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# Observations

## The Ultimate Unity of Rights and Utilities

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It is a familiar problem in both constitutional law and moral philosophy that social benefit sometimes conflicts with individual rights or common intuitions about moral duty. Competing schools of philosophers have battled over that conflict for generations. One frequent analytic tool is the hypothetical case designed to pose the conflict as sharply as possible.

Judith Jarvis Thomson's recent article is in that tradition.<sup>1</sup> My brief response to Professor Thomson proceeds at two levels. At one level, the response is directed at Thomson: I think there are better solutions to the moral problems in her hypothetical cases. At a more general level, my response is directed to both sides in the long debate over rights and utilities. Thomson's cases highlight fundamental disagreements about the nature of rights and the relationship between rights and utilities.<sup>2</sup> I think that we cannot solve these problems until we combine the analysis of rights and utilities into a single moral calculus more inclusive than anything Bentham envisioned.<sup>3</sup>

### I.

Thomson starts by comparing two cases. In the case she calls *Trolley Driver*, a runaway trolley is about to kill five workers on the track.<sup>4</sup>

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1. Thomson, *The Trolley Problem*, 94 *YALE L.J.* 1395 (1985).

2. See generally *UTILITY AND RIGHTS* (R. Frey ed. 1984) (collection of essays discussing the clash between rights theory and utilitarianism).

3. The moral calculus refers to Jeremy Bentham's suggestion that we assess the moral worth of an act by calculating the sum of its good and bad consequences. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J. Burns & H. Hart eds. 1982). In particular, see Bentham's chapter on valuing and summing the pains and pleasures created by an act. *Id.* at 38-41.

4. Thomson, *supra* note 1, at 1395-96. Several of Thomson's hypothetical cases are drawn from the work of Philippa Foot. See P. FOOT, *The Problem of Abortion and the Doctrine of the Double Effect*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 19, 23 (1978).

The driver can save their lives by diverting the trolley to a spur, but if he does so he will kill one worker on the spur. Thomson reports that everyone agrees that it is morally permissible to divert the trolley, and some believe that it is morally obligatory to divert the trolley. I agree that it is at least morally preferred to divert the trolley, and I think it makes no difference whether the actor is the trolley driver or the bystander at the switch.

In the case she calls *Transplant*, a surgeon can save five lives by removing the heart, lungs, and kidneys of a healthy patient in for a checkup.<sup>5</sup> Once again, five lives can be saved by sacrificing one. She reports that everyone agrees that it is not morally permissible to perform these transplants without permission of the donor. I agree. Her specification that the donor is neutrally selected on the basis of tissue match and that no other donor is available should not change the result.

Professor Thomson devotes twenty pages to exploring the reasons for these contrasting intuitions, without touching on what seems to me the critical factor. In each case there is a choice between saving one life or five, and in each case, all six have equal entitlements to life. But only *Transplant* involves a strong entitlement to the means of saving life. The reason for our strong and unanimous intuitions about *Transplant* is that the healthy donor has the strongest imaginable entitlement to his own body organs. The donor's organs are dedicated to preserving the donor's life, no matter how badly they might be needed by the potential donees. This insight is at the heart of Thomson's work on abortion.<sup>6</sup>

For each of the trolley workers, the other branch of track is the means of saving life, just as the one working set of vital organs is the means of saving life in *Transplant*. But the one worker's claim to the main line is no stronger than the five workers' claim to the spur. None has a priority claim of entitlement comparable to the donor's entitlement to his own organs. All six workers are equally situated, and if at least one must die, better one than five.

Thomson's explanation of our intuitions about the two cases is that in *Trolley Driver* and its variations, the very threat that would have killed the five is diverted to kill the one. But in *Transplant*, the one would die of a new threat created by the surgeon—not organ failure, but organ removal.

She offers two other cases to illustrate the distinction, each involving

5. Thompson, *supra* note 1, at 1396.

6. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 53-55, 64 (1971). "My own view is that if a human being has any just, prior claim to anything at all, he has a just, prior claim to his own body." *Id.* at 54.

six patients in a hospital. In the first, the five could be saved from a collapsing ceiling by a machine that would release lethal fumes into the room of the one, who cannot be moved. In the other, lethal fumes from a heating system are spreading toward the room with the five; the fumes can be diverted to the room of the one. She finds it permissible to divert the existing fumes to save five at the cost of one, but finds it "plain" that we cannot turn on the machine to save five at the cost of one.<sup>7</sup>

This distinction between diverting an existing threat and creating a new one has no explanatory power whatever for me. In each of her hospital cases, I would save the five. Even if I accepted her distinction in principle, I would define the threat at a greater level of generality. In each case, all six patients were at risk from an incompetently built and managed hospital.<sup>8</sup> That is no different from any more realistic triage situation: the hospital's obligation is to save as many as possible.

Thomson might respond that the hospital does not kill unattended triage patients, but rather lets them die, and that in any event, they die from an existing threat and not a new one created by the hospital. But she has already rejected as insufficient the distinction between killing and letting die,<sup>9</sup> and for good reason. That distinction is incoherent in a world in which one of the most frequently occurring life-and-death ethical choices is whether to turn off a respirator. Her distinction between diverting existing threats and creating new ones is simply a corollary of the inadequate distinction between killing and letting die.

## II.

Thomson views *Transplant* as a case of Ronald Dworkin's metaphor that rights "trump" utilities.<sup>10</sup> But she eventually recognizes that the extent to which rights trump utilities is a "matter of degree,"<sup>11</sup> and that perhaps only "particularly stringent" rights trump utilities.<sup>12</sup> Once we get that far, we are balancing, not trumping. That is a fundamental change, and it is a change in the correct direction.

I would say that rights are a component of the good, to be weighed along with other components of the good. I do not mean merely that honoring rights may help maximize other goods in the long run. Rather, I believe that a just distribution of the good—a distribution that honors

7. Thomson, *supra* note 1, at 1407-08.

8. In one of the cases, the lethal fumes were hypothesized to come from a neighboring building, *id.*, but that does not affect the analysis. The risk was still common to all six patients.

9. *Id.* at 1396-1401.

10. *Id.* at 1404, 1406, 1414 (quoting R. DWORKIN, *TAKING RIGHTS SERIOUSLY* at xi (1977)).

11. Thomson, *supra* note 1, at 1411.

12. *Id.*

just claims of entitlement—is itself an intrinsic good. Fairness counts, but in the same way that other good things count.

I realize that many rights theorists will reject this effort to absorb rights into consequentialism. They may say I misunderstand the nature of rights. But I do not misunderstand their view of rights; I disagree with it. Rights are a good thing, and some rights are very good things, to be overridden only for compelling reasons. But no one good thing can always trump all other good things.

I am more accustomed to defending this view of rights against utilitarians and wealth-maximizers who think that rights do not count at all.<sup>13</sup> It is equally in need of defense against those who think that once identified, rights always trump. The middle ground on this issue seems underrepresented, but at least some scholars have taken positions similar to mine.<sup>14</sup>

### III.

Thomson's suggestion that perhaps only particularly stringent rights trump utilities may differ in principle from my position, or perhaps only in degree. But the differences in degree are substantial. When the difference in other good things is clear and of a magnitude of five lives to one, I think that only a very clear and important right will outweigh that utility. Thomson plainly does not agree. She worries whether moral duty in the trolley case would be changed if a bystander had to walk across land belonging to the one in order to reach the switch and save the five.<sup>15</sup> Whatever one thinks about the basic choice to save five at the cost of one, I find it indescribably absurd to think a trivial trespass could affect the analysis one way or the other.

My intuitions are not changed by another of her cases, which I will call *Mayor's Promise*.<sup>16</sup> The Mayor has promised the one that no trolley will ever come onto the spur. Thomson concludes that having made such a promise to the one, the Mayor cannot divert the trolley to save the

13. See Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEXAS L. REV. 875, 882-88 (1982); Laycock, *Injunctions and the Irreparable Injury Rule* (Book Review), 57 TEXAS L. REV. 1063, 1076-77 (1979).

14. See A. EWING, *SECOND THOUGHTS IN MORAL PHILOSOPHY* 152-55 (1959); W. FRANKENA, *THINKING ABOUT MORALITY* 65-71 (1980); J. LAIRD, *AN ENQUIRY INTO MORAL NOTIONS* 180-82, 248-49, 252-53, 312-14 (1935); Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3, 4-20 (1981). These scholars would disagree with me and with each other about the philosophical school into which their views best fit and the labels that best describe the relationship between rights and other good things. But all agree on what seems to me to be the fundamental point: that moral duty requires simultaneous consideration of both the quantity of good things and the just distribution of those good things.

15. Thomson, *supra* note 1, at 1411.

16. *Id.* at 1411-12.

five. I disagree. Breach of such a promise is an injustice to the one, but compared to his life, it counts for little. If it is inoral to take his life to save the five, it is certainly moral to break a promise to save the five.

Consider a variation on *Mayor's Promise*. Suppose the Mayor finds that the switch has been tampered with, and that the runaway trolley is about to turn into the spur where it will kill the one. Must he divert the trolley back to the main line, killing the five to redeem his promise? I think the answer is clearly no. But Thomson might have to say yes. She has rejected the distinction between killing and letting die, and she has concluded that the right to enforce a promise trumps the utility of five lives to one. What is left to distinguish her version of *Mayor's Promise* from my variation?

#### IV.

Either variation of *Mayor's Promise* involves an additional element besides the promise. By extracting the promise, the one consciously tried to avoid the risk of being rundown by a trolley, in a way that the five workers on the main line did not. My own intuition is that as between one who carefully avoided a risk and one or several who exposed themselves to a risk, the one who carefully avoided the risk has at least some moral claim that he is the one who should be saved.

But I do not think the principle applies to *Mayor's Promise*. Despite the promise, sitting on a spur involves some risk of being run over by a trolley. At the very least, there is the risk of vandals turning the switch. There is also the risk that the Mayor is a liar, or forgetful, or fickle. And there is the risk of various emergencies not in contemplation when the promise was made, such as the possibility that turning a trolley into the spur will save five lives at the cost of one. If the one were not sitting on the spur, the lives of the five could easily be saved by diverting the trolley. His presence thus increases the danger to them, and his moral claim amounts to this: that five should die because he is sitting on a spur that he was told would be safe. Neither the promise, nor his reliance, nor his inadequate attempts to avoid risk, give rise to such a priority claim on the means of saving life.

Avoidance of risk does affect my intuitions about the case Thomson calls *Fat Man*.<sup>17</sup> The fat man is standing on the bridge above the trolley track, completely clear of danger. If I throw him over the rail, his weight will stop the trolley and save the five, but at the cost of his life. Thomson's panel of moral intuitors is unanimous that I cannot throw him over

17. *Id.* at 1409-10.

the rail. That is my intuition as well, but I find the case very close, and I can imagine circumstances in which my intuition would be the opposite.

Suppose that the only reason the five are on the track is that a mad man threw them over the rail seconds before. In that case, it is better for the one fat victim to die than for the five original victims to die. On those facts, he was also at risk of being thrown over by the mad man. Diverting the one into the path of the trolley is hard to distinguish from diverting the trolley into the path of the one. Much of what explains my intuitions about *Fat Man* as originally presented is the assumption that the five went willingly upon the track, thus exposing themselves to a risk that the fat man avoided by staying on the bridge.

## V.

Another factor that affects my intuition about *Fat Man* is that I cannot sufficiently suspend disbelief. The problem assumes certainty that the fat man is just heavy enough to stop the trolley. But every part of that assumption is wildly implausible, and the element of certainty is the least plausible of all. To throw the fat man over the rail is a desperate gamble, based on an instant guess that he is heavy enough to stop the trolley and the nearest of the five is not.

If I throw the fat man over, the one certain consequence is that six are now in danger instead of five. If I have misjudged, all six may die. If I do nothing, the worst possible outcome is that only five will die.<sup>18</sup> This escalation of the risk reduces the expected utility of throwing the sixth victim over, and thus weakens the claim for overriding his right to life. I cannot imagine it ever being clear enough that the sixth will stop the trolley, or that the five will not somehow escape anyway, that I would be justified in putting the sixth in danger.

In the real world, choices among competing human lives do not look like Thomson's neat hypotheticals. Most commonly, they involve choices about risk allocation, in which the risk to any particular individual is small and the ultimate victims are unknown. One of my former students captured the problem when she described her job writing pesticide regulations: "I decide how many people should die of cancer to keep the price of tomatoes from going too high." Our instinctive first answer is that she should not knowingly write a regulation that will allow any cancer deaths, and that may be Thomson's final answer. But that

18. *Trolley Driver* does not raise this problem. The trolley may kill one or five, but nothing the driver does can kill all six. *Transplant* does raise this problem; the five recipients may die despite the donor's sacrifice.

may be the wrong answer in a world with starving children. In that kind of decision making, easy recognition of rights that trump utilities might cause untold harm, especially in the third world, where there is less wealth with which to pay for rights.

I grant that imposing a risk of death is not the same as imposing death. But Thomson's hypotheticals must be designed to illuminate cases involving only risk of death. The hypotheticals are useless if they do not help us think about moral choices in the real world. In the real world, the chance of saving the five is never certain, and the risk of losing the one is rarely certain.

The real world situations that approach the hypotheticals' degree of certainty nearly always arise in wars or natural disasters. Consider rescuers digging for earthquake victims. Can they accelerate their pace towards a group of five, if that means dumping more debris on top of one? What if there is little hope of reaching all six in time and substantial risk of not reaching any in time? If the comparative risks are clear enough, I have no doubt that they may dump more debris on the one. Thomson would presumably have to decide whether the additional debris created a new threat or merely diverted the earthquake threat common to all. However she answers that question, it would not help me with the moral choice.

### VI.

Balancing rights against utilities is common in the practical world of constitutional law. The essence of the compelling state interest test is that individual rights will be honored unless the consequent disutility is too great. It is mainly philosophers who have been able to hold rights and utilities in wholly separate categories.

I concede that rights and utilities are different kinds of good; the distinction provides analytically helpful subcategories of the good. But sound moral philosophy requires recognition of the ultimate unity of all such subcategories. We can neither pursue rights without regard to consequences, nor define consequences without regard to rights. A violation of rights is a consequence—an intrinsically bad consequence. It must be taken into account along with all the other intrinsically good or bad consequences an act may have.

