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Thresholds for Rights

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INTRODUCTION

When, on the basis of the consequences that can be brought about by infringing a right, is it permissible to infringe a rights claim? The moderate's position is that rights may justifiably be infringed when enough is at stake. On such a moderate view rights have thresholds, a point at which the protection a right normally offers us gives out.

Joel Feinberg presents the following case as an example which lends intuitive support to a moderate view about rights:

> ... you are on a back-packing trip in the high mountain country when an unanticipated blizzard strikes the area with such ferocity that your life is imperiled. Fortunately, you stumble onto an unoccupied cabin, locked and boarded up for the winter, clearly somebody else's private property. You smash in a window, enter, and huddle in a corner for three days until the storm abates. During this period you help yourself to your unknown benefactor's food supply and burn his wooden furniture in the fireplace to keep warm.[1]

Feinberg thinks it is permissible for you to break into the cabin, eat the food, and burn the furniture to keep warm, and yet he also believes that the cabin owner has property rights which normally protect him from having others enter and use his property in the absence of his consent. What makes a difference in this case is that you have enough at stake, your life, to override that right. To put the point differently, your life is enough at stake to surpass the right's threshold, hence you may proceed and infringe the cabin owner's right.

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If you do not share Feinberg's intuition in this case that there is enough at stake to override the right, consider a variant on the case where you break into the cabin and steal the food and burn the furniture, not for your own sake, but in order to save the life of a small child you find lost in the woods. In this variant on Feinberg's case, surely we all think that any property rights have been overridden.

In either case although you have *infringed* the cabin owner's right (and as a result owe compensation), once there is enough at stake this infringement does not count as a violation of the cabin owner's right, in the sense that it would have been morally wrong to proceed. This distinction, introduced by Judith Jarvis Thomson, between infringements and violations, is one I make use of throughout this paper.[2]

With Thomson, I take "infringements" to mean any instance of failing to accord a right, and "violations" to mean infringements which are morally unjustified. Also with Thomson, I believe that not all infringings of rights are violations. I believe that some infringings are instead "overridings" which is my term for the positive case of failing to accord a right when doing so is permitted on the basis of consequences at stake. Although there are other kinds of justified infringements—for example, when we must infringe one of two rights and we choose to infringe the less important right—here I reserve the term "overriding" for infringements that are justified on the basis of what is at stake for those who will benefit from the right's infringement. Hence, I will speak of unjustified infringings of rights, or violations, and justified infringings of rights, or overridings.

Are property rights (as in the case Feinberg presents) the only rights with thresholds? It seems to me that they are not. Suppose that through some strange circumstance you can save Susan's life by punching Mary in the nose. Mary has a right not be harmed and your action would infringe that right. Still, I think that you may proceed and punch Mary. This is an intuition I think many people share with me and so I think a moderate view about rights extends to other rights, including the right not to be harmed.

In the scenario just described, you, the reader, are the potential right infringer. Mary is the right bearer. And Susan is the beneficiary of the right's infringement. Often, in what follows, I will simply talk about infringers, right bearers and beneficiaries. By "infringer" I mean a person who infringes a right. "Right bearer" refers to the person who possesses the right. And "beneficiary" is the person who will benefit from the right's infringement.

Now, I think that even the right not be killed has a threshold. When there is a great deal at stake, I think we can be justified in infringing a person's right not to be killed. For

example, I think that if we can save a thousand lives by killing Mary, we are permitted to do so. But I recognize that this is an intuition that many moderates do not share. Many people think that there is something special about the right not be killed and that that right is absolute. It is a common mistake, however, to conclude from your thinking that the right not to be killed is absolute, that all rights are absolute. Even if you think that we can never justifiably infringe a right not to be killed, it seems to me that you likely do think that there are circumstances that justify infringing a right not to be punched in the nose. And so when I do use cases that involve the right not to be killed, feel free to substitute a less important right.

The view that (many, if not all) rights have thresholds is, as I have just noted, an extremely common one, both among the general public and among philosophers engaged in moral theory.[3]

Even philosophers who seem on first glance to be endorsing an absolute view of rights, often turn out to mean something much less straightforward than that. Consider Robert Nozick's work on "side-constraints," his term for rights. The very first sentence of *Anarchy, State and Utopia* reads: "Individuals have rights, and there are things no person or group may do to them without violating their rights."[4] This bald statement of a rights view, combined with Nozick's endorsement of a Kantian rationale for rights,[5] suggests that Nozick's side-constraints are absolute. But later, on the question of whether side-constraints can ever be overridden, he concedes that they may well give way in the face of "catastrophic moral horror."[6] As well, in a discussion of the moral status of animals, specifically about what may be done to people on behalf of animals, Nozick writes: "One may feel that the side-constraint is not absolute when it is *people* who can be saved from excruciating suffering, so perhaps the side-constraint also relaxes, though not as much, when animals' suffering is at stake."[7] What these remarks suggest is that Nozick's side-constraints have thresholds. While he may insist that the thresholds are very high—after all, some state of affairs must be pretty awful to count as "catastrophic moral horror"—they are thresholds just the same.

Like Nozick, Charles Fried sets out to defend an absolute account of deontological prohibitions. Fried begins his discussion by claiming that "It is part of the idea that lying or murder are wrong, not just bad, that these are things you must not do—*no matter what*."[8] But in the very next paragraph, Fried modifies the initial statement of his view, and instead claims that the prohibitions are only absolute within the boundaries that define their concepts. For example, Fried says that killing in self-defense is not murder, nor is withholding a

truth lying. And even within their boundaries, Fried thinks there are circumstances that justify overriding the prohibition, namely when there is enough at stake. "Even within such boundaries we can imagine extreme cases where killing an innocent person may save a whole nation. In such cases it seems fanatical to maintain the absoluteness of the judgment, even if the heavens will in fact fall," writes Fried.[9] In a similar vein, Fried concedes that although people have property rights, we would be justified in taking another person's car in the face of their explicit refusal, if doing so is the only way to get to the hospital in an emergency.[10] And so what began as a statement of the view that prohibitions are absolute, ends up as an endorsement of a far more moderate position. It seems that Fried's prohibitions, instead of being absolute, are prohibitions with thresholds.

Now, Nozick and Fried are philosophers who seem to be defending absolute rights and are at best only reluctant moderates, but most deontologists actually endorse, or propose, moderate views about rights. (Some examples: Thomas Nagel,[11] Judith Jarvis Thomson,[12] and W. D. Ross.[13])

Once we note the prevalence of moderate positions about rights, the omission of a worked out account of thresholds seems glaring. The appeal of many moderate views rests on the assumption of the intelligibility of thresholds and without some examination we do not know whether such an assumption is warranted. Henry Sidgwick noted this difficulty for non-utilitarian ethical theories in *The Methods of Ethics*:

> ... when we ask how far we may legitimately cause pain to other men (or other sentient beings) in order to obtain a greater happiness for ourselves or third persons, or even to confer a greater good on the sufferer himself, if the pain be inflicted against his will,—we do not seem to be able to obtain any clear and generally accepted formula for deciding this point, unless the utilitarian formula be admitted as such.[14]

It is surprising then, given the importance of thresholds to deontological theories, that the topic has been all but neglected. A notable exception in this regard is Judith Jarvis Thomson and for that reason an assessment of Thomson's account of thresholds is taken up in the second part of this paper.[15] In Part I, it is my hope to *begin* to remedy this omission in right's theory with the development of a structure which I believe helps us think more clearly about rights and their thresholds. In Part II, I apply that structure to Thomson's account of thresholds for rights.

Two assumptions that I will make throughout this paper are worth pausing to note before we begin our investigation. First, in this paper I do not attempt to answer the question of

whether, when there is enough at stake, we are ever required to infringe a right. But if it were the case that in some instances we were required, it would trivially be true that we were permitted. And so I use "permitted" throughout. Second, I assume that we can make various kinds of judgments about utility. It is in recognition of the difficulties in doing so that I chose my examples. All of my examples involve rights not to be harmed in various ways, such as being given a headache, being punched in the nose, losing a finger, having an arm chopped off, and most drastically, being killed. My thought is that we can judge, without too much trouble, that the list just given ranges from bad to worse. More controversially, I assume that we can make these judgments interpersonally. For example, I claim that it is worse overall if Fred has an arm chopped off than if Jean has a finger chopped off.

PART I: STRUCTURE OF THRESHOLDS

Total Requirement

The cases that prompt many people who believe in rights to deny that rights are absolute concern disaster scenarios.[16] Typically, the supporter of rights makes a claim to the effect that persons have rights not to be killed which entails that others cannot infringe these rights even to bring about an outcome that is superior to the one in which the right is not infringed. For example, Thomson takes as a basic intuition that we may not kill one person even to save four other lives. The critic of rights may then ask if it is the case that we are prohibited from taking a life even when a great deal hangs in the balance. Suppose there are not four other lives at stake but a thousand. Is it still the case that the right requires of us that we not kill the person? At this point many rights advocates (though not Thomson) will say that the right has given out. A moral agent may proceed to kill another person if by doing so they will prevent the death of a thousand other persons.

The basic idea then is this: there are some amounts of good which are too small to justify infringing a right to get them, other amounts of good which are large enough. The moderate rights theorist believes that there exists for each right a specific total amount, which were that amount at stake, the right could justifiably be infringed. I will call this the "total requirement" since it is the total amount required to be at stake before you can justifiably infringe a right.[17]

So far I have said nothing about the specifics of a reasonable total requirement, other than suggesting that many people who think four lives are not enough to override someone's right to life would think that a thousand lives are. One can see how different views on this subject will emerge,

with advocates of very strong rights arguing that the total must be very large, and advocates of relatively weak rights arguing that the total need not be so very large. But discussions of variations on this theme aside, this requirement is in need of refinement.

As I have been speaking so far there is some single, fixed, total amount of consequences which will justify the infringing of a rights claim. But this total amount cannot be constant for all cases. Suppose that something between four and a thousand lives is the amount which must be at stake to override a right not to be killed. For the sake of discussion let me assume that ten is the correct number. On this account, it is required that ten lives be at stake before a person's right not to be killed can be overridden. But the total amount, which is ten lives at stake or the moral equivalent of ten lives at stake, cannot be the right total for all rights. (I recognize that it is controversial that there is any moral equivalent to ten lives, but I find it prima facie plausible that, at least in some cases, enough smaller things at stake can be the moral equivalent of larger things at stake.)

Consider a scenario in which we can save Amy's life by punching Bob in the nose. It seems to me that we are permitted to proceed even though Bob has a right not to be punched in the nose and less than ten lives are at stake. Hence, I think the amount that must be a stake to justify killing a person is different than the amount that must be at stake to justify punching them in the nose. A great deal less must be at stake when the right in question is the right not to have one's nose punched. This is the intuition that the more serious the right, the more that must be at stake before its infringement can be justified. (For now I am assuming that the right amount to say that each agent has at stake is the amount they have at stake in this specific instance. The unit counted to be at stake is the incremental unit of well-being tied to this act.) A revised total requirement must take the seriousness of the right into account. Thus, for any specific infringement of a right to be justified, there must be a total amount at stake which reflects the seriousness of the right in question. This statement of the total requirement remains neutral on the question of just how the total need reflects the seriousness or strength of a right.

So far this discussion of what is necessary to override a rights claim has focused on the obvious—the question of *how much* need be at stake before the right ceases to protect the rights bearer. Very few philosophers writing about a moderate account of rights have offered a specific proposal for what the correct amount might be, but this question has at least been recognized as one that needs to be answered if one is to be a rights' moderate.[18] However, once one begins to work out an

answer to this question other issues come up. It seems that our intuitions about what is at stake are not just about the *amount,* but are also about the *distribution* of that amount.[19] Are there restrictions on what goes into the amount that is considered to be at stake for the purposes of meeting the total requirement?

Universal Constraint

One plausible constraint on the consequences which can count concerns the minimum that a person who will benefit from the infringement of another's right must have at stake. Consider an intuition that many people share: no number of people suffering from minor headaches, no matter how great the number, can justify infringing someone's right not to be killed. But, it seems as though the total requirement could be met by adding up a large number of small things at stake. There is nothing yet in the total requirement to prevent this result. Those who take this "no number of headaches can override a right not to be killed" intuition to reflect some moral fact will want to account for this fact when they spell out the conditions under which a right may be overridden.

Just what moral fact does this intuition reflect? Some philosophers have gone on to conclude from cases of this sort that the numbers do not count, that we cannot add consequences across persons. On this analysis of the intuition, if James and Susan will both have their headaches relieved by infringing Ken's right not to be killed, then what is at stake, morally speaking, is one headache, not two. As we cannot sum consequences across persons we cannot add James' and Susan's headaches. The same applies if we are talking about a thousand other headache sufferers in addition to James and Susan. Here too we are required to say that only one headache is at stake.

However, I think that the rejection of aggregation is too strong a moral to draw from our initial intuition. Rejecting aggregation across the board leads to results one may not want to accept in other moral arenas and in the arena of rights.

First, the wholesale rejection of aggregation would lead us to conclude that our obligations in general do not increase as the numbers of those who we can help increase. Few would want to deny that we have a stronger obligation to rescue five drowning people, than if there were only one person's life at stake. Likewise, if we have a choice to save five or one, the rejection of aggregation would lead to the result that it is a toss-up.[20] Second, there are cases, even within the arena of rights, where aggregation seems to yield the correct results. It is a fairly common intuition that although we cannot kill one person to save two other people, we may kill that person if

there are a thousand lives at stake. This result depends on the success of aggregation. For these reasons I think that the total rejection of aggregation is mistaken.

We will have to look elsewhere for an explanation of the intuition that no number of headaches at stake can justify infringing a right to life. One clue concerns the difference between the two cases just presented. In the cases where I think it is intuitive that aggregation works; what people have at stake is something fairly substantial—their lives. In the other cases, where I suggest aggregation fails, what people have at stake is something fairly small—headaches. The non-aggregation intuition, it seems to me, arises most often in cases where small amounts are at stake. My alternative account of our intuition explains this.

Aggregation will fail in the case where small amounts are at stake for two reasons, either because aggregation fails across the board or because of some fact about what we are trying to aggregate. I think the latter is the better explanation. The problem with small amounts at stake is not that they cannot sum. Rather, they are too small individually to count at all for the purpose of justifying a rights infringement; aggregation is simply irrelevant here.

Frances Myrna Kamm calls consequences which are too small to count, and as a result too small to make any moral difference, "irrelevant utilities." She asks us to consider a case in which we have a choice of redirecting a threat toward Joe or Jim. Next to Jim, but not Joe, is a beautiful patch of flowers that will be destroyed if we direct the threat Jim's way. Although it would maximize utility to send the threat to Joe, Kamm thinks we may not do so on maximizing grounds, as the flowers are an "irrelevant utility." The flower patch is too small an addition to make a moral difference.[21] This case makes the point that there might be special sorts of circumstances which make aggregation fail; we cannot add the flowers to Jim's life to tip the scales in favor of sending the threat to Joe. The special circumstance is that the flowers are too small a difference between the choices.

I think our intuition in the headache case is better accounted for in a similar fashion, by there being a minimum each beneficiary must have at stake in order to count in favor of infringing a right. The reason that no number of headaches to be relieved can result in the overriding a right not to be killed is not because they cannot sum. Again, aggregation is irrelevant.

This view, that aggregation depends on the size of what a beneficiary has at stake, differs from both pro-aggregation and anti-aggregation positions in the following way: The typical pro-aggregationist may say in the headache case that the total is reached by the thousand headaches. The typical anti-

aggregationist will say there is only one headache at stake for the purposes of justifying the infringing of a right, hence we are far from meeting the total requirement. But on my view both answers are mistaken. There is, in the headache case, nothing at all that matters morally at stake as a typical headache would fail to pass any reasonable minimum.

Thus, I think that the total requirement is subject to a constraint. In order to have what they have at stake count towards infringing a right, each and every beneficiary must have a minimum amount at stake.[22] This "universal constraint" acts to modify and constrain the total requirement. (It is called the *universal* constraint since it dictates a minimum that *each and every* of those who benefit from the right infringement must have at stake, if what they have at stake is to count towards the total.)

Now, in what follows, I will often speak as if the universal constraint is passed for a given beneficiary once that beneficiary simply has enough at stake. Indeed, that is how I have stated the universal constraint. But there is the following complication. A beneficiary might have a number of small things at stake which, when summed, equal enough to meet the universal constraint. However, when considered individually these benefits are themselves too small to meet the constraint. How do we determine when the minimum level specified by the constraint is met? If some beneficiary C has five of some small thing at stake, do we consider these five things individually or aggregatively?

It seems to me, given the motivation for the universal constraint ("some things are too small to count") that the constraint must be applied to the benefits considered individually. The constraint properly applies to benefits, not individuals. After all, it would be a peculiar result if C having two headaches at stake, separated by a period of days, was enough for what C has at stake to count, while D and E, each with a single headache at stake, failed to meet the constraint. This result is inconsistent with thinking that, in some cases, headaches are too small to count.

But if the constraint applies to the individual things beneficiaries have at stake, then we have another problem: How do we determine what the right unit of evaluation is, since presumably any benefit could be broken down into smaller amounts at stake? In many, if not most, cases I think benefits come in natural chunks. Five separate pains on five separate occasions might have the same disutility as one large pain on one occasion, but I think it makes sense to say that there are cases in which the former are too small to pass a universal constraint but the latter is large enough. Likewise, in many cases, I will be talking about the kind of benefits that are easy to break down in this way, the loss of limbs, for example.

All this is not to deny that there will be difficult cases for determining whether the universal constraint is met. But, in what follows, I will be assuming that we can always determine what is the right unit for evaluation. Further, I will generally speak as if this distinction, between benefits considered individually and aggregatively, did not exist. When I say "beneficiary C has enough at stake to pass the universal constraint," please understand that as my saying that C has a benefit which is large enough to pass the constraint.

But this complication aside, we are left with a more important question about the universal constraint. What kind of amount is too small to matter? The case we have discussed would suggest that headaches are too small to meet a reasonable universal requirement. But, while I think this is true for many rights infringements, I do not think it always is the case. Consider again the right not to have one's nose punched. I think a thousand headaches is more than enough to justify infringing such a right. The universal constraint, like the total requirement, ought to be sensitive to the strength of the rights claim in question. The weaker the right at issue the lower the universal constraint, and conversely, the stronger the right the higher the universal constraint.[23]

Even given that the universal constraint will vary with the strength of the right at issue, a variety of positions on the universal constraint are possible. That is, a range of positions would satisfy the condition of sensitivity to the strength of the right. The universal constraint could be very low and rule out very little, or high and rule out a lot. If the universal constraint is low, then small things at stake can still sum depending on the stringency of the right in question, and intuitively this seems correct. Enough headaches ought to be able to override someone's right not to be punched in the nose. On the other hand, the universal constraint could be so high that the minimum each beneficiary must have at stake in order to count is the same as the total that would justify overriding the right. Suppose the amount equivalent to a life is the total that needs to be at stake to justify infringing my right not to have my arm chopped off, and suppose further that the universal constraint is set at the same amount. Anyone with less than a life at stake will fail to meet this very high universal requirement. Nothing less than a life hanging in the balance will count toward meeting the total necessary to justify the infringement of my right. What results is that once the universal constraint is met the total requirement is also met. When we collapse the total requirement and the universal constraint in this way, then we get the result that the numbers of beneficiaries makes no moral difference. But, as I have said, this result need not follow from the failure of aggregation. More

plausibly, it follows from a universal constraint which spells out a very high minimum each beneficiary must have at stake.

Existential Constraint

Another intuition that suggests a constraint on the total requirement concerns a one-on-one comparison between the right bearer and a beneficiary. Suppose the right in question is a right not to have one's arm chopped off. A universal constraint might say that anything less at stake than the harm caused by the loss of a finger does not count, and so the total needed to override the right could conceivably be met by some number of people having fingers at stake. Is this an acceptable result?

Aside from the horror of losing a limb, there is some further complaint the right bearer might have. Focusing on this complaint suggests a further constraint on the total requirement. As the right bearer looks about and sees what others have at stake, he may well note that were the right not violated no one person would be as badly off as he will be were the right infringed. All they stand to lose individually is a finger, while the right bearer has an entire limb at stake. As with the discussion of the universal constraint, one is right to note a distinctive anti-aggregationist tone to this comparison. Rejecting aggregation yields the result that the right comparison morally speaking is between one arm and one finger, not between one arm and many fingers since no one person has many fingers at stake. But again, I think skepticism about aggregation is the wrong place to look for the source of our intuition, in this case our intuition about the right bearer's complaint. The right bearer would have no such complaint were five other arms at stake, and he may well grant that five arms at stake is more compelling than merely one arm at stake. The source of the complaint concerns the comparison between what the right bearer has at stake and what the worst off of the beneficiaries will suffer.

This focus on the one-on-one comparison suggests that there must be at least one person who has an amount at stake, proportional to what the rights bearer has at stake. Call this restriction on the total amount the "existential constraint."[24] (The name "existential constraint" is meant to contrast with the universal constraint. While the universal constraint applies to *all* those who would benefit from a right infringement, the existential constraint is satisfied when *one* person who will benefit from the right infringement has enough at stake.) I have in mind that a plausible version of this constraint would say that there must be at least one person among the beneficiaries who has at least as much at stake as the rights bearer.

What would this imply for the case sketched above? Under what conditions could we justifiably infringe a person's right not to have their arm chopped off? First, there must be some total amount at stake. Second, that total must be obtained by summing what is at stake for beneficiaries who have enough at stake to meet the universal constraint. Thirdly, there must be at least one person among the beneficiaries who has at least as much at stake as the right bearer, that is, at least an arm.

The version of the existential constraint that I endorse says "as much or more" must be at stake for at least one beneficiary. But weaker and stronger versions of the existential constraint are possible also.[25] A weaker version might be so weak that it could collapse with the constraint, and anyone who would meet the universal constraint would trivially meet the existential constraint. A stronger version might say that there must be one person who has enough at stake to justify infringing the right, and as with the strong universal constraint, aggregation drops out of the picture as a result. Thus, when the existential constraint is low enough it adds nothing to the universal constraint, and when the existential constraint is high enough the total requirement is no longer needed.

The same complications arise for the existential constraint, as did for the universal constraint. There may well be an individual who, when we consider the sum of benefits, has enough at stake to meet this constraint, even if the benefits are too small when considered individually. Which is the right unit of evaluation? I think the answer I gave to this problem earlier applies here also. The beneficiary must have *a single benefit* large enough to meet the constraint. Again, in what follows, I will assume when I say that the existential constraint has been met, that this is the way in which it has been met, even if I make no further reference to this distinction.

PART II: THOMSON'S HIGH THRESHOLD THESIS

With the total requirement, the existential constraint, and the universal constraint laid out I now want to proceed and analyze Judith Jarvis Thomson's theory of when rights can be overridden along these lines. As Thomson is one of the very few moral philosophers to offer an explicit proposal for when rights can be overridden, it is important to see how my categories account for her position. My goal in this section is not to settle any substantive issues regarding when a right may justifiably be infringed, for to do that would involve arguing

for specific versions of the total requirement, the universal constraint, and the existential constraint. (Though from time to time I have *suggested* that I prefer specific versions of the constraints, such as my endorsement of an "as much or more" existential constraint.) Rather, my goal at this stage is more general—to demonstrate the usefulness of my overall framework for thresholds. Let us turn now to Thomson's account.

Thomson's general view is that rights come in varying degrees of stringency and the stringency of a right is a function of harm to the right bearer were the right infringed. This view, that the strength of a right is a function of harm to the right bearer, is not without its problems. While I agree with Thomson that harm to the right bearer is the main determinant of a right's strength, I am not sure that it is the only determinant. As well, more needs to be said about what sort of function takes us from facts about harm to the right bearer (were the right infringed) to a claim about how stringent that right is. Without an answer to this question, it is not clear what Thomson would say about cases where there is *zero* harm to the right bearer.[26] For now, I will put these complications aside and assume with Thomson that the strength of a right is just a function of harm—the greater the potential harm, the more stringent the right.

For Thomson, if both you and I have rights not to have our lawns trespassed upon and there were some strange causal mechanism such that I would lose my life were my lawn trespassed upon and you would only suffer in the normal way, mild displeasure, perhaps, then my right is significantly more stringent than yours. In cases where an agent must infringe upon a right—for example, the agent must cross my lawn or yours—Thomson thinks that they ought to infringe the least stringent rights claim. Trade-offs with other rights are not the only circumstances in which Thomson thinks it permissible to infringe a right. She also says that we may infringe a right when enough is at stake, even when what is at stake does not include any other potential rights violations. We can infringe a right, in Thomson's view, in order to bring about certain kinds of consequences in cases where there is enough at stake. It is this category of justified infringings with which I will be concerned. When is enough at stake for Thomson? Her basic rights-consequences trade-off idea is this: "It is permissible to infringe a claim if and only if infringing it would be sufficiently better for those for whom infringing it would be good than not infringing it would be for the claim holder."[27] What we are to compare is the good at stake for those who would benefit from the infringement of the right—the beneficiaries as I call them—and the harm to the right bearer, were the right infringed. Thomson's specific version of what we are to look for in such a comparison is something she calls the

High Threshold Thesis (HTT). It is composed of two parts. First, Thomson says that a great deal more must be at stake for those who would benefit than for the right bearer. Second, the amount at stake for those who would benefit must be restricted to the benefits to a single individual; we cannot aggregate welfare across beneficiaries.[28]

If the HTT is true, then we would have an explanation of why some rights appear to be absolute. Consider the right not to be killed. Thomson thinks that no amount of good could ever justify infringing an individual's right not to be killed because no one person could ever have enough at stake. The right not to be killed, along with many other such rights, is "maximally stringent" on Thomson's view. This notion of maximal stringency depends upon facts about the world in a way that the concept of absoluteness does not. Thomson does believe, as the advocate of absolute rights does not, that there is some amount x which, were x at stake, would justify infringing someone's right not to be killed. Still, Thomson thinks that the right not to be killed is maximally stringent because she believes that no one person could ever have that amount x at stake. Because no person could ever have x at stake, there will never be a situation in which infringing a right to life is justified.

But is Thomson correct to think that the right not to be killed is maximally stringent? Her view needs three components to get the result that the right not to be killed is maximally stringent. First, she needs a specific view about the total required to justify infringing the right not to be killed, namely that the total must be very large. Second, she needs a view about the measurement of what people might have at stake. After all, her view is not just that a great deal is needed to justify infringing a right not to be killed. It is also that nothing a person could have at stake could be big enough to meet that total. Third, Thomson needs to reject aggregation. If aggregation were allowed, then even though no one person could have enough at stake, if there were enough beneficiaries each with the most a person could have at stake, there would be a point at which the right would be overridden.

Let us consider these components of Thomson's view in more detail:

(i) We know that Thomson's total requirement is comparative, so that the more stringent the rights claim the greater the amount of good required to justify infringing the right need be.[29] It is also strong. There must be, for Thomson, a great deal more at stake for the beneficiary than for the rights bearer.[30] How much more need be at stake? Ten times as much? A hundred times? Thomson does not give specifics, but we can gather some information based on her judgments about the permissibility of proceeding in various infringement sce-

narios. We know, for example, that Thomson thinks that nothing one person could have at stake could justify infringing a person's right not to be killed.

It would be interesting to know whether Thomson thinks the right not to be killed would still be maximally stringent if humans had greater capacities for pain and suffering, or if there were persons other than humans who could have more at stake than one of us could. This is not merely speculation about highly unlikely logical possibilities. If Thomson had said something about what would justify infringing someone's right to life, even if the example she might have given could never happen, we would have a better idea of just how stringent the right not to be killed is.

Note that it is not contradictory to ask how stringent a maximally stringent claim is. Thomson says that both the right not to be killed and the right not to be tortured are maximally stringent, although the former is more stringent than the latter.[31] All this means is that it would take more to override a right not to be killed than it would to override a right not to be tortured, but no one person could ever have enough at stake to justify infringing either right. Likewise, Thomson thinks that the right not to be blinded or have a limb amputated is maximally stringent. That is to say that Thomson thinks that no one person can ever have enough at stake—even his or her life—to justify the blinding or the cutting off the legs of another.[32]

Can we extract Thomson's total requirement from these sorts of cases? Suppose that on Thomson's view the total amount required to be at stake for a beneficiary before a right is overridden is obtained by multiplying the harm to the right bearer (were the right infringed) by some number m. In order to investigate the value of m based on the various cases Thomson presents, we will have to make a further assumption about the way in which the multiplier operates. We need to assume that m is constant across cases, that is m cannot vary with the kind of right at issue or the amount of potential harm to the right bearer. For example, if the beneficiary must have a thousand times as much at stake as the rights bearer for it to be justified to infringe the right not to be killed, I will assume that a beneficiary must have a thousand times as much at stake as the rights bearer for it to be justified to infringe the right not to have one's nose punched. Now Thomson does not discuss these issues, and nothing she says commits her to these assumptions. Still, they seem consistent with her general view and worth adopting for the purposes of investigating the specifics of her total requirement.

We know that on Thomson's view the total required to be at stake to justify blinding or amputation is greater than the amount at stake that is equal to a potential beneficiary of the

infringement having a life at stake. How much worse is death than being blind? Presumably death is more than ten times as bad. This being so, we can conclude that m is greater than ten. Having determined a lower bound for m, we can now try and narrow the range of values by establishing an upper bound.

To determine the upper bound of m, what we need is a case in which Thomson thinks it intuitive that we may proceed to infringe a right—kicking a shin to save a life, for example. Hence, we know that in Thomson's view the total required to justify infringing someone's right not to be kicked in the shin is less than the amount at stake that is a person's life. How much worse is death than being kicked in the shin? Being killed is, of course, much worse than being kicked in the shin. But maybe it is not a billion times as bad. This being so, we can conclude that m is less than a billion.

My tentative conclusion is that on Thomson's total requirement the value of m lies between ten and one billion. That is, Thomson thinks that a beneficiary must have at stake at least somewhere between ten and a billion times as much as the right bearer has at stake for it to be justified to infringe the right. I realize that this does not narrow the range of values for m very much, but this is the best one can do given (a) that Thomson herself does not provide much detail about her total requirement, and (b) the range of cases Thomson discusses.

(ii) Thomson's measurement claim is the least interesting component of the HTT, it seems to me. What Thomson is committed to saying about measurement in order for it to follow that the right not be killed is maximally stringent is that nothing one person could ever experience could meet the total requirement. If we assume her total requirement is the largest of the range discussed, what we are saying is that nothing one person could have at stake is more than a billion times as bad as being killed.

(iii) Finally, Thomson rejects aggregation. She restricts what is considered to be at stake for the purposes of meeting the total requirement to the total at stake for a single individual. Thomson calls this a distributive constraint. If the total required to override a right is some amount x, then there must be some single individual who has x at stake in order for the total to met. It would not be permissible to proceed and infringe the right if instead there were one hundred people each with 1/2 x at stake, even though there is in this case 50 times x hanging in the balance, on Thomson's HTT.

Taken together these three components—the high total, the measurement view, and the anti-aggregationist distributive constraint—yield Thomson's conclusion that there are maximally stringent rights. But a critic could avoid this conclusion, therefore, by disagreeing with Thomson about any one of these components.

The following example can be seen as a criticism of Thomson's total requirement or of her view about measurement. Consider a case in which what a person has at stake is their being brutally tortured but kept alive every day of their life. Is this enough to justify infringing a person's right to life? Thomson must say that it is not since she believes the right not be killed is maximally stringent. I am not *convinced* that it is enough either, but I at least find it *possible* that a person could experience enough suffering to justify the infringing of another's right not to be killed. After all, even Thomson recognizes that there are worse things that could happen to a person than being killed. She writes that "[i]t is surely worse to be tortured to death than just to die."[33] If one thinks that the lifetime of torture is a case that would justify infringing a right to life, then the disagreement with Thomson could be over two different aspects of her view. First, you might be disagreeing about the size of the gap between mere death and a life of torture. Second, you could be disagreeing with Thomson's high total. To either of these criticisms Thomson might respond by claiming that one is just asserting a contrary intuition, namely that the thresholds are not as high as she claims they are, or that a life of torture is worse than she thinks it could be.

But suppose that we accept Thomson's views about the total requirement and measurement. Is it possible to still reject her claim that the right not to be killed is maximally stringent? I think that one can accept her views about the total requirement and measurement, and deny maximal stringency, by questioning Thomson's rejection of aggregation. Grant Thomson that nothing one person can have at stake is enough to justify infringing the right of another person not to be killed. I suggested, contra Thomson, that a lifetime of torture might be enough. Suppose, however, that she is right; even a lifetime of torture in which one is kept alive solely for the purpose of enduring more torture is insufficient to meet the total requirement. Nonetheless, it seems me that even people who will want to side with Thomson on this case will disagree if what is at stake is not one person being tortured for a lifetime, but rather a thousand people being tortured for a lifetime. If the addition of the nine hundred and ninety-nine other potential sufferers made a difference in your intuition about whether the total had been met, then you do not share Thomson's strong anti-aggregation intuition. Unless aggregation is rejected, the maximal stringency of certain rights cannot be maintained.

What argument does Thomson offer against aggregation?[34] Thomson writes that consequences fail to add up across beneficiaries because there is something special about rights. Her belief in the failure of aggregation here is not fueled by a be-

lief in the *general* failure of aggregation. After all, she does believe that aggregation works elsewhere. Thomson writes, "I stress that the idea here is that *where claims are concerned* the numbers do not count. The idea here is not that the numbers never count in morality. Where matters of mere distribution are concerned, the numbers arguably do count."

Thomson makes her case for the failure of aggregation of benefits with regard to right infringements by appealing to our intuitions about examples. I now want to assess Thomson's view by considering three sorts of cases in turn: cases in which the beneficiaries have small amounts at stake, cases in which the beneficiaries have medium amounts at stake, and cases in which the beneficiaries have large amounts at stake.

First, we will consider small amounts at stake. Thomson writes that on no sensible view can it be the case that it is permissible to kill a person to save a billion others from headaches.[36] According to Thomson, her strong distributive constraint can account for the fact that no number of headaches can ever justify infringing someone's right not to be killed. Thomson's account has the result that all that is really at stake—for the purposes of counting towards infringing the right—is one headache. And *one* headache surely is not enough to justify infringing a right not to be killed.

There are, however, two other responses one can make to the case as it is presented by Thomson. One can either deny the intuition that no number of headaches ever is enough at stake to justify infringing a right not be killed, or one can accept the intuition and come up with an alternative explanation of it. Earlier I granted the "no number of headaches is enough" intuition while maintaining that what is at stake for the beneficiaries can sum for the purposes of meeting the total required to override a right. I proposed the universal constraint as a way of accounting for this shared intuition. The reason that headaches do not count toward meeting the total required to override a right not to be killed is that they are too small a harm when compared to the harm of a lost life.

Second, we will consider medium amounts at stake. Suppose that we are dealing with medium amounts at stake such as the loss of a hand versus the right not to have one's arm chopped off. Thomson does not consider this sort of case, but presumably she would think that no number of medium-sized things at stake can justify infringing this right. I share Thomson's intuition. Here I cannot appeal to the universal constraint. Yet, I have an alternative explanation of the intuition, this time in terms of the existential constraint. The reason the hands cannot justify the loss of an arm is because the *existential* constraint is not met. There is not one person among the beneficiaries with a reasonable amount at stake

when compared with what is at stake for the right bearer (as much or more, on my view).

Third, we will consider large amounts at stake. Thomson does consider cases in which the beneficiaries have large things at stake. In fact, consideration of these cases forms part of her defense of the HTT. She appeals to our intuitions about aggregating goods for the purposes of justifying rights' infringements in cases where the goods are very large, such as the loss of a life. Thomson writes that I may not kill you to save Bloggs from death, and this being so it follows that I may not kill you to save Bloggs and a hundred others from death. A person's life is clearly enough to pass any reasonable universal and existential constraint and so an appeal to these components of my view cannot constitute my response to the Bloggs case. But here I do not need an alternative explanation of Thomson's intuition because it is one that I do not share. I think when Bloggs and enough others have their lives at stake your right has been overridden. My intuition is that when a sufficiently large number of people have their lives at stake an agent is justified in killing you.

Thomson recognizes that reasonable people may want to get off the boat at some point: "Where the numbers get very large, however, some people start to feel nervous. Hundreds! Billions! The whole population of Asia!"[37] Many people will have the intuition that when the numbers get large enough some fact about the situation has changed. Advocates of my version of threshold rights will say that what has changed is that the right's threshold has been met; there is now enough at stake to allow us to proceed and justifiably infringe your right. But Thomson is forced to give an alternative explanation for the intuition that the moral judgment shifts once the numbers get large enough. According to Thomson, we are reacting to the fact that when the numbers get large enough we think you ought to volunteer your life. But she notes that from the mere fact that you ought to volunteer, it does not follow that we can force you. Of course, those of us who think that we can proceed and kill one person when enough other lives are at stake are free to reject Thomson's explanation of our intuition. It is open for us to stick to our guns and insist that we really do think we can kill one person to save thousands. It may be that the one ought to volunteer, but if the one does not, I believe we may kill the one.

Thomson thus has given no argument for her view other than appeal to our intuitions. After considering the various possible cases, I have rejected this appeal. When we were dealing with small amounts at stake such as headaches versus a very strong right such as the right not to be killed, then I shared Thomson's intuition that no number of the smaller things at stake can ever justify infringing a very strong right.

But I gave an alternative explanation of this intuition in terms of the universal constraint; headaches are too small to count towards overriding a right not to be killed. When we were dealing with medium-sized things at stake versus a very strong right, then I had the intuition that no number of medium-sized things at stake can ever justify infringing a very strong right (an intuition that Thomson presumably would share). But I gave an alternative explanation of this intuition in terms of the existential constraint; if all the beneficiaries have only medium-sized things at stake, then the existential constraint is not met. Finally, when we were dealing with benefits of the right size at stake I could not appeal to either the universal constraint or the existential constraint, but in these cases I do not share Thomson's intuition. I rejected Thomson's claim that what additional beneficiaries have at stake makes no difference.

I think Thomson's defense of her view is not successful and that we ought to reject maximally stringent rights. In the first part of this paper I offered two ways to motivate constraints on the consequences that matter morally for the purpose of justifying rights infringements. In this remaining section, I want to explore the question of whether the universal constraint or the existential constraint can capture what is behind Thomson's anti-aggregationist distributive constraint.

A very high universal constraint—making the universal constraint equal to the total requirement—yields the extensional equivalent of Thomson's distributive constraint. But this cannot work here. First, the motivation behind the universal constraint concerned the failure of aggregation in *some* cases, not *all*. The universal constraint was motivated by the thought that some sorts of things do not sum for the purposes of justifying rights infringements because of some feature the consequences possess. In the case of the universal constraint, I suggested that some things were too small to sum. Clearly, that is not the case with Thomson's constraint as she means it to apply to all consequences. On her view, no kind or size of thing at stake can add up across persons when what is at issue is a right. Second, a very high universal constraint, though a logical possibility, is implausible. The only means of support for this type of constraint is through intuition and I think it fails to capture our intuitions. When the universal constraint rules out aggregation completely, then the explanation offered to motivate the constraint in the first place no longer holds.

Put differently: a very high universal constraint is the extensional equivalent of Thomson's distributive constraint. One could say they are the same thing. But doing so does Thomson's view no good since when the universal constraint is made so high as to be the equivalent of Thomson's view there

is no independent motivation for the universal constraint. And the search for an explanation, other than the brute anti-aggregation intuition, was what made us look to the universal constraint in the first place.

(It is worth pausing here for a moment to be clear about the difference in philosophical merit of the story I have given with the universal constraint versus Thomson's case for non-aggregation, with regard to the consequences that count in favor of overriding a rights claim. To say that Thomson has only intuition, whereas I have an explanation is not exactly correct. After all, the universal constraint only gets off the ground by considering intuitions we have about certain cases. The contrast is not between competing methodologies, as if I have foundational arguments where Thomson has only intuition, it is rather a degree of depth in explanation. Thomson has no answer to the question of why aggregation fails in the cases she considers. She claims there is something special about rights, but just this is mysterious. However, the universal constraint is able to answer that question by claiming that some things a beneficiary may have at stake can be too small for the purposes of summing to meet a total requirement. Those who support the universal constraint have philosophically richer intuitions on their side. First, it seems like the right explanation, that the failure of aggregation is due to the size of what the beneficiaries have at stake. Second, this explanation seems to work in other areas of moral theory such as Kamm's "Joe, Jim, and the flowers" case.)

A very strong existential constraint also yields the same results as Thomson's distributive constraint. When we require that there be one person who has a lot at stake, equal to the total requirement, then we get the result that the addition of other beneficiaries makes no moral difference. Once the existential constraint is met, the total requirement is fulfilled trivially. Is there a motivation here for this component of Thomson's HTT? The existential constraint got off the ground by focusing on a one-on-one relationship between some individual person with something at stake and the rights bearer. This, at least, has the virtue of sounding consistent with remarks Thomson makes about respecting the importance of the person who holds a right. I think it is useful to see Thomson's distributive component of the HTT as a very high existential constraint, so high that the one person must have at stake the total required to justify the infringement of the right in question.

Of course, Thomson might insist that her distributive constraint is not a version of the existential constraint as I have suggested it is. But I think there is a good reason for Thomson to accept this amendment to her view. And, if it *is* rejected as an amendment to Thomson's view, then I think it is the better

view for someone choosing between the two to adopt. The two views, Thomson's distributive constraint and a very high existential constraint, are extensionally equivalent. But there is no motivation offered for Thomson's constraint. If one rejects supporting views purely on case-based intuitions, or if one rejects Thomson's intuitions, then one ought to reject her distributive constraint. In contrast, the existential constraint was made plausible by more than brute appeal to intuition, and it is available to people who have rejected the distributive constraint.

I leave open the question of whether Thomson's distributive constraint just is a very strong existential constraint. If they are the same, then we have found an additional motivation for the distributive constraint. If they are not, then we have found a better view. Focusing on the one-on-one relationship between the rights bearer and the person whose well-being is at stake offers a reason for insisting that there be a person with some largish amount at stake.

Moving from Thomson's distributive constraint to the existential constraint will have a result that Thomson may not like. One can accept the existential constraint and think that its motivation is consistent with a much weaker constraint than Thomson's proposal. If one thinks that the existential constraint should say that there must be a person with as much at stake as the rights bearer before what is at stake starts to add up for the purposes of meeting the total needed to justify infringing a right, then there will be no maximally stringent rights. Suppose Jane's right not to be killed is at issue. Her right may be overridden once a beneficiary of the rights infringement also has a life at stake, and there are enough other beneficiaries with enough at stake to meet the total. Even accepting Thomson's view about the high total and her measurement component, two parts of the HTT, maximal stringency fails once we weaken the other part, namely the existential constraint. Of course, Thomson could resist this by offering us an argument for setting the existential constraint at a very high level.

Thomson's position is one answer to the question of when it is permissible to infringe a rights claim. On her view, a right may be overridden if the beneficiary of the rights violation would be harmed a great deal more were the right not infringed than the rights bearer would be were the right infringed. Thomson's High Threshold Thesis says that there must be a very large gap between the amount of harm at stake for the beneficiary and the amount of harm at stake for the rights bearer, and that the beneficiary must be a single individual. While I do not think that Thomson is right about the High Threshold Thesis, I do think she has opened up a range of very interesting questions about the overridability of rights.

I urge that we see Thomson's view as merely one among a continuum of views about such features as the total requirement, the existential constraint, and the universal constraint. This has the advantage of focusing debate on when a rights claim can be overridden on specific features, such as constraints on consequences.

While I have, in this paper, fallen short of the ambitious goal set by Sidgwick—that of setting out a "clear and generally accepted formula" for when we may infringe the rights of one or the benefit of others—it is my hope that I have gone enough of the distance to convince the reader that the task of developing an account of thresholds for rights is not impossible. I also hope to have shown that a moderate rights position is well-placed to capture our intuitions about morality. This is what makes our difficult task worthwhile.[38]

NOTES

[1] Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," *Philosophy and Public Affairs* 7 (Winter 1978), 102. This example is also discussed in Judith Thomson's *Rights, Restitution, and Risk,* ed. William Parent, 66. Cambridge: Harvard University Press,1986.

[2] This distinction is introduced on page 122 of Judith Jarvis Thomson's *The Realm of Rights* (Cambridge: Harvard University Press, 1990) in the course of her rejection of the claim that all rights are absolute or that every infringement is also a violation.

[3] Thomson notes that if the view that rights have thresholds is correct, several popular metaphors for talking about rights are misleading. Rights are not trumps, as Ronald Dworkin calls them. Rather they are only high cards, writes Thomson. Likewise, Robert Nozick calls rights "side-constraints," but Thomson says that at best rights can be only "spongy" side-constraints. (Thomson,*The Realm of Rights,* 153, n. 2)

[4] Robert Nozick, Preface to *Anarchy, State and Utopia.* (New York: Basic Books, 1974).

[5] Nozick, *Anarchy, State and Utopia,* 28–32.

[6] Nozick, *Anarchy, State and Utopia,* 30, fn.

[7] Nozick, *Anarchy, State and Utopia, 41, emphasis his.*

[8] *Charles Fried, Right and Wrong.* (Cambridge: Harvard University Press, 1978), 9, emphasis mine.

[9] Fried, *Right and Wrong,* 10

[10] Fried, *Right and Wrong,* 10, fn.

[11] For example, see Nagel's "War and Massacre," "Ruthlessness in Public Life," and "The Fragmentation of Value" in *Mortal Questions,* (Cambridge: Cambridge University Press, 1979).

[12] See Thomson's "Some Ruminations about Rights" in *Rights, Restitution, and Risk* and *The Realm of Rights.*

[13] W. D. Ross, *The Right and the Good,* (Oxford: Clarendon Press, 1930) and *Foundations of Ethics,* (Oxford: Clarendon Press, 1939). Ross' views are explained and defended in "An Ethic of Prima Facie Duties" by Jonathan Dancy in *A Companion to Ethics,* ed., Peter Singer, 219–229. (Oxford: Basil Blackwell, 1991).

[14] Henry Sidgwick, *The Methods of Ethics,* (Indianapolis, IN: Hackett

Publishing, 1981), 348. The further question Sidgwick raises here, of what the thresholds look like when the beneficiary of the infringement is the right bearer herself, is addressed in my "Paternalism and Rights,"*Canadian Journal of Philosophy* 24 (3) 1994: 419–440.

[15] Judith Jarvis Thomson, *The Realm of Rights,* (Cambridge: Harvard University Press, 1990).

[16] As was noted previously Robert Nozick and Charles Fried, seeming advocates of absolute rights, are moved to step back from an endorsement of the claim that rights may never be overridden by considerations of "catastrophic moral horror" and "extreme cases." (Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), 30 and Charles Fried, *Right and Wrong* (Cambridge: Harvard University Press, 1978), 10.)

[17] There are two ways of describing the total requirement. It might say that there is a total, such that when that amount is at stake, the total requirement is met. Alternatively, it could require that more than the given amount be at stake, so that the total requirement is fulfilled only when the total is surpassed. I have chosen to say that enough is stake to justify infringing a right (assuming all other conditions are fulfilled) once the total is *met*.

[18] For example, see Shelly Kagan's discussion of thresholds for constraints in *The Limits of Morality,* (Oxford: Clarendon Press, 1989), esp. 4–5, 50–51.

[19] Of course, both the amount and its distribution are concerns about *quantity*. We might also have concerns about the *quality* of what is at stake. For example, it seems plausible to think that potential pains to a beneficiary count towards overriding a right while pleasures do not (or at the very least that pains and pleasures count differently). That is, some might think that no amount of pleasure Amy gets from seeing good movies could justify infringing Bob's right not to be punched in the nose. But this is a further complication I will not address in this paper.

[20] See John Taurek, "Should the Numbers Count?" *Philosophy and Public Affairs* 6 (Summer 1977), 293–316 for precisely this point. He argues that what an agent ought to do when faced with a situation where one can save a smaller or a larger group is decide by flipping a coin.

[21] Frances Myrna Kamm, "The Choice Between People: 'Common Sense' Morality and Doctors," *Bioethics* 1 (3) 1987:255–271.

[22] Like the total requirement, we can either say that the universal constraint is met once this minimum amount is at stake, or else only when more than that amount is at stake. Again, I say that a beneficiary fulfills the universal constraint once that amount is met. What the beneficiaries have at stake need not surpass that amount in order to count toward meeting the total.

[23] How do we determine the strength of a right's claim? It seems to me that the strength of a right, hence the conditions that would justify infringing it, is dependent on what is at stake for the right bearer. Throughout this paper I will assume with Thomson that the strength of a right is a function of *harm* to the right bearer were the right infringed. In fact, I think the story is more complicated than Thomson claims but I will leave any further discussion of this point for another time.

[24] The existential constraint is fulfilled once one person has this amount at stake; they need not surpass this amount.

[25] It has been suggested that the existential constraint might vary in

strength not just with respect to the strength of the right at issue, but also in response to the *total amount at stake.* That is, some people think that the existential constraint relaxes when the total at stake for the beneficiaries is very large. For example, we might be able to justify infringing someone's right not to have their arm chopped off if a million people had their hands at stake. Again, I here just note this possibility, but discussion of this point takes me beyond the scope of this paper.

[26] There are several pieces to this puzzle. First, there is Thomson's general view the stringency is a function of harm. Second, there is Thomson's verdict about how stringent certain rights are given a certain positive amount of harm. Third, there is Thomson's analysis of rights with negative stringency which occurs when there is a negative amount of harm—that is, benefit—to the right bearer (see *The Realm of Rights,* 198–199, for Thomson's discussion of such cases). The missing piece is information about what Thomson would say in the in-between case, where the harm is neither negative nor positive. If one were to plot Thomson's view on a graph, one could ask the question this way: Does the function that takes us from harm to stringency yield a line that crosses through the origin?

[27] Judith Jarvis Thomson, *The Realm of Rights,* (Cambridge: Harvard University Press, 1990), 153.

[28] Although Thomson's anti-aggregationist stance is stated clearly and strongly in *The Realm of Rights,* a more recent article "Self-Defense" (*Philosophy and Public Affairs* 21 (1991): 283–310) muddies the waters a bit. In "Self-Defense" Thomson claims that a third party to the standard trolley case may not save one person by deflecting the trolley to another track where another person is standing (who will then be killed by the trolley). Yet, she thinks it is permissible to proceed if the third party can save five persons by deflecting the train again at the cost of the life of the one on the other track. Clearly, the one has a right not be killed. Since that right could not be overridden when only one life was at stake and could be overridden when there were five lives, it must be the addition of the other lives made a moral difference. This is at odds with Thomson's stated disavowal of aggregation in rights contexts. But, for the purposes of this paper, I will continue to assume her view just is the view she details in *The Realm of Rights.*

[29] Thomson, *Realm of Rights,* 153.

[30] Thomson, *Realm of Rights,* 168,.

[31] Thomson, *Realm of Rights,* 169.

[32] Thomson, *Realm of Rights,* 168.

[33] Thomson, *The Realm of Rights,* 169.

[34] In my "Moral Rights and Moral Math: Three Arguments Against Aggregation" (unpublished paper) I examine other arguments against aggregation, found in the work of Robert Nozick and John Taurek, to see if they can help support Thomson's anti-aggregationist position. Since my conclusions in that paper are negative, I will not repeat the discussion here.

[35] Thomson, *The Realm of Rights,* 167, note 5, emphasis in original.

[36] Thomson, *The Realm of Rights,* 169.

[37] Thomson, *The Realm of Rights,* 167.

[38] Thanks to Shelly Kagan for philosophical support and assistance above and beyond the call of duty (though he would deny such a category exists) in his capacity as the supervisor of the thesis from which this paper originates. (*Thresholds for Rights,* University of Illinois at

Chicago, 1993). Thanks also to Thomas Pogge, Liam Murphy, Wayne Sumner, Mariam Thalos, and Anita Superson for their comments on earlier versions of this paper; and to audiences at the philosophy departments of The University of Western Ontario, Barnard College, Columbia University, and St. Mary's University for helpful discussions of my project. Finally, I thank the Social Sciences and Humanities Research Council of Canada for their financial support during the time this paper was written.