

# Michigan Law Review

---

Volume 90 | Issue 6

---

1992

## The Realm of Rights

Richard J. Mooney  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Law and Society Commons](#), and the [Natural Law Commons](#)

---

### Recommended Citation

Richard J. Mooney, *The Realm of Rights*, 90 MICH. L. REV. 1569 (1992).

Available at: <https://repository.law.umich.edu/mlr/vol90/iss6/28>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

THE REALM OF RIGHTS. By *Judith Jarvis Thomson*. Cambridge: Harvard University Press. 1990. Pp. viii, 373. \$35.

The nature and moral force of rights is one of the most frequently recurring themes in Western philosophical and political discourse.<sup>1</sup> What does it mean to have a right? Which of many contenders deserves to be called a right, and who possesses them? What are the sources of rights? These important questions confront all those who believe that part of being human is possessing certain rights.<sup>2</sup> Judith Jarvis Thomson's latest contribution to this discussion is *The Realm of Rights*,<sup>3</sup> an engaging and insightful investigation into ethical theory. Thomson's approach to rights theory differs in two ways from that employed by most authors. First, she focuses primarily on what having a right means instead of analyzing what rights we do or should possess.<sup>4</sup> Second, the arguments she advances concerning what rights we possess do not depend primarily on any particular analytic device or teleological conception of humanity. Instead, she argues from various assumptions, some concerning the moral content of particular actions and some concerning how most persons would view such actions.<sup>5</sup>

*The Realm of Rights* consists of two distinct but related sections. The first, "Rights: What They Are," is the more interesting and uncommon of the two.<sup>6</sup> Thomson first separates rights into claims, privi-

---

1. At least as early as Socrates, Western philosophers have explicitly considered rights and their sources. See, for example, Plato's *Apologia*, where he discusses Socrates' views concerning individuals' freedom of conscience and religion. Recent important attempts to provide rational and complete methods of understanding rights include ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1975), JOHN RAWLS, *A THEORY OF JUSTICE* (1971), and MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

2. Most modern philosophers follow the traditional practice of suggesting that the rights enjoyed by humans are not similarly enjoyed by animals. Exceptions are becoming increasingly prominent. See, e.g., ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1966). In fact, it has been seriously argued that the biosphere we call earth is in an important sense an entity which has rights. See, e.g., Iredell Jenkins, *Nature's Rights and Man's Duties*, in *LAW AND THE ECOLOGICAL CHALLENGE* 87 (Eugene E. Dais ed., 1978) (arguing that humanity has a moral duty to decree its own extinction to preserve the earth). Thomson does not subscribe to this approach.

3. Judith Jarvis Thomson is Professor of Philosophy at the Massachusetts Institute of Technology. Thomson's previous works include *ACTS AND OTHER EVENTS* (1977) and *RIGHTS, RESTITUTION, AND RISK* (1986).

4. This is in contrast with most important modern investigations of rights and ethics. See, e.g., RAWLS, *supra* note 1; SANDEL, *supra* note 1.

5. In this respect Thomson is reminiscent of Ronald Dworkin, who also eschews rights paradigms derived from first principles in favor of investigations premised upon a small number of what he considers widely held beliefs concerning morality. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

6. Many authors have attempted to argue, from virtually innumerable starting positions, that certain sets of rights belong to certain groups of peoples or entities. See, e.g., THOMAS AQUINAS, *ON LAW, MORALITY, AND POLITICS* (William P. Baumgarth & Richard J. Regan eds., 1988)

leges, powers, and immunities (pp. 37-60). Claims are rights to be free from the effects of certain activities others might engage in — for example, the right to be free from physical assault. Privileges are rights to take action that would otherwise violate another's claim — my right to eat your salad after you give me permission, for example. A power is the ability to alter the rights of oneself or others, as the owner of a typewriter may alter two persons' rights by giving it away. An immunity is a right to prevent another person or persons from exercising a power against you. Your ownership of a typewriter, for example, makes you immune to my altering the cluster of rights ownership confers on you. To the extent there are inalienable rights, persons possess immunities against themselves. The section then discusses the relationship between rights and constraints on the behavior of others, with particular emphasis on when a claim should be accommodated and when countervailing considerations are sufficient to justify infringing a claim.<sup>7</sup>

Thomson's method of analysis in this section closely resembles that employed in abstract mathematical investigations. She begins by accepting certain statements as postulates, without justification. These postulates are assertions that certain moral relationships are true; rational deduction and logic expand the few postulates into numerous and diverse conclusions. For example, Thomson assumes without argument that possession of a right constrains the behavior of another.<sup>8</sup>

This method of argumentation is central to the first section and dominates any consideration of the section's strengths and weaknesses. All investigations of moral theory must make *some* assumptions,<sup>9</sup> and Thomson's decision to make concrete and detailed assumptions has important benefits. In a few bold steps, she makes significant progress toward establishing a comprehensive paradigm of rights that is detailed enough to provide answers to complex moral dilemmas. The decision also imparts a tone of confidence to her writing that brings the comfort of being in the company of a sure-footed guide through the morass.<sup>10</sup>

---

(arguing for rights based upon the gift of God); ARISTOTLE, *NICOMACHEAN ETHICS* (Terence Irwin trans., 1985) (arguing for rights based upon the unique attributes of humanity); RAWLS, *supra* note 1 (arguing for rights based on those which would be chosen behind a "veil of ignorance"). Fewer, however, have explicitly addressed the issue of what exactly a right is, and what a possessor can do with it.

7. Thomson argues that rights/claims are not absolute and so may morally be *infringed* in some situations. She distinguishes *violating* a claim, which is failing to accord a claim *without sufficient justification*.

8. "I did not first argue that A's having that right against B does constrain B's behavior in some way, and then proceed to ask what precisely that way is; I took for granted you would agree that A's having the right against B does constrain B's behavior . . ." P. 64.

9. Philosophers have long recognized the necessity of making at least some assumptions, the most famous of which may be Descartes's *cogito ergo sum*. Various assumptions seem more or less plausible, depending on their complexity and their intuitive appeal.

10. This is in stark contrast, for example, to the communitarian-influenced theories of

This enthusiastic use of postulates is not without a price, however; the method that provides beauty and intellectual excitement in the exercise of abstract mathematics is less well-suited to a discipline seeking answers applicable to *our* world and not a hypothetical one. Some important assumptions slice through the Gordian knot so abruptly they leave the reader wondering if a page, or at least a footnote, is missing. For example, Thomson indicates that *X*'s possession of a claim (a particular type of right) against *Y* is equivalent to *Y*'s behavior's being constrained in some way related to *X*'s claim.<sup>11</sup> This assertion that rights have a tangible existence and moral force in the world of actions is surely central to any book concerning rights and ethics.<sup>12</sup> Yet we are blithely asked to accept it as true because "that is surely correct" (p. 65). This example demonstrates two difficulties inherent in the approach. First, arguing from a set of "truths" ensures that many central and difficult problems are not rigorously analyzed. Thomson's approach ignores the important and interesting question *why* having a right is equal to a constraint. This is unsatisfying to those seeking to examine our culture's assumptions at a deeper level. Although finding a principled and satisfying reason *why* rights exist and are what they are is difficult, or perhaps impossible, investigation of the question is both interesting and theoretically crucial. The second difficulty is more prosaic. If the reader disagrees with a postulate preceding a lengthy discussion, several pages lose their interest. An unconvincing argument may at least be thought-provoking, if not entirely persuasive. However, when the argument is not *for* an unpersuasive premise, but *from* an unpersuasive premise, the situation is very different and presents little to engage the reader.

Other aspects of the first section are very impressive. The delineation of rights into four distinct types substantially aids the attempt to think rigorously about them. Thomson draws extensively on the work of Wesley Hohfeld<sup>13</sup> and applies his legal ideas to the realm of ethics. She also expands upon his ideas by, for example, demonstrating that some rights are in fact "cluster-rights" — rights such as liberty that include within them several subsidiary rights (pp. 53-55).

The discussion of utilitarianism is similarly powerful, both in its

---

Michael Sandel, which provide rights that are more nebulous and contingent. See SANDEL, *supra* note 1.

11. P. 64. Thomson ducks, however, the more complicated question whether the two statements are identical.

12. If one assumes a world where God is dead, it is certainly not preposterous to argue that rights are merely a useful human construct and have no real existence or force. Some feminist scholars argue in a related fashion that rights have no real existence but are creations of patriarchy designed to create division, oppression, and ownership. See, e.g., NELL NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984); Patricia A. Cain & Jean C. Love, *Stories of Rights: Developing Moral Theory and Teaching Law*, 86 MICH. L. REV. 1365, 1384 (1988).

13. WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (Walter Cook ed., 1919).

description of consequentialist act and nonconsequentialist act utilitarianism and in its demonstration that neither can explain the moral reactions most people have to specific situations (pp. 124-48). Thomson concludes that rights have intrinsic value, which must be considered when evaluating any action related to rights. This conclusion leaves her a difficult task — calculating the value of a right, and thereby determining when it may be infringed. Thomson rightly argues that rejecting utilitarianism allows claim infringement “if and only if *sufficiently much more* good would come of infringing it than would come of not infringing it” (p. 149; emphasis added). Although her answer to the question of what increment of good is sufficient “is that there is no answer” (p. 153), Thomson does provide several interesting examples to help frame the problem.

One major question when assessing the level of good necessary to justify claim infringement is whether a benefit enjoyed by fifty people should be accorded fifty times the weight of a similar benefit enjoyed by only one. Thomson concludes that the sum does not matter and that claims may only be infringed when one individual will receive sufficient good to justify the infringement (pp. 166-67). Not enough time is spent here, however. Thomson may be correct in refusing to infringe 1,000 claims in order to provide equivalent benefits to 1,001 other persons. And she may be correct even when the numerical disparity is much greater but the claims are very stringent; perhaps it is impermissible to kill one person to save a million others. Yet her conclusion is implausible when there are great numerical disparities *and* weak claims. It seems perfectly acceptable for you to tweak my nose if doing so will prevent a million other nose-tweakings. These distinctions between large and small numerical disparities and between more and less stringent claims merit further consideration.

The second section, “Rights: Which They Are,” examines the rights people do and do not possess. Discussion begins with what Thomson calls “natural rights” — those which accrue to persons by virtue of (1) humans’ ability to conform themselves to a moral code and (2) the individuality of every person (p. 222). The section continues with a discussion of “social rights” (those bestowed only by society) and their relationship to natural rights. The final chapter is an interesting examination of how people can lose rights, concluding that this loss can occur without fault or volition.

This section’s method of argumentation is similar to that found in the first section, with similar benefits and difficulties. The first section’s assumptions about the nature of rights are replaced by two other types of assumptions: (1) those concerning what moral conclusions are required by certain “obvious” situations and (2) those concerning what moral views the majority of persons would have concerning a situation. As she concedes, “I take much of the stuff of morality as

given: I do not offer a recipe for constructing it out of elementary particles" (p. 4). For example, she provides a hypothetical surgeon the opportunity to save five lives by killing one patient to transplant her organs. Without analysis, Thomson says: "That he ought, or even may, [proceed] is so obviously false that it would be a disaster for a moral theory to [so conclude]: a theory that [so concludes] is a theory in dire need of revision. In short, I take [such conclusions'] being false to be a datum."<sup>14</sup> Thomson's positivistic acceptance as postulates of those moral conclusions apparently accepted by a large majority is especially striking. Indeed, the book's first sentence is "We take ourselves to have rights."

These two methods ultimately reduce to counting votes, an approach with several difficulties. First, it is not at all clear that such a consensus can be developed over a broad range of situations. Second, such an approach is haphazard, and amounts mostly to a summary validation of extant notions of rights. Thomson convincingly discusses the difficulties in deriving *ought* from *is*, but then dismisses them with insufficient analysis. For example, she attempts to derive *ought* from *is* by relying on claims such as: "(1) A will be acting rudely if he shouts 'Boo!' [implies that] (2) Other things being equal, A ought not shout 'Boo!' And isn't (2) a moral judgment?" (p. 12). This argument, however, implicitly relies on a normative judgment of what *is* to evaluate morality (what should be). It is true that (2) is a moral judgment, but so is (1) and (1) can only lead to (2) to the extent that (1) is a moral judgment and not merely a descriptive statement.

An especially unfortunate weakness of this approach is that it may yield results not applicable in different cultural contexts. For example, Thomson says it is clear that causing one person to feel any level of pain is an impermissible method of saving five others from that pain (p. 252). This is far from clear to me, and likely even more dubious to non-Western individuals. For example, African human rights treaties emphasize duties and community at the expense of what Western people might call individualism.<sup>15</sup> Thomson's contingent view of morality therefore provides no solid basis for a distribution of rights; rights can only exist within human groups small enough and homogenous enough to make consensus possible.

Finally, Thomson's reliance on positivism and the absence from her work of an accompanying analytic framework make it difficult to reach conclusions where intuition fails. The reader is provided no principled method of assessing the relative value of various moral factors. For example, Thomson suggests that it is impermissible to ac-

---

14. P. 135. Thomson is very open about her methods. She acknowledges that disagreement with her premises yields disagreement with her conclusions.

15. See, e.g., African Charter on Human and People's Rights, arts. 27-29 (1981), reprinted in CHRIS M. PETER, HUMAN RIGHTS IN AFRICA 108-09 (1990).

cede to a mafia demand to kill *A* in order to save *B*, *C*, *D*, *E*, and *F* (pp. 140-41). This seems perfectly plausible. It also seems plausible even if we assume that such a trade with the mafia would work and that we live in a world where this is the mafia's final act, so that there are no problems related to providing incentives to further extortion.<sup>16</sup> Yet Thomson's analysis of the trolley hypothetical<sup>17</sup> suggests exactly the opposite conclusion. Thomson concludes that it is permissible to turn the trolley by reasoning that such a response would have been approved by all trolley workers if they had met in advance and knew that their positions on the two tracks would be assigned by lot. But if society consisted of six persons, of whom five would later be abducted by the mafia, and we asked them in advance what action they would wish taken, all six would likely ask that the one person be sacrificed to save the five. While it does seem at a gut level that a different response is appropriate in this situation, Thomson does not justify the difference. Perhaps the fact that one instrument of death is animate instead of inanimate is a critical difference, but Thomson does not tell the reader why. She does hint that the impermissibility of action in the transplant hypothetical may be due to some notion of bodily integrity, but does not explain how her conception of rights accounts for this notion. Is bodily integrity a personal right? A societal right? A right of humankind? Without further explanation of her conclusion, it is difficult for the reader to rely on this postulate as the discussion becomes more complex.<sup>18</sup>

Thomson's inability to categorize varied situations leaves the reader desiring further investigation of open hypotheticals, although this would mean expansion of an already dense and reasonably long work. For example, Thomson concludes her discussion of the trolley hypothetical with a short, nonanalytic paragraph suggesting that even though it is *permissible* for Bloggs to turn the trolley, "[t]he view that morality requires Bloggs to turn the trolley seems to me to be merely a morally insensitive descendant of the Central Utilitarian Idea" (p. 196). Bloggs, for example, might think such things should be left to chance, or to God, or might merely feel incapable of killing someone.

---

16. The situation then mirrors Thomson's transplant hypothetical, where she similarly argues against killing one to save five.

17. The famous trolley hypothetical is adapted from PHILLIPA FOOT, *The Problem of Abortion and the Doctrine of the Double Effect*, reprinted in VIRTUES AND VICES (1978). As Thomson restates it:

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.

P. 176.

18. Thomson also suggests that this conclusion might be justified by an argument that our world lacks the medical certainty to ensure that an *ex ante* agreement endorsing such behavior would be in everyone's interest. This merely begs the question.

It seems at least plausible, however, to believe that any moral theory that *permits* killing one to save five should in fact *endorse* that action. Perhaps it would be wrong to attach too much blame to Bloggs' failure to act, but it would require more analysis than Thomson provides to conclude that acting and not acting are moral equivalents in this situation.

These difficulties exist to some extent in all rigorous attempts to analyze moral rights, and discussion of them should not obscure the several strengths and consistent quality of Thomson's book. Many of Thomson's substantive arguments are important and well-reasoned, especially the extensive and well-considered limitations she places upon putative rights. For example, she denies the existence of a right to be saved from death based on her previous conclusion that it is morally impermissible to take one of a person's two kidneys by force to save a dying person.<sup>19</sup> She then uses this conclusion to argue that there is no natural right not to have one's livelihood diminished (pp. 266-67) or to receive aid of any sort, even from the government.<sup>20</sup>

After limiting the scope of natural rights, Thomson effectively argues that rights are not absolute and often ought *not* be accorded. For example, many writers suggest that *A*'s feeling of obligation after promising *B* a banana implies that *A* *ought* to give *B* a banana.<sup>21</sup> They bolster this argument by claiming that *A* feels remorse if she fails to give *B* a banana, even if the failure was through no fault of her own. Thomson demonstrates that *A*'s feelings do not require this conclusion. For example, giving *B* a banana might be incompatible with a previous promise to give *C* a banana or might preclude *A* from giving the banana to *D*, a starving and potassium-deficient child. Surely it cannot then be the case that *A* *ought* to give *B* *A*'s only banana. Thomson concludes that perhaps *A* should provide compensation for breaking her promise, but argues that this obligation does not change the correctness of *A*'s failure to accord *B*'s claim. Second, Thomson's argument that *B*'s claim against *A* is exactly coextensive with *A*'s obligation to *B* demonstrates that rights are not absolute because *A*'s compliance with the obligation can only be obtained through socially

---

19. P. 160. Thomson adds that this conclusion in no way contradicts the fact that there are many situations where a person very much should save another.

20. Pp. 273-74. Assertions of such rights are particularly prevalent in Western Europe. See, e.g., European Social Charter, October 18, 1961, 529 U.N.T.S. 89. Law professor David Schuman provides an illuminating discussion of American assertions of such rights, and the unhealthy effects of these assertions, in *What's Wrong with Rights*, OLD OREGON, Winter 1991, at 31. Thomson here is discussing natural rights that one has by virtue of being human. She is intimating no opinion on the question of whether such rights have been or should be conferred by our society, and avoids altogether the question whether such benefits should be provided even in the absence of rights.

21. See, e.g., Ruth Barcan Marcus, *Moral Dilemmas and Consistency*, J. PHIL., Mar. 1980, at 121.



acceptable coercion.<sup>22</sup> Finally, Thomson responds to those who defend rights as absolute by defining them conditionally.<sup>23</sup> She claims that such defenses obscure the complexities inherent in the rights debate.

The major difficulty this conclusion leaves unresolved is providing principled criteria for when claims (rights) may be violated. Thomson attacks the problem with her customary vigor. She first concludes, in opposition to strict utilitarians, that infringing a right is justified only when an increment of *excess* good is present. Second, Thomson argues that denying rights absolute force justifies concluding that different rights have different stringency. Consequently, different rights require different levels of benefit to justify infringement, levels proportionate to the harm that the infringement causes.

Thomson's discussion is generally convincing, but she reaches one subsidiary conclusion concerning stringency that seems unwarranted. She asserts that, given any event *A* which would cause a result *B*, *X*'s claim against *Y* not to do *A* is at least as stringent as *X*'s claim that *Y* not do *B* (p. 273). Consider, however, an *X* with a rare disease (unknown to *Y*) such that kicking her in the shin will cause her death. Certainly *X*'s claim not to be killed is very stringent, and it is hard to imagine that the stringency of her claim not to be kicked in the shin (although real) is equal. *Y* is not as blameworthy for causing *X*'s death by kicking her in the shin as she would be for shooting *X* in the head.<sup>24</sup>

Another strong point of *The Realm of Rights* is Thomson's lucid and insightful investigation of the relationship between natural rights and societal rights. She demonstrates the dichotomy by discussing the differences between the right to not be killed and the right to have one's garbage collected on Wednesdays (p. 76). The first must exist everywhere, and is anterior to any society. The second can exist only when granted by a society. These categories are not mutually exclusive; some actions are prohibited by rights which are both natural and societal. For example, the right to not be assaulted is both a natural right and one conferred by the criminal law of most societies.

Thomson continues her investigation by exploring the limitations on rights which follow from this dichotomy. First, any right which is purely societal can later be abrogated by the society. Second, she argues counterintuitively that rights that are simultaneously natural and societal may be abrogated by a properly constituted government. This

---

22. Pp. 107-10. Although admitting that violence might be permissible in a Hobbesian state of nature, Thomson argues that such violent coercion is not acceptable in any true society. P. 109.

23. For example, "I have a right that you not hit my nose unless some condition *a* — *x* exists" where (*a* . . . *x*) is the set of all conditions such that you may then hit my nose.

24. For a classic common law investigation of the stringency problem, see *Hadley v. Baxendale*, 9 Exch. 341 (1854) (limiting damages, which seem analogous to an evaluation of a claim's stringency, to those reasonably foreseeable).

is particularly true of privileges. For example, *A* has a natural privilege to act in a manner offensive to others because persons have no claim to be free from belief-mediated distress.<sup>25</sup> Yet a legitimate lawmaker may take away this privilege (pp. 354-55). Finally, she argues that many rights we might consider natural are in fact purely social. A prominent example is her argument that the right to pursue and acquire property,<sup>26</sup> often considered a natural right inherent in individuals, is in fact only a societal construct. Thomson derives this conclusion from her contention that the very ideas of ownership and property cannot exist in the absence of a settled society.<sup>27</sup>

Thomson's considerable rhetorical skill makes her book a pleasure to read. The numerous hypothetical situations required are concise and imaginative and consistently illuminate the bases of her thinking. A memorable example depicts an intrepid explorer harvesting oil resources on the moon, after the earth's fossil fuels become suddenly depleted.<sup>28</sup> She also effectively uses a small number of famous hypotheticals<sup>29</sup> and the best of other authors.<sup>30</sup> *The Realm of Rights* does more than merely discuss what rights individuals possess; it assesses the import of having a right and provides a concrete and inviting framework for thinking about rights. As such, it is a welcome complement to her other writings about rights and a valuable aid in evaluating the numerous approaches offered by other writers.

— Richard J. Mooney

---

25. *B*'s distress caused by the conjunction of *A*'s action and some attitude or belief of *B*. Pp. 253-59.

26. The "right" to pursue and acquire property is here distinguished from the cluster of rights one obtains by virtue of "ownership," which almost all would agree is a social construct. The right to strive to acquire the cluster of rights called ownership is much more widely accepted as a natural right. See, e.g., JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ch. 5 (1690).

27. Thomson makes interesting observations about the moon. See text *infra*. Since property rights can only be created by a society in settled control over an area, the moon is not only unowned but *unownable* unless and until extensive settlement is present. This represents a conclusion of a different magnitude than that reached by Roman and common law analyses suggesting that uncontrolled wild animals are unowned. See, e.g., Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). Such analyses never disputed that the proper authority *could* decree ownership over such animals — the King could arrogate to himself ownership of all the animals in Sherwood forest. Similarly, the nations of the earth could theoretically dictate ownership of Antarctica because that area meets Thomson's criterion of being within the settled control of the "society" of humanity. The moon, however, is outside such settled control. Pp. 344-47.

28. Pp. 328-29. Thomson's effective use of hypotheticals has long been recognized. See, e.g., Cain & Love, *supra* note 12, at 1366-67 (discussing examples).

29. Including the trolley and transplant hypotheticals.

30. For example, she uses Nozick's example of an innocent victim strapped to a tank which is attacking an innocent third party. P. 370. See NOZICK, *supra* note 1, at 35.