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Rights, Explanation, and Risks*

David McCarthy

It is permissible to impose some risks of harm on another only if she consents. It is permissible to impose other risks of harm on her without her consent. At least in some cases, if you impose a risk of harm on her and she is harmed as a result, you are under a duty to compensate her. Sometimes it is permissible for you to harm someone to prevent her from imposing a risk of harm on you or someone else. And it is permissible for government to punish people for imposing certain kinds of risks. So much is clear. But can these and other facts about the morality of actions which impose risks of harm on others be accommodated within a theory of rights?

Many people have thought they cannot. The main claim of this article is that they can. But first, let us ask whether they should be accommodated in a theory of rights. For not every fact about permissibility is somehow a fact about rights. But permissibility, consent, compensation, self-defense, and punishment lie deeply within the morality of risk imposition, and these concepts are what rights are centrally about. Moreover, any plausible theory of rights will ascribe to us something at least very much like the right that others not harm us, at least when harm is construed fairly narrowly to cover, largely, death and physical injury. It would be very surprising if facts about the morality of imposing risks of harms did not connect importantly with the morality of harming, and that part of morality lies at the center of what rights are about.

Despite this, many writers have been pessimistic about whether the morality of risk imposition can be accommodated in a plausible

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theory of rights.¹ It is easy to see why. Many of the activities we engage in daily impose minor risks of harm on others. It is clearly permissible for us to engage in many of these activities, but as soon as we start speaking of the rights of others not to have risks imposed upon them, our hands become tied, morally speaking, and we wind up with a morality which is far too restrictive. Or so the argument goes.

If this pessimism were well founded, it would be a strong mark against the theory of rights and a disappointment to anyone who thinks that the theory of rights is an important part of moral theory. Not only would the theory of rights turn out to have less scope and explanatory power than we might have hoped, but it would also turn out to be unhelpful in just the kind of area in which it should be illuminating.

I will be arguing, however, that facts about the morality of risk impositions can be accommodated by a plausible theory of rights. In particular, they can if we accept that we have the right that others not impose risks of harm on us. The obvious objections to this claim are not good objections, and the explanatory power we gain by accepting that we have that right is sufficient reason to believe we really do have it.

I

It will help if we ask what we want of a theory of rights. Disagreements over which rights we have are usually disagreements over what it is permissible for others to do. Someone who claims to have a certain right is usually claiming, roughly, that there are strong moral constraints on others performing actions which would infringe that right. Someone who denies that she has that right is usually claiming, roughly, that those strong moral constraints do not exist. Let us call this a moral disagreement about rights.

Suppose, fantastically, that two people agree on everything that it is permissible to do in every set of circumstances. Why might they still disagree over which rights people have? It is very plausible that the moral significance of an individual's having a right consists entirely in its effect on what people may or may not do, so what could be the basis for their disagreement? A natural answer is that they think

1. For example, Robert Nozick says that risk impositions pose "serious" problems for any natural rights theory for which it is "difficult to see" a resolution; see Nozick, *Anarchy, State, and Utopia* (New York: Basic, 1974), pp. 74–75. Peter Railton says that Lockean natural rights theories may be incapable of giving an adequate account of the morality of risk imposition; see Railton, "Locke, Stock, and Peril: Natural Property Rights, Pollution, and Risk," in *To Breathe Freely*, ed. Mary Gibson (Totowa, N.J.: Rowman & Allanheld, 1983), pp. 89–123. Dennis McKerlie argues that no adequate theory of rights can explain the relevant facts; see McKerlie, "Rights and Risk," *Canadian Journal of Philosophy* 16 (1986): 239–51.

ascriptions of rights explain (some) facts about permissibility, and they disagree on which ascription best explains the facts about permissibility they agree on. Here, explanation consists in stating a theory of rights from which those facts can be derived which meets the various other criteria one normally wants of an explanatory theory. For example, the theory should reveal underlying structure and unity in the facts about permissibility, it should be simple and unified, and it should yield plausible conclusions about new cases. Let us call a disagreement in this sense a philosophical disagreement about what the best theory of rights is.

There are several reasons for trying to construct a theory of rights.² First, even if we are sure of the correctness of a particular set of propositions about the permissibility of actions, having a theory of rights which explains them well may improve our understanding of them by revealing various underlying contours. Second, we may be able to extrapolate from the theory. If it explains propositions we are sure about, we can view the theory as strongly supported by those propositions, and we can then use it to help us with those we are less sure about. Thus, the theory would provide a way of consistently extending our judgments about some cases to other cases. Third, if we can construct a theory which elegantly explains the great majority of our judgments about permissibility but is at variance with our judgments about a small number of cases, that may, for example, help us to see that those intuitions are the result of an undesirable kind of bias. Fourth, since internal coherence is something we generally want of our moral judgments, a theory of rights which reveals a coherent internal structure in a group of our judgments about permissibility would go some way toward a general justification of those judgments, if such a thing were needed. Of course, none of this is a guarantee that there is a theory of rights which can do all this; that is a matter for investigation.

The mention of rights as a way of talking about disagreements about the permissibility of actions is somewhat distinct from the philosophical project of constructing a theory of rights, and it is the latter that concerns us. I shall be describing the theory of rights we have most reason to accept independent of risk imposition, and I will be citing facts about the permissibility of actions associated with risk impositions. I will then argue that those facts can be well explained by that theory when we extend it in certain motivated ways. This will show that the pessimism many have felt about whether a theory of rights can adequately handle risk imposition is unwarranted. And, given the

2. Compare T. M. Scanlon, "The Aims and Authority of Moral Theory," *Oxford Journal of Legal Studies* 12 (1992): 1–23.

prominence of being a good explanation among the criteria of what counts as a correct theory of rights, this will give us good reason to believe that the theory of rights, when extended in those ways, really is correct.

II

The most obvious way of trying to accommodate facts about risk impositions in a theory of rights is to accept that we have the right that other people not impose risks of harm upon us. Call the claim that we have that right the Risk Thesis. The main claim of this article is that the Risk Thesis is correct.

There would be theoretical advantages to accepting the Risk Thesis. For example, it would enable us to explain why some risk impositions are impermissible, such as exposing someone to high levels of radiation for no particular reason or playing Russian roulette on her.

But the Risk Thesis looks straightforwardly false.³ It makes far too many risk impositions impermissible and gives us a morality of risk imposition which is far too restrictive. Or so the argument goes. But that is a poor argument. Once we see what a theory of rights should say about the permissibility of rights infringements, we will see that the Risk Thesis gives the right answers about the permissibility of risk impositions.

The simplest reason for rejecting the Risk Thesis comes from the idea that rights are absolute. On that view, if someone has the right that others not bring about p , then it is impermissible for others to bring about p . If rights are absolute, then the Risk Thesis is false since many risk impositions are permissible.

The idea that rights are absolute is, however, quite problematic. Suppose you are away on vacation and I suddenly and unexpectedly need a small amount of the drug you have plenty of to save my life. It is quite clearly permissible for me to take that amount of the drug, despite your having the right that I not take it (you own it). But we cannot then maintain that your right that I not take it is absolute.

3. Judith Thomson has offered a series of arguments that the Risk Thesis is false; see Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), pp. 242–47, and “Some Questions about Government Regulation of Behavior,” in her *Rights, Restitution, and Risk* (Cambridge, Mass.: Harvard University Press, 1986), pp. 154–72. In the passage referred to in *The Realm of Rights*, I think she regards risk imposition as not something a theory of rights has to explain—see in particular the last paragraph on p. 245—so I am tentatively inclined to place her among those who are pessimistic about a good theory of rights being able to accommodate the morality of risk imposition, although she thinks considerations of risk have an important role elsewhere in the theory of rights; see the discussion of the Trolley problem in chap. 7. McKerlie also thinks the Risk Thesis is false; see McKerlie. Samuel Scheffler thinks its truth is unclear; see Scheffler, “The Role of Consent in the Legitimation of Risky Activities,” in Gibson, ed., pp. 75–88.

Someone who wants to hold onto the view that rights are absolute has two options. One is that you only have the right that I not impermissibly take the drug. But then there is no explanation of when I may or may not take your drug by appeal to the rights you have in the drug: one might as well just say that it is permissible for me to take the drug when and only when it is permissible. A theory of rights with as little explanatory power as that must be rejected out of hand. A second possibility is to say that you have the right that I not take the drug except when such and such is the case, where “such and such” is some illuminating description of the conditions in which it is permissible for me to take it. But Thomson points out that in cases like the one described, having taken the drug I would be under a duty to compensate you for it, a duty I would not have had if you had not had property rights in the drug when I took it.⁴ So she suggests that we see this duty to compensate as arising out of the rights infringement. A theory of rights in which there is a strong connection between rights infringements and later duties to compensate will therefore be able to explain why I am under a duty to compensate you for the drug, provided it allows that my taking the drug was a rights infringement, and thus allows that there can be permissible rights infringements or, equivalently, that rights are not absolute.

The explanatory power of a theory of rights in which rights are not absolute will not, however, be that great unless we can say something informative about when rights infringements are permissible. What made my taking your drug permissible surely had a lot to do with the fact that I needed it to save my life. If my taking it would have only given me a little pleasure, like drinking a glass of wine, it would not have been permissible for me to take it. So the good that results from a rights infringement has a lot to do with whether it is permissible. But it cannot be the only factor: if you had needed the drug to save your life, then it would not have been permissible for me to take it. So the greater the burden to the bearer of a right, the greater the resulting good has to be for the infringement of the right to be permissible. (This is consistent with some burdens being so great that no amount of good would make the infringement of the right permissible.) Thomson’s second idea then, the Trade-off Idea, is that whether a rights infringement is permissible depends on both the good that would come from the infringement and the degree to which the

4. See Thomson’s “Self-Defense and Rights,” “Some Ruminations on Rights,” “Rights and Compensation,” and “Some Questions about Government Regulation of Behavior,” pp. 33–48, 49–65, 66–77, and 154–72, respectively, all reprinted in her *Rights, Restitution, and Risk*. See also Joel Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life,” *Philosophy and Public Affairs* 7 (1978): 93–123; and Nozick, chap. 4.

bearer of the right would be made worse off by the infringement.⁵ At least roughly, a rights infringement is permissible if the good that would come of the infringement sufficiently outweighs the burden of the infringement to the bearer of the right.

There is a lot of work to be done here. We would like to know how the role of consent in legitimating rights infringements connects with the Trade-off Idea. We would also like to know more about the connection between rights infringements and later duties to compensate. We will look at these issues later. And we would like to know when the resulting good is sufficient to make an infringement of a right permissible. At the very least, it is sufficient only if it is greater (probably much greater) than the burden to the bearer of the right, perhaps also only if there is at least one person whose benefit is greater than the burden.⁶ And the avoidance of harm might count more than other kinds of goods.

I cannot begin to say what a complete theory of rights should say about all this. But my concern is only to show that we should reject the idea that rights are absolute. Even if answers to the remaining questions quickly become only matters of intuition, the theory of rights we get by accepting Thomson's two ideas has far greater explanatory power than the theory built around the idea that rights are absolute. That is enough to reject the claim that rights are absolute and enough to answer the objection, on the basis of that claim, to the Risk Thesis.

III

If rights are absolute, the Risk Thesis is false. But showing that rights are not absolute hardly shows we have a good reason to accept the Risk Thesis. Before we can claim that, we need to see what the Risk Thesis says about the permissibility of risk impositions.

Let us suppose we understand well enough the general idea of when the good that would result from a rights infringement sufficiently outweighs the burden to the rights bearer to make infringing his or her rights permissible. To see what the Risk Thesis entails we need an account of how someone is burdened by bearing a risk of harm.

An idea familiar from decision theory is that we can measure the degree to which one would be made worse off by bearing a risk of harm by using an appropriate measure of the harm and discounting it by its probability. The measure of the degree to which one has been made worse off by bearing risks of a number of different harms is given by the sum of measures of each distinct harm risked discounted by its probability.

5. In particular, see Thomson, *The Realm of Rights*, chap. 6.

6. *Ibid.*, p. 166.

To illustrate, suppose we have an appropriate measure of harms. Then, imposing a risk of a ten-unit harm with a probability of 0.1 on someone makes her as badly off in the relevant sense (prospectively worse off) as imposing on her a risk of a 100-unit harm with a probability of 0.01 and as badly off as imposing on her a one-unit harm with a probability of one. And imposing a risk of a ten-unit harm with a probability of 0.1 and a twenty-unit harm with a probability of 0.1 on someone, where she cannot suffer both harms, is equivalent to imposing a risk of a thirty-unit harm with a probability of 0.1 on her.

When we combine this with the rough idea that a rights infringement is permissible if and only if the resultant good sufficiently outweighs the burden to the bearer of the right, we can see that the Risk Thesis gives us a good account of the permissibility of risk impositions. Low-level risk impositions, such as those associated with many of our day-to-day activities, will require very little good to make them permissible, and the leisure or productive benefits of most of those activities will be sufficient to make them permissible. Higher-level risk impositions, such as those associated with speeding, will not normally result in enough good to be permissible, although they may be permissible in some circumstances, like getting a critically injured person to the hospital. Still higher-level risk impositions, such as exposing someone to high levels of radiation, will be so great that in normal circumstances (i.e., self-defense and the like aside) no amount of good will make them permissible.

In short, we should accept that there is a sliding scale of the good, varying with the severity of the infringement, needed to make a rights infringement permissible. Once we accept this, incorporating the Risk Thesis into our theory of rights enables that theory to explain a wide range of facts about the permissibility of risk impositions. But before concluding that this gives us a good reason to accept the Risk Thesis, we need to address two objections.

The first is that some judgments look resistant to this kind of explanation. Each Sunday morning I go for a drive in the country just for pleasure and thereby impose a one in a million risk of death on Jones, who lives near the road. That is clearly permissible. But suppose that I were to get an equal amount of pleasure from playing Russian roulette on Jones, with a bullet in one of a million chambers.⁷ Many people would find that impermissible. But Jones would be made worse off to the same degree in each case, and the good that would result is the same in each case. This example therefore seems to contradict the claim that the permissibility of a rights infringement is a function of only the severity of the infringement and the good that would result.

7. This example is discussed in Nozick, p. 82, and Thomson, "Some Questions about Government Regulation of Behavior," p. 167.

In response, anyone who has similar intuitions is most likely being moved by the idea that the structure of an agent's intentions is relevant to the permissibility of her actions. On one familiar account, when an agent knows that an action will bring about an outcome that is in some sense bad for another, it can make a difference whether she intends that bad outcome to occur (it is part of her reason for performing the action) or whether she merely foresees that it will occur (it is not part of her reason for performing the action). Intending the bad outcome makes the corresponding action harder to justify.

But if this sort of idea is correct, it can easily be factored into a theory of rights. The idea that an infringement of a right is permissible if and only if the good that would result sufficiently outweighs the burden to the bearer of the right was only a rough idea, and there is plenty of room for refinement. To handle the present case we could make the permissibility of an agent's infringing a right a function not only of the severity of the infringement and the good that would result but also of the structure of the agent's intentions, taking into account, for example, the difference between intention and mere foresight. The example therefore does not threaten the claim that the Risk Thesis can explain which risk impositions are permissible.

The second objection to the Risk Thesis is that it entails that there can be rights infringements which seem morally insignificant. Driving by someone and thereby imposing, say, a one in ten million risk of death on her seems to be an action of little moral significance, yet it would count as a rights infringement on the view we are exploring. That may seem counterintuitive. On Thomson's view, for example, this is something we might well prefer that a theory of rights avoid saying, and she takes this to be good reason to reject the Risk Thesis.⁸

Even if this objection is sound, it does not obviously follow that a theory of rights cannot accommodate risk impositions. We might instead, as Thomson suggests (but goes on to reject), adopt the High-Risk Thesis: we have the right that others not impose high risks of harm upon us, but not the right that others not impose nonhigh risks of harm upon us.

There are, however, several difficulties with the High-Risk Thesis. It is far from obvious where, or even how, to draw the line between high and nonhigh risks. Now, in the theory of rights sketched here a lot is being left to intuition, as in, for example, the question of how much good (if any) would make a particular rights infringement permissible. So we should not overstate the force of the objection that where we draw the line is being left merely to intuition. But a more serious difficulty is

8. See Thomson, *The Realm of Rights*, p. 245, where she also makes the suggestion of the following paragraph.

that it is far from obvious why we would even want a line at all. We have seen that by allowing that there is a sliding scale of the good that is needed to make a rights infringement permissible, with, in particular, relatively little good needed to make permissible infringements which hardly make the bearer of the right any worse off at all, we can account for our understanding of the permissibility of a very wide range of risk impositions. It is therefore far from obvious that the distinction between high and nonhigh risks is doing any work at all, and we would do well not to clutter up our theory of rights with distinctions with no explanatory power. It may even be that our feeling that there should be no such things as trivial rights infringements is merely a vestige of the mistaken but compelling view that rights are absolute.

If we accept that the structure of an agent's intentions is relevant to the permissibility of her infringing the rights of others, we may have another reason to reject the High-Risk Thesis. The example we used of the possible relevance of the agent's intentions involved the distinction between his intending and merely foreseeing that one of his actions would cause some sort of bad outcome for another agent. But clearly we need to say what kinds of bad outcomes are relevant here. Now, it is noteworthy that the usual examples that are used to illustrate this kind of doctrine are rights infringements, and so it is at least plausible that the bad outcomes in question are just those that we have rights that others not bring about.⁹ For the sake of argument, assume that a one in a hundred thousand risk of death is high, while a one in a million risk of death is not. If the High-Risk Thesis were true, then my playing Russian roulette on Jones with one bullet in a gun with a million chambers would not count as a rights infringement. Hence, it would not fall within the scope of the relevance of the distinction between intention and mere foresight, so we could not appeal to our theory of rights to explain why it is impermissible, as we could if the Risk Thesis were true.

A further kind of reason to reject the High-Risk Thesis lies in acts which simultaneously infringe the rights of many agents. Smith has a noxious chemical he wishes to get rid of.¹⁰ There is a perfectly safe way of disposing of it, but it is rather expensive. So he considers two alternatives, dumping it in the nearby pond or pouring it into the river. If he dumps it in the pond, his neighbor Bloggs will thereby

9. As suggested in Warren Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," in his *Morality and Action*, ed. Philippa Foot (Cambridge: Cambridge University Press, 1993), pp. 175–93, p. 188.

10. This example is based on one discussed in McKerlie, although my conclusions are different from his. Railton also suggests that similar examples are difficult for a theory of rights to handle, but as the text will make clear, I disagree.

bear a one in a hundred thousand risk of death. If he pours it in the river, a million people will bear a one in a million risk of death.

We were assuming that a one in a hundred thousand risk of death is high. So if the High-Risk Thesis is correct, then Smith's dumping the chemical in the pond would be a rights infringement. Furthermore, let us also suppose that the resultant good would not be great enough for it to be permissible (it is not that expensive to dispose of it safely). Now my intuition is that if imposing a one in a hundred thousand risk of death on one person for a given benefit is impermissible, then so is imposing a one in a million risk of death on a million people for the same benefit. Assuming that this kind of intuition is correct, we might ask how a theory of rights could explain it, for it is exactly the kind of intuition which a theory of rights should explain. The most natural explanation is that the rights of each of the million somehow aggregate to form a stronger moral constraint. But we were also assuming that a one in a million risk of death is not high. So if the High-Risk Thesis is correct, then Smith's pouring the chemical in the river would not infringe anyone's rights, so there would be no rights to aggregate. It would therefore seem easier for a theory of rights to explain this kind of intuition if we allow that the act in question would infringe the rights of each of the million, and this gives us reason to prefer the Risk Thesis to the High-Risk Thesis. Now, the whole topic of aggregation within the theory of rights, and, more generally, within nonconsequentialist moral theory, is notoriously unclear, and so this kind of example cannot be seen as decisive support for that conclusion. But in the absence of a complete theory of aggregation, it seems more natural, at least provisionally, to accept that rights can aggregate and to prefer the Risk Thesis.

Since there are several reasons to prefer the Risk Thesis, we should perhaps ask what exactly is wrong with a theory of rights that allows that there can be trivial rights infringements. One reason is that it would give the wrong answers about permissibility. But we have already seen that it need not once we accept, as we should, that there is a sliding scale of the good needed to make a rights infringement permissible, depending, largely, on the degree of severity of the infringement. In fact, the only difficulty I can think of lies in a worry about the proliferation of rights: if we allow that there can be trivial rights infringements, then our respect for rights will diminish. But I am far from sure that this is a good objection, at least in the case in question. First, I suspect that we do not take risk impositions as seriously as we should, and this includes simultaneous impositions of very small risks on very large numbers of people. If we were to accept the Risk Thesis, then we might well end up treating risk impositions with more like the appropriate degree of seriousness. (One might even suspect that it is the fanatical combination of the proliferation of rights

and the view that they are absolute that in fact seems to occur in public debate that leads to their cheapening and that more modesty in the way we talk about rights would lead to greater respect for rights.) Second, I stressed earlier that the construction of a theory of rights is what I have been calling a philosophical inquiry. If, as I think we should, we incorporate the Risk Thesis into our theory of rights, it does not follow that the best, or even a good, way of engaging in what I called moral disagreement about rights would be to talk in terms of the Risk Thesis. And it is public discussion, not philosophical inquiry, that would have an effect on our respect for rights. On balance, the one objection I can see to the idea that there can be trivial rights infringements is at best moot, while there are several good reasons to prefer the Risk Thesis to the High-Risk Thesis.

Incorporating the Risk Thesis into our theory of rights enables that theory to give a good explanation of a wide range of facts about the permissibility of risk impositions. The objections to this form of explanation can be answered, so this gives us a good reason to accept the Risk Thesis. Yet, it does not give us a decisive reason. Accepting the Risk Thesis has ramifications for other parts of the morality of risk imposition aside from the permissibility of risk impositions, and to these we must turn.

IV

Consent is one of the most important notions within the realm of rights, and it is clearly relevant to the permissibility of many risk-imposing activities: consider exposing someone to radiation as part of an experiment. A plausible general feature of rights is the Consent Idea: if an agent has the right that others not bring about p , then it is permissible for others to bring about p if the agent consents. So accepting the Risk Thesis would enable us to explain why it would be permissible to expose someone to radiation if she consented.

But the more important thing to be explained is that it would not be permissible if she did not consent. We saw the plausibility of the Trade-off Idea earlier, and that entailed the following: if an agent has the right that others not bring about p , then it is permissible for others to bring about p if the good that would come of bringing about p would sufficiently outweigh the burden to the bearer of the right. So it is natural to say that if an agent has the right that others not bring about p , then, self-defense and the like aside, it is impermissible for others to bring about p unless it is made permissible either by the Consent Idea or by the Trade-off Idea. Since the Trade-off Idea would not legitimate the radiation exposure, accepting the Risk Thesis would explain why it would be impermissible unless the agent consented.

But this cannot be the whole story. It seems plausible that even if the Trade-off Idea makes permissible an infringement of a right,

then, other things being equal, the potential infringer of the right ought to seek (but not necessarily obtain) the consent of the holder of the right first. And this may seem to make trouble for the Risk Thesis because there are a great many risk impositions for which it is not true that one ought to seek consent first.

The answer lies in the "other things being equal" clause. If the Trade-off Idea makes permissible an infringement of a right, it is permissible for the about-to-be infringer of the right not to seek consent if seeking it would be unduly onerous. In the example where I needed your drug but you were away on vacation, it would have been very hard to get hold of you, so it was not the case that I ought to have sought your consent. In fact, two features of risk impositions often make seeking consent difficult. First, it is often hard to know who the potential risk bearers are. Second, many risk-imposing activities impose very small risks on very large numbers of people, and the more people, the harder it is to seek consent from all of them. So if we accept the Risk Thesis, we can use the general structure of our theory of rights to explain why consent is necessary for some risk impositions to be permissible, why the potential risk imposer ought to seek consent for still more risk impositions, and why it is not the case that she ought to seek consent for other risk impositions. This gives us a reason to accept the Risk Thesis.

Another aspect of the morality of risk imposition is that it is sometimes permissible to use force in self-defense to prevent someone from imposing certain risks on you. And, provided certain procedural constraints are met, government can permissibly punish people for imposing certain risks on others. What I am going to say about self-defense applies almost unchanged to punishment, so to save space I will discuss only self-defense.

Self-defense is complicated in two ways. First, the amount of force you may use is subject to a proportionality constraint: it cannot be too great in relation to the magnitude of the risk imposed. Second, you may use force in self-defense only to prevent certain kinds of risk impositions, not, for example, to prevent the risk your neighbor imposes on you each time he turns on his gas stove. So which risk impositions may you use force in self-defense to prevent? A natural suggestion is that it is the risk impositions which are impermissible.

While that is along the right lines, there is something missing. One may not use force in self-defense to prevent just any kind of impermissible behavior. There are many occasions on which people really ought not to be impolite, but this does not make it permissible to use force to prevent them. What we need is a way of carving out the kinds of impermissible actions to which self-defense is a permissible response. We have a clue from the earlier idea that if the structure of an agent's intentions is relevant to the permissibility of actions which

produce certain kinds of bad outcomes, then the kinds of bad outcomes that are relevant are rights infringements. So I suggest that the kinds of impermissible actions which make self-defense permissible are impermissible rights infringements. More generally, I suggest that a plausible theory of rights will contain something like the following. If an agent has the right that others not bring about p , then it is permissible for others to bring about p if that is necessary to prevent the agent from impermissibly infringing the rights of others, subject to a proportionality constraint. So a plausible theory of rights can explain why it is permissible to harm someone to prevent her from impermissibly imposing a risk of harm on another, subject to a proportionality constraint, provided that her imposing such a risk is a rights infringement. Thus, considerations of self-defense and punishment, like considerations of consent, give us a good reason to accept the Risk Thesis.

V

I now want to turn to compensation, but it will help first to make explicit something I have been assuming all along. In discussing the permissibility of impositions of risks of harm and their relation to the Risk Thesis, I have been assuming that insofar as the consequences of an agent's act are relevant to its permissibility, it is the expected consequences that matter, not the actual consequences. Suppose two actions impose a risk of the same magnitude, but one happens to cause a harm while the other does not. If everything else about the actions is the same, then, on this assumption, they were either both permissible or both impermissible.

There is an alternative view. This says that insofar as the consequences of an agent's act are relevant to its permissibility, it is the actual consequences that matter, not the expected consequences. So in the example just given, one action might have been permissible while the other was impermissible because of the difference in their actual consequences.

The issues lurking beneath the surface here are surprisingly complex. I have argued elsewhere that the assumption I have been making is correct, but there is a lot to be said for the other view, so I am going to have to bypass this issue.¹¹ I will continue to assume, and I hope you will follow me, that insofar as the consequences of an agent's actions are relevant to their permissibility, it is the expected consequences that are relevant, not the actual consequences. There is one caveat: this assumption does not mean that whether a risk imposition

11. See David McCarthy, "Actions, Beliefs, and Consequences," *Philosophical Studies*, in press. While not endorsing it, Thomson cautiously suggests it is very hard to see what is wrong with the other view; see Thomson, "Imposing Risks," in *Rights, Restitution, and Risk*, pp. 173–91.

happens to cause harm or not has no bearing on issues of compensation and punishment. It does, and why this is so will come out in what follows. I turn first to compensation.

Recall the example in which I took some of your drug to save my life. I infringed one of your rights, and although the infringement was permissible, I was then under a duty to compensate you. That suggested a strong connection between rights infringements (permissible or not) and duties to compensate.

Suppose I impose a risk of harm on someone. Then, from the point of view of questions to do with permissibility, my action is equivalent to an action which imposes a different risk, but one of the same magnitude, and which is identical in all other respects apart from, possibly, the actual consequences. In particular, my action is equivalent to an otherwise identical risk imposing action where the relevant probability is one but the harm is equal in magnitude to the risk of harm my action imposes. In other words, my risk imposition is, from the point of view of questions to do with permissibility, equivalent to an action which is certain to make someone suffer a smaller harm. Since a strong connection holds between actions which are certain to harm someone and later duties to compensate, and since, from the point of view of questions to do with permissibility, the two actions are equivalent, there is a strong case for saying that risk impositions give rise to duties to compensate which are in some way parallel. A theory of rights will be able to explain this by appeal to the strong connection between rights infringements and later duties to compensate if the Risk Thesis is true. Hence, considerations of compensation appear to support the Risk Thesis.

This is only a gesture toward an argument. To make it firmer, we need to be clear on two things. First, we need to ask what this strong connection between rights infringements and later duties to compensate is. Second, given an answer to that, we need to see whether it generates a plausible theory of compensation if we adopt the Risk Thesis.

The examples usually used to establish the connection between rights infringements and later duties to compensate are quite special. They involve intentional, broadly self-interested, uncoerced rights infringements performed in conditions of full information. And it is clear that the duties they give rise to are quite ordinary duties for the infringer of a right to compensate the bearer of the right.

But are the duties that arise from all rights infringements so clear? It is far from obvious that there cannot be rights infringements which are unintentional, altruistic, coerced, or performed in conditions of incomplete information, and in many of these cases our intuitions about compensation are quite murky. And the form of the duties which arise out of such rights infringements and which are connected

with compensation is not always obvious. Thus, I suggest that we say that other things being equal, if one person infringes the right of another, then, very roughly, the infringer is under a duty to compensate the bearer of the right. Call this the Compensation Idea. This is somewhat vague, but we may welcome that. The most important cases for a theory of compensation are those in which one person is harmed as a result of another's imposing a risk of harm on him or her, and we do well to leave some flexibility in what we say about such cases.

It will appear that the Compensation Idea makes the Risk Thesis look implausible. In almost every case in which one person is under a duty to compensate another, the first actually caused the second to be harmed. There are few cases in which one person is under a duty to compensate another without having caused that person to be harmed,¹² and at most very few cases in which one person is under a duty to compensate another merely for having imposed a risk of harm on that person without that person's having been harmed at all.¹³ Thus, given the Compensation Idea, accepting the Risk Thesis seems to lead to counterintuitive results.¹⁴

One response to this objection is to appeal to the "other things being equal" clause in the Compensation Idea to explain why risk impositions do not always lead to duties to compensate. But that clause mostly gestures toward cases in which the infringer of a right was ignorant, and reasonably so, of the fact that his or her action would be infringing a right. But the objection could be made about actions which the risk imposer knows will impose a risk of harm on someone else: they often do not lead to a duty to compensate the risk bearer, so in the discussion that follows, I will assume that the "other things being equal" clause makes no difference.

In responding to the objection, we do better to focus on the "very roughly" part of the Compensation Idea. To see why, we must ask what would compensate someone for bearing a risk. We are assuming that insofar as the consequences of an agent's actions are relevant to their permissibility, it is the expected consequences that matter, not the actual consequences. This means that the morally relevant sense in which agents are made worse off by bearing risks is that they bear an expected harm or are made prospectively worse off. An agent

12. For a discussion of such cases, see Thomson, "Remarks on Causation and Liability," in *Rights, Restitution, and Risk*, pp. 192–224.

13. But there are, I believe, some cases like this. I also believe that these cases and the cases referred to in the previous note support the general claim I am advancing in this section, that duties to compensate are very closely linked to risk impositions. See David McCarthy, "Liability and Risk," *Philosophy and Public Affairs* 25 (1996): 238–63.

14. Thomson takes this to be a good reason to reject the Risk Thesis. See Thomson, "Some Questions about Government Regulation of Behavior."

would therefore be compensated for bearing a risk if she were to receive some benefit that made her, on balance, prospectively as well off as she would have been had she neither received the benefit nor borne the risk.

One way in which you can be compensated for bearing a risk is by receiving a direct payment. For example, if you are what is known as risk neutral with respect to money, then receiving ten dollars would make you as prospectively well off for bearing a one in ten risk of (a harm equivalent to) a hundred-dollar loss as you would have been had you neither borne the risk nor received the ten dollars. In other words, receiving the ten dollars would compensate you for bearing the risk.

But there is another way in which you can be compensated for bearing a risk. Suppose that as a result of bearing a risk of harm, you receive a guarantee to be compensated for the harm if you suffer the harm as a result of bearing the risk, and nothing otherwise. This compensates you for bearing the risk. For, two things can happen: either you do not suffer the harm as a result of bearing the risk or you do suffer it as a result of bearing the risk but are fully compensated for suffering it. So the guarantee means that in each case you are no worse off for having borne the risk. Thus, you are prospectively no worse off for bearing the risk and receiving the guarantee than you would have been had you neither borne the risk nor received the guarantee. Hence, receiving the guarantee fully compensates you for bearing the risk.

This needs to be qualified in one way. Suppose that in one case I impose a risk of harm on you without your knowing about it, while in the other I impose the same risk on you, but you are aware of it and suffer fear as a result. If the prospective value of the compensation you will receive in either case is the same, then if that fully compensates you for bearing the first risk, it would seem that it does not fully compensate you for bearing the second risk because of the additional fear.

Fear raises many puzzling questions. For example, there is the question about when to count it as a kind of harm, and there are questions about what Nozick once called "free-floating fears."¹⁵ These give rise to difficult problems for any theory of compensation, but I do not think they raise any particular difficulties for the theory I will be arguing for. For example, if we regard fear as a kind of harm, then we could treat causing fear and the duties to compensate that it gives rise to separately. Or we probably do better, for the kinds of reasons that will emerge, to base our account of the duties to compensate that

15. See Nozick, pp. 65–69.

arise from risk impositions which cause fear on the following idea. If you are guaranteed to receive an appropriate amount in excess of compensation for the harm if you are harmed, and nothing otherwise, then the prospective value of this guarantee fully compensates you for bearing the risk of harm and suffering the fear that it causes.¹⁶ But developing these ideas would take us away from our main task, so for simplicity I will ignore fear in what follows.

Consider two rules. First, the Direct Payment Rule: if an agent imposes a risk of harm on another, then he or she is under a duty to compensate the risk bearer by making a direct payment. Second, the Natural Lottery Rule: if an agent imposes a risk of harm on another, then he or she is under a duty to pay the risk bearer compensation for the harm if the risk bearer suffers the harm as a result of bearing the risk, and nothing otherwise. These rules have this in common. Suppose an agent imposes a risk of harm on someone, and one of the rules applies. If the agent is guaranteed to comply with whatever duties arise from that rule, then the risk bearer is fully compensated for bearing the risk. (Of course, the agent can fail to comply with whatever duties arise from the Natural Lottery Rule, but the agent can also fail to comply with the duties that arise from the Direct Payment Rule.) Hence, a theory of rights which contains the Risk Thesis, and which says that the Natural Lottery Rule applies to all risk impositions, satisfies the requirement the Compensation Idea gestures toward. Indeed, we can now state the Compensation Idea more precisely: other things being equal, if an agent infringes someone's right, then the agent is subject to a rule such that if the agent is guaranteed to comply with whatever duties arise from that rule, then the bearer of the right is fully compensated for the infringement.

Some will find it implausible to claim that, given the Risk Thesis, the Natural Lottery Rule satisfies the intuitive requirement behind the Compensation Idea. But I see no reason to reject that claim once we accept that what is morally significant about risk impositions is the magnitude of the risk imposed. That magnitude has to be understood in terms of prospective, or expected, value, but the expected value to the risk bearer, given that risk imposers will comply with whatever rules apply, is the same and is compensation for the risk under both the Direct Payment Rule and the Natural Lottery Rule. Hence, if the Risk Thesis is true, the Natural Lottery Rule meets the requirement behind the Compensation Idea to the full extent that the Direct Payment Rule does.

16. I believe this kind of factoring idea can also be used to answer the worry Nozick raised about compensation and the fair division of the benefits of exchange. *Ibid.*, pp. 63–65.

Suppose a theory of rights contains the Risk Thesis. That theory is consistent with the Compensation Idea if the Natural Lottery Rule applies to all risk impositions, if the Direct Payment Rule applies to all, or if the Natural Lottery Rule applies to some and the Direct Payment Rule to others. So, there is more work to be done if we want to uncover the theory of compensation that results from adopting the Risk Thesis.

Two facts help us to do this. First, risk imposers are certainly not guaranteed to comply with whatever duties arise from their risk impositions. Second, even if they do comply, compliance has costs. This means, at least roughly, that it is to advantage of both risk imposers and risk bearers that the rule which applies to a particular kind of risk imposition is the rule which is easiest to comply (and to enforce compliance) with. For that means that the value to the risk bearers of the rule which applies comes as close as possible to full compensation for bearing the risk, while the costs for risk imposers of engaging in valued productive and leisure activities are as low as possible consistent with, very roughly, their being under a duty to compensate those on whom they impose risks.

In terms of ease of compliance, the Natural Lottery Rule enjoys three great advantages over the Direct Payment Rule. First, consider the number of times each puts the risk imposer under a duty to depart from the status quo. The Direct Payment Rule does this each time someone imposes a risk, but the Natural Lottery Rule only does this when someone has been harmed as a result of bearing a risk. For a one in ten thousand risk of harm, for example, the Direct Payment Rule will put the risk imposer under a duty to depart from the status quo ten thousand times more often in the long run than the Natural Lottery Rule. Since the transaction costs associated with such departures are significant, this is a great advantage of the Natural Lottery Rule. Second, the two rules give rise to different information costs. This happens in two ways. (1) To know what the Direct Payment Rule requires, one needs to know who has imposed a risk on whom, whereas to know what the Natural Lottery Rule requires, one merely needs to know who has caused whom to be harmed. And it is clearly easier to identify someone who has been harmed (and who caused it) than someone who has merely borne a risk of harm (and who imposed it). (2) To know what the Direct Payment Rule requires, one also needs to know the magnitude of the risk. But it is notoriously difficult to determine the relevant probabilities which determine this magnitude. But a truly delightful feature of the Natural Lottery Rule is that one does not need to know this: one knows in advance that if someone imposes a risk of harm on another and will compensate the risk bearer for any harm that results from the risk imposition, then the risk bearer is compensated for bearing the risk no matter what the probability was of the harm resulting from the risk imposition.

These advantages the Natural Lottery Rule enjoys over the Direct Payment Rule are enormous. While there are other considerations, this illustrates why if we accept both the Risk Thesis and the Compensation Idea, then the Natural Lottery Rule is the rule which governs most risk impositions. Thus, contrary to the objection made earlier, given that we accept the Compensation Idea, it does not follow that if we accept the Risk Thesis we are committed to counterintuitive claims about compensation. Moreover, by accepting the Risk Thesis—an idea which explains so much else connected with risk imposition—we provide a foundation for the common intuition that in a large number of cases, if one person causes another to be harmed, then the first is under a duty to compensate the second for the harm. This gives us a further reason to accept the Risk Thesis.

I have argued elsewhere that, independent of any position on rights, we ought to see risk imposition as what lies at the heart of the theory of compensation, more or less along the lines sketched here.¹⁷ If that is correct, we can draw two corollaries about rights. First, it shows that not only does the Risk Thesis not yield counterintuitive claims about compensation, but it also provides a good way of fitting the best theory of compensation into the theory of rights. Second, it provides a further reason to prefer the Risk Thesis to the High-Risk Thesis. There are cases in which one person imposes a very small risk of harm on another but is under a duty to compensate the other for the harm if she suffers the harm as a result.¹⁸ It is hard to explain this if we accept the High-Risk Thesis, but straightforward if we accept the Risk Thesis.

The reasons why the Natural Lottery Rule applies to most risk impositions if we accept the Risk Thesis carry over to punishment. We are used to thinking that a successful attempt at a certain crime should be punished more severely than a failed but otherwise identical attempt at the same crime. But it is not so obvious how to justify this when the difference between success and failure is purely a matter of luck, because it seems natural to treat equally serious attempts at the same crime equally. But we can do that if the expected punishment we impose on equally serious attempts is the same. And it is natural to treat more serious attempts at a crime more severely than less serious attempts at the same crime. And we can do that if the expected punishment we impose upon the former is greater than the expected punishment we impose on the latter. But we can do both by punishing attempts at a certain crime with the Natural Lottery Punishment: mild punishment if the attempt fails, severe punishment if the attempt succeeds. And many of the reasons for preferring the Natural Lottery

17. See McCarthy, "Liability and Risk."

18. *Ibid.*

Rule over the Direct Payment Rule in the context of compensation are also reasons for preferring the Natural Punishment Rule to the Direct Punishment Rule, where the punishment is in proportion to the seriousness of the attempt.¹⁹

I want to end this discussion of compensation by considering a second objection to the whole account of the connection between compensation and rights offered here. I began this article by saying that any plausible theory of rights will assign to us something at least very much like the right that others not harm us. Call the claim that we have exactly that right the Harm Thesis, and suppose it is correct. Suppose I impose a risk of harm on you, and this causes you to be harmed. I have thereby infringed your right that I not impose a risk of harm on you, and I have also infringed your right that I not harm you. If the account of compensation I have just sketched is correct, that would seem to entail that I am now under a duty to compensate you twice for the harm: once because of the Harm Thesis and once because of the Risk Thesis. That would be an absurd result. I reply that the only right that you have connected with your being harmed is that ascribed by the Risk Thesis; insofar as the Harm Thesis ascribes to you a distinct right, it is a right you do not have; hence, I am not under a duty to compensate you twice.

This may seem counterintuitive, but it is not. It would be if your not having that right meant, say, that it is permissible for me to knowingly harm you but not to knowingly impose a risk of that harm on you. But it does not mean that. If I knowingly harm you, then I knowingly impose a risk of that harm on you, the probability of that harm being one, so the Risk Thesis will give the correct answer about the permissibility of my act. Moreover, the Risk Thesis will, as I have argued in earlier sections, give the correct answer about the permissibility of actions in which I impose a risk of harm on you where the probability is less than one. In fact, there is something deeper here. I have been assuming all along that the permissibility of risk-imposing actions is a function of, in part, the magnitude of the risk imposed, and not what the risk imposition happens to cause. The claim that the Risk Thesis is correct and the Harm Thesis false insofar as it ascribes a right distinct from the Risk Thesis naturally reflects this assumption, whereas the claim that the Harm Thesis is correct and the Risk Thesis false naturally reflects the claim that the permissibility of risk imposing actions is a function, in part, of what they happen to cause, and not the magnitude of the risk. Since I believe that the assumption I have been making is correct, I am glad to have to reject

19. This parallels the main argument in David Lewis, "The Punishment That Leaves Something to Chance," *Philosophy and Public Affairs* 18 (1989): 53–67.

the Harm Thesis insofar as it ascribes a right not ascribed by the Risk Thesis.

VI

To say that someone has a right is a useful way of gesturing toward a very complex set of moral constraints and prerogatives. To those of us who are convinced that people have rights, that those kinds of constraints and prerogatives really do exist, a list of the rights we think people have describes some important, if rough, contours in a part of morality and may help us to understand what that part of morality is about. But, given the complexity of the kinds of moral constraints and prerogatives that talk of rights gestures toward, there is a great deal that such a list fails to reflect. Much of the interest of constructing a theory of rights lies in trying to get a more fine-grained description of those constraints and prerogatives while bringing out their internal structure, although this may ultimately be only a stepping stone to a deeper understanding of those constraints and prerogatives in which rights are not mentioned.

Without being very clear on what makes a particular kind of moral constraint or prerogative something that a theory of rights should explain, it seems clear to me that the constraints and prerogatives related to acts which impose risks of harm on others are of that kind. The pessimism that many writers have expressed over whether such constraints and prerogatives can be accommodated within a theory of rights should, I think, be seen as a deeper form of pessimism, because it puts into doubt the viability of the whole project of constructing an adequate theory of rights. But I have argued that if we incorporate the Risk Thesis into our theory of rights and reject the Harm Thesis, insofar as that assigns a right not assigned by the Risk Thesis, then the resulting theory of rights is both simple and well motivated and captures a wide range of facts about the morality of risk imposition—including the permissibility of risk impositions, consent, self-defense, punishment, and compensation—and reveals and explains their structure. Some of the ideas needed may seem counterintuitive, such as the idea that there can be trivial rights infringements and the idea that the Natural Lottery Rule is founded on a way of compensating someone for bearing a risk of harm, but I can see no good objection to them. The only reason for rejecting the Risk Thesis despite all this must lie in the thought that the whole project of trying to construct a theory of rights along the lines I have described is deeply misconceived. But I do not see why that would be.