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# On the relative stringency of negative and positive moral duties

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UNIVERSIDAD TORCUATO DI TELLA

WORKING PAPER N° 13

**ON THE RELATIVE STRINGENCY  
OF NEGATIVE AND POSITIVE MORAL DUTIES**

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## 1. INTRODUCTION

It has frequently been argued that negative duties, duties to refrain from performing certain actions (in particular, harming others), prevail over positive duties, duties to perform certain actions (in particular, helping others). Major lines of libertarian thought rest on this view of the relative stringency of each type of duty (henceforth, "the priority principle").<sup>1</sup> One goal of this paper is to question the priority principle, at least when it is read as mirroring the legal rights recognized by libertarian institutions. Section 2 will show that the impact of a well-known counterexample to the priority principle invalidates it to a greater extent than has often been admitted. In Section 3 I will suggest, however, that libertarian institutions need not be undermined by the conclusions of the previous section, and that such institutions gain support from their being located within a reflective equilibrium in which firmly held moral beliefs and well-established nonmoral beliefs mesh together within a coherent whole.

## 2. TROLLEY

Judith Jarvis Thomson presents the following imaginary example:

**Trolley.** An out-of-control trolley is hurtling down a track. Straight ahead of it on the track are five men who will be killed if the trolley reaches them. Bloggs is a passerby, who happens at the moment to be standing by the track next to the switch; he can throw the switch, thereby turning the trolley onto a spur of track on the right. There is one man on that spur of track on the right; that man will be killed if Bloggs turns the trolley.<sup>2</sup>

If, as most of us believe, it is morally permissible for Bloggs to divert the trolley, this case poses a serious difficulty for the priority principle. For Bloggs may infringe a

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<sup>1</sup> Recent elaborate developments of this idea can be found in Loren E. Lomasky, Persons, Rights, and the Moral Community (New York: Oxford University Press, 1987) and Horacio Spector, Autonomy and Rights. The Moral Foundations of Liberalism (Oxford: Clarendon Press, 1992).

<sup>2</sup> Judith Jarvis Thomson, The Realm of Rights (Cambridge, Massachusetts-London: Harvard University Press, 1990), p. 176. This case is a variant of another presented by Philippa Foot in "The Problem of Abortion and the Doctrine of the Double Effect", in Philippa Foot (ed.), Virtues and Vices and Other Essays in Moral Philosophy (Oxford: Blackwell, 1978), p. 23. All indented examples are textually quoted from the texts mentioned in the corresponding notes, unless otherwise indicated.

(negative) duty not to kill the one to save the five, thus presumably complying with a positive duty to do so.

Thomson tries to limit the difficulty by arguing that Trolley belongs to "a narrow class of exceptions" to the general rule that one may not kill one to save five.<sup>3</sup> Furthermore, she sees such a class as constituted by permissions to kill, but not by duties to kill, so that not even Trolley would establish a supremacy of positive duties over negative ones.<sup>4</sup>

Now it is clear that a defense of the priority principle based on the claim that Trolley is exceptional must satisfy the following conditions: (1) the criterion employed to define the candidate class of exceptions to the priority principle, which Trolley is a member of, should itself face no counterexample, (2) such criterion should not be ad hoc, and (3) according to such criterion, the scope of the supremacy of negative rights over other morally relevant factors should be appropriately wide. (Notice that fulfillment of condition [3] is necessary for the candidate priority principle to serve as a basis for a libertarian legal system; in what follows I will interpret the priority principle as mirroring libertarian legal rules in the moral realm). I will now show that usual explanations of Trolley fail to fulfill these conditions.

### 2.1. The exceptionality of Trolley.

Thomson has maintained that the priority principle is subject to a "distributive exemption" according to which "it is not morally required of us that we let a burden descend out of the blue onto five when we can make it instead descend onto one if we can make it descend onto the one by means which do not themselves constitute infringements of rights of the one."<sup>5</sup> The distributive exemption clearly accommodates Trolley. Notice that the condition that there be no infringement of rights is needed to explain cases such as this:

Fat Man. George is on a footbridge over the trolley tracks. He knows trolleys, and can see that the one approaching the bridge is out of control. On the track back of the bridge there are five people; the banks are so steep that they will not be able to get off the

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<sup>3</sup> The Realm of Rights, op. cit., p. 178.

<sup>4</sup> See, for instance, The Realm of Rights, op. cit., p. 196.

<sup>5</sup> "The Trolley Problem", in John Martin Fischer and Mark Ravizza (eds.), Ethics, Problems and Principles (Forth Worth-Orlando: Harcourt Brace Jovanovich College Publishers, 1991), p. 288 (originally published in The Yale Law Journal, 1985).

track in time. George knows that the only way to stop an out-of-control trolley is to drop a very heavy weight into its path. But the only available, sufficiently heavy weight is a fat man, also watching the trolley from the footbridge. George can shove the fat man onto the track in the path of the trolley, killing the fat man; or he can refrain from doing this, letting the five die.<sup>6</sup>

It is clearly impermissible for George to shove the fat man onto the track, even though this is the only way to save the five. Thomson explains the impermissibility of saving the five in this case by saying that shoving the fat man violates the following two conditions that must be satisfied to save five by killing one: (a) the agent must deflect onto one a thing that was threatening five, and (b) such deflection must not in itself infringe John's (so I will call the one in all these imaginary cases) rights.<sup>7</sup> Shoving a person onto the track is not to redirect an (extant) threat; rather, it is to bring someone into that threat's range (violation of condition [a]). By contrast, redirecting a trolley that is threatening five is acting on the threat in a way (throwing a switch, pressing a button, and so on) which in itself does not infringe John's rights. This difference explains, in Thomson's eyes, that while it is permissible to save the five in Trolley, it is impermissible to do so in Fat Man.

However, this account falls prey to counterexamples. Consider the following case, presented by F. M. Kamm:

Owned-trolley case. Everything like in Trolley, except that the trolley is a very valuable antique that belongs to John.<sup>8</sup>

Although in this case saving the five requires infringing John's rights (i.e. his property rights in the trolley), doing so seems permissible.

By means of the following case, Kamm correctly illustrates the shortcomings of various criteria advanced in the literature to detect morally relevant differences in cases in which the agent's act saves five and kills one (including the rights-infringement criterion just discussed):

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<sup>6</sup> Judith Jarvis Thomson, "Killing, Letting Die, and the Trolley Problem", in Fischer and Ravizza (eds.), op. cit., p. 71 (originally published in The Monist, 1976).

<sup>7</sup> "Killing, letting die, and the Trolley Problem", op. cit., pp. 74-7.

<sup>8</sup> F. M. Kamm, "Harming Some to Save Others", Philosophical Studies, 57 (1989), pp. 229-30. My wording, excepting the title, which belongs to Kamm.

**Grenade.** Suppose the only way to stop the trolley is to throw a grenade which will stop it, but we foresee that pieces of the grenade will also hit and kill Joe, an innocent bystander, whose death will play no causal role in saving the five.<sup>9</sup> [Joe plays John's role in this example].

Since in this case it seems impermissible to save the five, we have to exclude, Kamm says, the following two candidates for an explanation of **Trolley**: (i) the act that saves the five must not in itself (that is, independently of its causal consequences) be an infringement of John's rights (imagine that the grenade does not belong to Joe), and (ii) John's death is necessary to save the five (should Joe not be there, the throwing of the grenade would also save the five). Kamm also rejects a possible explanation of **Grenade** on the ground that Joe dies from a threat that is different from that headed toward the five.<sup>10</sup> This explanation, she says, is undermined by cases such as the following:

**Two Trolleys.** I must press a switch to turn the trolley headed toward the five onto a track where no one sits. This switch also controls another trolley which has been inactive till now. When the switch is pressed it not only turns the first trolley away from the five but also turns the second trolley toward one person on another track.<sup>11</sup>

Since in **Two Trolleys** it seems permissible for me to press the switch, this case rules out the possibility of characterizing the exceptionality of **Trolley** with regard to the priority principle on the basis of the idea of **redirecting** a threat onto John. It is worth observing that **Two Trolleys** also undermines as well any attempt at explaining the exceptionality of **Trolley** via a principle forbidding the agent to create a new threat, that is, a threat which is different from that headed toward the five.

Kamm summarizes as follows the difficulties in explaining **Grenade** by means of the thomsonian distributive exemption criterion, even if this is restricted to acts which do not violate rights: "If we do not save the five either by laying hands on Joe or anything of his, or by requiring that he be harmed, by infringement of what rights of Joe's would we save the five in the Grenade case?"<sup>12</sup>

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<sup>9</sup> "Harming Some to Save Others", op. cit., p. 230.

<sup>10</sup> The importance of this factor is defended by Thomson in "The Trolley Problem", op. cit., p. 287-8.

<sup>11</sup> "Harming Some to Save Others", op. cit., p. 228.

<sup>12</sup> Ibid. p. 231.

None of the above attempts at limiting the deleterious impact of Trolley on the priority principle is successful. Even though such attempts are not ad hoc (thereby fulfilling condition [2] above) and appeal to factors defining a relatively small class of exceptions to the priority principle (thereby fulfilling condition [3]), they face counterexamples (thereby violating condition [1]).

**2.2. Thomson's current explanation of Trolley: a critique.** It is instructive to consider the account of Trolley currently preferred by Thomson. She now maintains that the permissibility of saving the five requires the fulfillment of the following two conditions: (a) there was an earlier time at which the six (the five and John) would increase their probabilities of surviving should Bloggs, the bystander, save the five (by killing the one) when the threat arrived, and (b) there exist no other factors, like contractual duties to work in teams of five or alone, or an especial aversion to dying in certain ways, which would override the fulfillment of (a).<sup>13</sup> To bring home how these conditions work, it is useful to consider Thomson's treatment of the following case:

**Transplant.** Here is Bloggs, who is a transplant surgeon, an extraordinarily good one - he can transplant anything at all successfully. He has five patients who need parts and will soon die if they do not get them: two need one lung each, two need one kidney each, and one needs a heart. Here is a young man in excellent health; he has the right blood type and can be cut up to supply parts for the patients who need them. (Let us bypass a possible objection by supposing that none of the patients can be cut up to supply parts for the others.) The surgeon asks the young man whether he would like to volunteer his parts, but the young man says "I deeply sympathize, but no."<sup>14</sup>

It is clearly impermissible for the surgeon to cut up the young man (and save the five). Let us see now how Thomson's conditions work. Both in Transplant and in Trolley (a) gets satisfied; however, only Trolley complies with (b) - or at least so Thomson believes.<sup>15</sup> Thomson says that when both (a) and (b) are met, it is "to the

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<sup>13</sup> The Realm of Rights, op. cit., pp. 181 ff.

<sup>14</sup> Ibid. p. 135.

<sup>15</sup> The pair Trolley-Transplant has been employed by Thomson to state what she has defined as "The Trolley Problem": why is it permissible to save the five in Trolley, but not in Transplant? Thomson states for the first time this problem in "The Trolley Problem", op. cit., p. 283. Her formulation thereof in The Realm of Rights is in pp. 177-8.

advantage of all" at the earlier time referred to in (a) that the five be saved when the threat arrives.<sup>16</sup> Let us refer to this view as the "mutual advantage" theory.

I find this account faulty. One of the examples Thomson appealed to to illustrate how (b) works is Transplant. In support of the claim that in this case (b) remains unfulfilled, she writes that "dying of organ failure after a long illness, which gives time to bring one's affairs to some meaningful conclusion, is one thing; dying in consequence of being suddenly grabbed off the street, or out of a doctor's examining room, and having one's body organs removed for use to save others, is quite another, and markedly worse."<sup>17</sup> It seems, then, that Thomson makes the satisfaction of (b) dependent on the considered judgments most of us hold with regard to various ways of dying. Since this account purports to draw a moral distinction between Trolley and Transplant by pointing to their differential standing regarding (b), our moral intuitions (here, those concerning ways of dying) end up as ultimate explanatory factors. But this renders the explanation circular, since it appeals to the very moral intuitions which had to be explained in the first place.

It might be thought that Thomson's account could fend off the circularity objection by narrowing the class of factors referred to by (b) so that the resulting class does not coincide with the class of intuitions to be explained. Independently specified aversions to certain ways of dying and a few other factors could then be presented as constraints on the application of (a) as a necessary and sufficient condition for the permissibility of saving the five. That is, it might be claimed that it is permissible to save five by killing one if and only if (a) constrained by (b) is satisfied: if none of the factors indicated in (b) exists, then the permissibility of now saving the five will result from the fact that there was a time at which each of the five's probabilities of surviving would have been greater had it been stipulated that the agent would save the five now. On this view, the fulfillment of (b) does not suffice to render the rescue of the five permissible, but it is a component of a necessary and sufficient condition, constituted by the satisfaction of (a) and (b), for the rescue of the five to be permissible.

Unfortunately, when interpreted in this way, Thomson's argument fails again. For this interpretation leads to justifying the duty to save the five in Trolley-like situations, rather than its mere permissibility. This is so because the constrained maximization of the probabilities of surviving is incompatible with the bystander's inactivity: if Bloggs fails to deflect the trolley, he is not performing the action whose performance was to the advantage of all at an earlier time. Thomson's argument, then, places the bystander under the positive duty to save the five.

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<sup>16</sup> The Realm of Rights, op. cit., pp. 191 ff.

<sup>17</sup> Ibid. p. 184.

We can therefore conclude that Thomson's current analysis of Trolley fails, at least if it is understood as an attempt to circumscribe the damage caused by Trolley to the priority principle. More importantly for our purposes, the reasons I offered to reject Thomson's analysis undermine the priority principle itself. On the one hand, we have seen that on a first reading Thomson's account is circular, which violates condition (2), whose fulfillment we had required to defend the exceptionality of Trolley in connection with the priority principle. On the other hand, in leading to the priority of the positive duty to save the five over the negative duty not to kill the one, a second reading of Thomson's account narrows the scope of the priority principle to an extent which makes it useless in defending a libertarian order; in other words, this second reading violates condition (3) for a defense of the exceptionality of Trolley.<sup>18</sup> This is so because most of us belong to many groups of people (henceforth, "mutual aid groups") such that it is to the advantage of all that a third party help some by harming some others if certain circumstances obtain. Thus, the state can be viewed as the third party who is in the position to (re)distribute burdens and benefits by taxing some individuals in order to assist others. Notice that the analogy between the state and the bystander of Trolley can be stretched quite far; a recession, for example, could be "redirected" through unemployment benefits from the unemployed to taxpayers, who would thereby bear lower losses, given diminishing marginal utility.<sup>19</sup>

### 3. INSTITUTIONAL CONSEQUENCES

The political institutionalization of the mutual advantage view on the relative stringency of negative and positive moral duties are clearly nonlibertarian in character. It can be argued, for example, that many usual redistributive schemes in favor of the unemployed, the sick, the old, and so on, can be justified along such lines. Furthermore, such redistributive schemes do not seem objectionable for reasons such as those included in Thomson's condition (b), whatever they may be. If, according to Thomson herself, such reasons are not forthcoming in Trolley to forbid the bystander to kill someone by turning a trolley onto him, there certainly has to be some amount of resources which the state may redistribute via taxes to aid people suffering from severe deprivations.

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<sup>18</sup> This point is also an objection to Thomson's claim that Trolley does not force us to recognize positive rights (she denies in general the existence of such rights in The Realm of Rights, op. cit., pp. 160-3), insofar as we accept the well-known analysis of rights as correlative of duties.

<sup>19</sup> To ensure satisfaction of Thomson's condition (a) the taxpayers should belong to the same mutual aid group as the recipients of the unemployment benefit. Of course, this proviso is very easy to satisfy (think of the rich whose wealth was at an earlier time unforeseeable).

Trolley raises, then, a serious difficulty for the (libertarian) priority principle. We have seen that the distributive exemption criterion, which seemed to preserve a wide scope for the priority principle, fails to explain Trolley, and that the mutual advantage theory, though more promising, is incompatible with a libertarian priority principle. Note, however, that nothing I have said so far implies that we have reasons to abandon the priority principle as a legal principle. In particular, it does not imply that, all things considered, certain schemes for redistributing income or wealth, that is, political decisions to alter distributions yielded by the free markets, are legitimate. For our intuitions in Trolley might be overridden by reasons supporting a legal version of the priority principle; for example, reasons of economic efficiency (like those explored in the literature on economic analysis of law and in public choice theory).<sup>20</sup> What I do believe to have shown is that a major theoretical tradition aimed at supporting libertarianism, a tradition which has attempted to ground a libertarian order on (almost) absolute negative moral rights, runs against our particular intuitions.

As a matter of fact, I believe that a legal version of the libertarian priority principle is arguable. Let me conclude by sketching an argument in this direction. What I have in mind hinges on a well-known distinction between the moral status of an act and the moral status of the use of coercion to force someone to perform that act or of imposing on someone who performed it sanctions or rewards (other than those that might be involved in the very blaming or praising the agent for having performed such act). A judge's ruling on Bloggs's choice in Trolley is relevantly different from Bloggs's choice itself: our beliefs about the moral standing of the act of convicting or acquitting Bloggs are not to be translated into beliefs about the moral standing of a different act, namely, Bloggs's turning the trolley or refraining from doing so. For it is arguable that the publicity of legal rules or judgments concerning imaginary cases like those dealt with in Section 2 involves an alteration of the clause "other things being equal", implicit therein; that is, the exemplary, corrective, symbolic, and other effects usually accompanying legal rules and sentences are ruled out by construction in those imaginary cases. Thus, it could be maintained that in a case exactly like Trolley but for the fact that Bloggs is (likely to be) prosecuted for murdering John (call this case Trolley\*) those effects may well justify a moral prohibition to save the five, even though in Trolley (which ruled out those effects) it is morally permissible to save them. To put it more generally, the

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<sup>20</sup> The most influential general work on economic analysis of law is Richard A. Posner, Economic Analysis of Law (Boston-Toronto-London: Little, Brown and Company, 1992, first ed. 1973). For a brief presentation of public choice theory, see James D. Gwartney and Richard E. Wagner, "Public Choice and the Conduct of Representative Government" and "Public Choice and Constitutional Order", in James D. Gwartney and Richard E. Wagner (eds.), Public Choice and Constitutional Economics (Greenwich, Connecticut-London: Jai Press Inc., 1988).

moral assessment of the choice made by Bloggs in Trolley does not entail a definite moral assessment of a legal rule prohibiting or permitting such choice, or of a judgment acquitting or convicting Bloggs of a crime (both the rule and the judgment refer by necessity to Trolley), nor is it entailed by the latter.

And there are good reasons why such entailments do not obtain. The moral justifiability of a legal rule or judgment on Trolley depends on the weights of morally relevant factors which (conceptually?) underlie the concepts of "just legal rule" and "just judgment", but not the concept of "just (or morally right) decision made by the bystander in Trolley"; particularly important amongst such factors are a judgment's conformity to legal rules or principles (when the legal system is by and large just) and the more or less beneficial or harmful consequences such judgment could have by virtue of rules on precedents (including consequences in terms of equality under the law, which is sometimes viewed as an independent value). Mutatis mutandis, these remarks apply also to the legal rules that govern Bloggs's behavior (for instance, by penalizing the turning of the trolley, or by imposing a duty to compensate John's relatives in case he happens to be killed in a Trolley-like situation, or by permitting the turning of the trolley).

The morally relevant factors I am focusing on should be distinguished from those invoked in certain explanations of the usual primacy of negative moral duties over positive moral duties aimed at defending the moral equivalence between killing and letting die.<sup>21</sup> Such explanations endeavor to show that the cases usually cited in support of the priority principle draw on certain differential features which normally, but not necessarily, display cases of killing and of letting die, like the difference between the amounts of effort or sacrifice involved in either case, or the difference between the number of alternatives that are examples of killing in a certain context of choice and the number of alternatives that are examples of letting die in the same context of choice. My argument in favor of a legal version of the priority principle does not rest on the alleged exceptionality owing to the infrequency of the situations in which such differences operate in the opposite direction or fail to obtain, or to the infrequency of the situations in which (moral) positive duties prevail over negative ones or are as stringent as the latter.<sup>22</sup> Indeed, my treatment of Trolley involves a denial of such exceptionality. The argument I am proposing entails the moral relevance of the fact that a certain behavior be regulated by legal rules or submitted to legal judgment. Such relevance stems from factors like deterrence, efficient allocation of resources, and equality under the law. Let me conclude by suggesting

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<sup>21</sup> An example of such strategies is Jonathan Bennett, "Whatever the Consequences", in Fischer and Ravizza (eds.), *op. cit.* (originally published in Analysis, 1966), esp. pp. 100-1.

<sup>22</sup> Richard Trammell does adopt such a strategy in "Saving Life and Taking Life", in Fischer and Ravizza (eds.), *op. cit.* (originally published in The Journal of Philosophy, 1975).

why these factors in general override the moral positive duties which might be involved in a given situation if a wide reflective equilibrium of independently well-supported moral and nonmoral beliefs is to be attained.

The distinction between the moral assessment of legal rules or judgments and the moral assessment of the acts that are the target of such rules or judgments is central to a plausible defense of a libertarian order. The challenge posed by Trolley to the priority principle need not affect its legal counterpart. It seems to me, rather, that a version of the priority principle addressed to legislators, judges, and the agents of appropriately modified versions<sup>23</sup> of the imaginary cases I have been discussing is defensible as a component of a reflective equilibrium in which particular intuitions such as those discussed in Section 2, branches of economic theory, intuitions regarding aggregative values, and whatever independent value we assign to certain political principles (such as equality under the law) are mutually reinforcing. Let me outline the structure of this equilibrium. Widely respected (libertarian) negative duties seem to promote values we certainly cherish, like personal autonomy, increase in global wealth and increase in the consumption levels of large masses of people. It is a matter of controversy what the convenient degree and form of state coercion to overcome certain more or less confined market failures, like those generated by what economists call "externalities" and "public goods". However, the overall trends of economic theory, in particular if we pay heed to such relatively recent fields as the economic analysis of law and public choice theory, seem to move toward recognizing that the free market, with the negative legal rights it presupposes (i.e., Lockean property rights), is in general a better alternative for the promotion of those values than awarding powers to governments to enable them to enforce moral positive rights in proportion to the moral weight that they, as I have agreed, have.<sup>24</sup> I should emphasize that efficiency need not be the only relevant value here. It is fairly clear, I believe, that public choice theory shows not only the inefficiencies of arrangements purported to enforce positive rights, but also the tensions between those arrangements and values such as equality under the law, eradication of privileges, and rejection of clout as a legitimate means to increase one's income.

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<sup>23</sup> That is to say, versions which remove the consequences of being legally regulated from the domain of the "other things being equal" clause.

<sup>24</sup> See Gwartney and Wagner, *op. cit.*, *passim*.