Claims yields an infinite number of non-incidental rights: the right not to be harmed to this degree, to that degree, to another degree ..., in this way, in that way, in another way... (RT) involves proliferation of still another kind, of course, since it adds yet another dimension (degree or size of risk) that admits of infinite variation, but it is hard to see why this proliferation should bother Thomson when other types do not. I think that none of these proliferations should worry us; they all emanate in a systematic way from a single source, namely, the interest we have in not being harmed.[45]

Indeed, adopting (RT) allows us to deal with cases that seem otherwise difficult to handle. Consider again the case of Russian roulette. It seems clear that, if B were subsequently to discover A's shenanigans, he would have special cause for complaint — not just the complaint that anyone might have that A acted wrongly, but the complaint that A wronged him in particular. The most natural way to understand this is in terms of A's having violated a right of B's. Or consider a case that Thomson gives elsewhere that seems especially intractable in the absence of (RT):

> Suppose [Aggressor] has got hold of a tank. He had told Victim that if he gets a tank, he's going to get in it and run Victim down. Victim sees Aggressor get in his tank and start toward Victim. It is open country, and Victim can see that there is no place to hide, and nothing he can put between himself and Aggressor which Aggressor cannot circle around. Fortunately, Victim happens to have an anti-tank gun with him, and it is in good working order, so he can use it to blow up the tank, thereby saving his life, but of course thereby also killing Aggressor. I think that most people would say that it is morally permissible for Victim to use that anti-tank gun: surely it is permissible to kill a man if that is the only way in which you can prevent him from killing you![46]

The usual rationale for the view that it is permissible in such a case to kill in self-defense is that Aggressor has forfeited the right that he would otherwise have against Victim that Victim not kill Aggressor. But it is hard to see why this should be so unless Aggressor, in attacking Victim, is thereby violating a right that Victim has against Aggressor. The right in question cannot be the right not to be harmed, since Victim has not yet been harmed. If Victim had to wait for that right to be violated before responding to Aggressor, the response would come too late (if at all). On the contrary, the right in question appears to be the right that Aggressor not impose a risk of harm on Victim.[47]

Or rather: the right that Victim has is the right that Aggressor not perform an intentional action such that he thereby imposes (whether intentionally or not) a risk of harm on Victim. (Putting matters this way ties in with the proposal, made in section IV above, that what one ought to do is a function of the risks that one runs by virtue of the actions one intentionally performs.) Thus, I would suggest that we in fact accept, not (RT), but rather this revised version of it:

> (RRT) We have claims against others that they not perform intentional actions that constitute imposing risks of harm on us.

Similar theses can be drawn up regarding other commonly alleged rights, such as the rights to life, property, privacy, and so on. Notice that, although (RRT) does not validate (HT), it does validate this revised version of that thesis:

> (RHT) We have claims against others that they not intentionally cause us harm;

for any intentional causing of harm is a case of intentionally performing an action that constitutes imposing a risk of harm. (This, too, repeats a point made in section IV.)

Should we revise (RRT) still further and limit it to actions that run a *high* risk of imposing harm? I see no reason to do so. First, the problems that Thomson notes with (HRT) would once again come into play. Second, given that rights are correlative to prima facie duties, which may vary infinitely in stringency, it seems innocuous to say that, all else being equal, the lower the risk of harm, the less stringent the right in question, with very low risks simply involving very weak rights.[48] Still, we should presumably add that, in order for Aggressor to forfeit his right not to be intentionally killed by Victim, the risk of harm that he imposes on Victim must be serious — how serious, however, I would not venture to say.

But is the rationale of forfeiture acceptable? At one point, Thomson claims that it is not, saying:

> Suppose that as Victim raises his anti-tank gun to fire it, Aggressor's tank stalls. Aggressor gets out to examine the engine, but falls and breaks both ankles in the process. Victim (let us suppose) now has time to get away from Aggressor, and is in no danger. I take it that you will not think that Victim may all the same go ahead and kill Aggressor. But why not? — if Aggressor really has forfeited his right to not be killed by virtue of his attack on Victim?[49]

But there is no need to think that forfeiture must be permanent.[50] On the contrary, the usual view regarding forfeiture would appear to be that not only is an attack by Aggressor sufficient, under the circumstances, for his forfeiting his right not to be intentionally killed by Victim, but so too is it (or something like it) necessary. Hence, if Aggressor's tank stalls, and thus the risk of harm he imposed on Victim is eliminated, his right not to be intentionally killed will be reinstated.

There is this complication. Aggressor's right to life (whether forfeit or not) is, more precisely, the right that Victim (and others) not perform an intentional action that constitutes imposing a risk of death on him; this is correlative to a duty (whether incumbent or not) on Victim's part not to impose such a risk. The risk in question is relative to Victim's position. (All risk is relative. As noted earlier, risk is a function of evidence, and what is evident to one person or at one time may not be evident to another person or at another time.) Suppose, then, that it is evident to Aggressor but not to Victim that Aggressor's attack cannot succeed; Victim cannot be expected to be aware, say, that Aggressor has broken his ankles and cannot get back into his tank. In that case, since Victim's evidence is that his life is still in danger, I think we must say that Aggressor's right to life remains forfeit *visa vis* Victim, and that it is therefore permissible for Victim to kill Aggressor. Suppose, by contrast, that Aggressor has not broken his ankles but that it is evident to Victim that he has. In that case, I think we must say that Aggressor's right to life is no longer forfeit *vis a vis* Victim, and that it is therefore impermissible for Victim to kill Aggressor. This will change, of course, as soon as Victim's evidence changes regarding the threat that Aggressor poses — which at some point it presumably will.

Part VII

I have proposed that we accept

> (RRT) We have claims against others that they not perform intentional actions that constitute imposing risks of harm on us,

a thesis that Thomson opposes. At one point she makes some remarks that can be turned into an argument against this thesis. The argument is this:

> (a) If one person infringes another's right, then the former owes restitution to the latter.
> (b) If (RRT) were true, then, in the case of Russian roulette, A would have infringed a right of B's.
>
> But
>
> (c) In the case of Russian roulette, A owes no restitution to B.
>
> Hence
>
> (d) (RRT) is not true.[51]

Premise (b) is true; hence I must reject either (a) or (c). I accept (c); it is (a) that I reject.

An easy way of meeting Thomson's challenge is simply to amend (a) as follows:

> (a') If one person infringes another's right and thereby causes the latter a loss, then the former owes restitution to the latter for that loss.

Since A causes B no loss in the case of Russian roulette, (a') would be inapplicable. That, I think, would settle the matter; for I see no reason to think (a) preferable to (a'). In fact, though, I think we should reject (a') too. Let me indicate, very briefly, why this is so.

When an innocent person suffers a loss, that person deserves to have that loss made whole. This is true, regardless of the cause of the loss. Consider Alf and Bert, both innocent people. Each has had a leg broken. Alf s was broken when a tornado struck his house; Bert's was broken when Charlie's car struck his car. A common reaction, in keeping with Thomson's remarks, is to say that Charlie owes restitution to Bert. Why should Bert suffer the loss that Charlie has imposed? Let Charlie suffer it instead; after all, he caused it. This natural reaction is problematic, however. First, it leaves Alf out in the cold (unless he has insurance), even though he is no less deserving of restitution than Bert. Second, it may be that Charlie is just as innocent as Bert; he may not have been at fault in any way when his car struck Bert's. Third, even if Charlie was at fault, the degree of fault may not match up with the degree of Bert's loss, so that, again, he (Charlie) is relatively innocent. (How to match fault with loss is of course a very difficult matter.) Fourth, Dave may have been driving just as faultily as Charlie and yet have luckily avoided causing any loss; if Charlie deserves to be made to make amends due to his having driven faultily, Dave would seem to be just as deserving.

In my view, justice would be done if Alf received restitution along with Bert, and if Dave were made to make amends along with Charlie in keeping with the degree of fault displayed, which in Charlie's case may or may not match up with the degree of loss caused to Bert by Charlie and in Dave's case clearly does not match up with the degree of any loss caused by Dave. (a) would have Charlie make restitution in full to Bert. This may not be in keeping with the degree of fault (if any) displayed by Charlie, and it entirely overlooks both Alf and Dave. I therefore find it unacceptable.[52, 53]

Notes

[1] Thomson (1986), pp. 177-78.
[2] Moore (1912), pp. 80-83.
[3] This is not to say that we should agree with Moore's account of just what the conditions of blameworthiness are. On p. 79 of Moore (1912) he apparently endorses the claim that an agent is morally blameworthy if and only if it is morally right to blame her. Given Moore's own account of moral rightness, this implies that an agent

is morally blameworthy if and only if blaming her would produce consequences that are, on the whole, at least as good, intrinsically, as those that would be produced by not blaming her. This strikes me as badly misguided, but there is no room to pursue the issue here.

[4] See Zimmerman (1997). Cf. Moore (1912), p. 82; Parfit (1984), p. 25. Thomson also seems to accept the possibility of accuses at Thomson (1991), p. 295.

[5] Thomson (1986), p. 181.

[6] This is not to say that Moore himself would declare the assertion of (3) epistemically justified. Given his own account of the conditions of "ought (morally)," he would presumably declare it unjustified.

[7] Thomson (1986), p. 185.

[8] Cf. Parfit (1984), p. 25; Feldman (1986), p. 46.

[9] Thomson (1986), p. 179. Cf. Thomson (1990), p. 173.

[10] Jackson (1991), pp. 462-63.

[11] Of course, a conscientious person may have a number of other concerns also.

[12] In saying this, I am supposing that the evidence available to Jill matches the evidence available to you. But what if this is not the case? Might it then happen that two "oughts" once again emerge, one relative to Jill's evidence and the other to yours? I believe not, but there is no space to deal with this important question here.

[13] Thomson (1986), p. 186.

[14] Thomson (1986), p. 186. In her article, Thomson uses the label "(IP_1)" to refer to a different principle.

[15] Thomson (1986), pp. 186 and 188.

[16] There is of course a large question about what it is for something to be "unavoidable" for someone — about the relevant sense of "can(not)." This is too large a question to discuss here.

[17] For an early discussion of this issue, see Åqvist (1967).

[18] The literature on conditional obligation is large. For a general treatment of the matter, see Zimmerman (1996), ch. 4.

[19] One wonders whether Thomson would still want to reject it. In a later work, she embraces what she calls the Sole-Means Principle of Permissibility, which says (Thomson (1990), p. 108): If the only means X has of doing beta is doing alpha, then it would be permissible for X to do beta if and only if it would be permissible for X to do alpha. There are some important differences between this principle and (IP_4); nonetheless, the two principles are certainly of a kind, and Thomson's acceptance of her principle suggests that she has managed to overcome her suspicions regarding at least one abstract moral principle and that, perhaps, she no longer subscribes to the solution that she has offered to our problem.

[20] It is a task that I undertake in Zimmerman (1996). There I indicate (pp. 69-70) that (IP_4) is in fact still not quite what is needed; it should be further stipulated in the antecedent that A can at T_1 Y at T2. This nicety need not concern us here, however.

It is of course possible to plumb a course intermediate between that of rejecting all inheritance principles and adopting one such as (IN**,** and that is to develop and defend an inheritance principle that does not imply that (1) and (2) are inconsistent (e.g., by modifying (IP_4) by adding a clause to the effect that it is not just true but *evident to A* that A cannot avoid its being the case that if A Y-s he X-s). Notice, however, that this by itself would do nothing to impugn (IP_4).

[21] Smith (1989), p. 417.

[22] Thomson (1986), p. 187.

[23] Cf. Thomson (1986), p. 187.

[24] Thomson (1986), p. 188.

[25] This is because the probability that someone will die, given that one kills him, is 1. (In saying this, **I** am assuming that killing entails causing a death, which itself entails that a death occurs.) Thus in general it is possible that the probability that some event E occurs, given that one X-s, is different from the probability that E occurs, given that one Y-s, even though under the circumstances one cannot X without Y-ing.

[26] We should distinguish between (a) intentionally imposing a high risk of death and (b) intentionally acting in such a way that one does in fact (whether one intends this or not) thereby impose a high risk of death. It is the latter that I mean.

[27] Moore himself would not say this. He explicitly limits his discussion to *voluntary* actions (Moore (1912), p. 5 ff.) which he understands to be actions that one would do if one chose to do them.
[28] There is a complication. It might be objected that, although Jill cannot intentionally open the safe, she *can* intentionally give John drug B (once she has opened the safe, something that she can do, even if not intentionally). The proper response is to note that Jill cannot intentionally put herself in a position in which she can intentionally give John drug B. I won't elaborate on this response here.
[29] See n. 26 above.
[30] This of course does not establish that, when Greg falls asleep, the wrongdoing associated with his failing to make his appointed rounds *must* be traced to some earlier intentional action of his; it only shows that focusing on intentional actions in one's account of moral obligation does not preclude condemnation of Greg's behavior. Still, it is worth noting that falling asleep is not an action, whether intentional or not, so that rival proposals also face a prima facie difficulty in accounting for the wrongness of Greg's behavior. Tracing Greg's control over his failure to make his rounds to some earlier episode in his history is a natural and by now well-known and respected response to this sort of difficulty.
[31] Cf. Rescher (1983), p. 5 ff; Jackson (1991), pp. 463-64. As noted in section I, the relevant probability is a measure of the evidence available to the agent, that is, of the degree to which the agent would be justified in believing that a certain outcome would occur if a certain act were performed. (I make no assumption here about how finely grained degrees of justification can be.) If the outcome is causally undetermined, then the probability must be less than 1. Of course, even if the outcome is causally determined, the probability may well still be less than 1.
[32] Jackson and Pargetter (1986), p. 247.
[33] We would of course understand the doctor's saying, "Whatever you do, don't do *just* that [i.e., don't quit smoking without also eating less]!" But that's not what he says, and not what Jackson and Pargetter have in mind (or, at least, not all that they have in mind). He is telling Smith (and they have in mind) that Smith ought not to quit smoking.
34I develop such an account in Zimmerman (2005).
[35] Hohfeld (1919).
[36] For a discussion of its merits, see Zimmerman (1996), p. 176 ff. Time-indices may be explicitly supplied, but I omit them here for the sake of simplicity.
[37] Thomson (1990), p. 41.
[38] Thomson (1990), p. 123 ff.
[39] Thomson (1990), pp. 168-69.
[40] Ross (1930), p. 19 IT.
[41] Thomson (1990), p. 228 ff.
[42] Thomson (1990), p. 245.
[43] Strictly, it is only that half of (CT) that holds that rights entail duties that is at issue here. If Thomson's neighbor has a right against her that she not cause him harm, then, by (CT), she has a duty to him not to cause him harm; if she lacks the duty, then he lacks the right.
[44] Thomson (1990), pp. 156-157. The principle in question goes as follows: *If (i)* X has a claim against Y that Y not do beta, and (ii) if Y does alpha then he or she will thereby do beta, *then* X has a claim against Y that Y not do alpha, that claim being at least as stringent as X's claim that Y not do beta. This is, of course, a kind of inheritance principle and, as such, suggests once again (see n. 19 above) that Thomson no longer subscribes to the position she adopts in "Imposing Risks." (The Means Principle for
Claims resembles (IP_1). I think we should reject it as it stands but accept it if modified a *la* ($1P_2$).)
[45] Another objection to (RT) is that it allows rights to be "lightweight." But this is really no objection, since on any plausible account rights just can be lightweight. (Consider my right to the two cents you owe me.) Still another objection to (RT) is that, to be plausible, it must allow for rights sometimes to be overridden by considerations that are, from the duty-holder's perspective, self-centered; for example, my alleged right that you not impose a risk of harm on me must not be thought to imply that it is impermissible for you to drive your car past me while I am walking nearby on the sidewalk. But again this is no objection, since on any plausible

account rights just can be overridden by such considerations. (Consider the permissibility of your breaking an appointment because you have a splitting headache.)

[46] Thomson (1986), p. 33.

[47] At Thomson (1991), p. 301, Thomson agrees that, in attacking Victim, Aggressor loses his right to life and hence that it is justifiable for Victim to kill Aggressor, but she claims that this is due, not to Aggressor's actually violating a right of Victim's (namely, the right that Aggressor not impose a risk of harm on him), but rather to Aggressor's being "about to" violate a right of Victim's (namely, the right that Aggressor not harm him). This seems inadequate. There are cases in which Aggressor is in fact *not* about to harm Victim but in which it would nonetheless be justifiable for Victim to kill Aggressor because of the threat that Aggressor poses to Victim's life. Suppose, for example, that Aggressor's tank is defective in such a way that, if Victim did not defend himself against Aggressor's attack, it would turn out that Aggressor could not succeed in killing Victim after all, but that this fact is not known by either party, so that Aggressor persists in his attack and Victim justifiably continues to believe that his life is at risk. Under such circumstances, it would surely still be permissible for Victim to defend himself by killing Aggressor.

[48] In Thomson (1990), p. 154, the following "Aggravation Principle" is proposed: If X has a claim against Y that Y do alpha, then the worse Y makes things for X if Y fails to do alpha, the more stringent X's claim against Y that Y do alpha. (This principle is modified later on p. 256 and 372; it constitutes a generalization of a proposal made in Thomson (1986), p. 59.) I would suggest the following modification: "...then the worse Y risks making things for X..." (Concerning rights that are weak, see n. 45 above.)

[49] Thomson (1986), p. 34.

[50] Later, at Thomson (1986), p. 36, Thomson appears willing to concede this point.

[51] Thomson (1986), p. 165.

[52] See Zimmerman (1994) for a fuller discussion of this issue. The view that I have just outlined has much in common with the views presented in Schroeder (1995) and Waldron (1995).

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