

Jeremy Waldron
Notes on “Threshold Deontology”

[A] WHAT’S THRESHOLD DEONTOLOGY ALL ABOUT?

1. Introduce the idea of Threshold Deontology (TD)

- a. From Google: “Threshold deontology is a theory which holds that some act which is intrinsically wrong even if it produces the best consequences, can still be morally justified if those consequences surpass a certain threshold of seriousness.”
- b. A threshold deontologist holds that deontological norms govern up to a point despite adverse consequences; but when the consequences become so dire that they cross the stipulated threshold, consequentialism takes over (Moore 1997, ch. 17)

2. Nozick’s formulation

- a. Nozick famously hinted at something along these lines, and philosophers often just parrot Nozick. He said, of the side constraints that protected individual rights:

“The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.” (ASU 30n)
- b. “Catastrophic moral horror”—what are these terms doing?
 - i. For example: why “*moral*” horror—what’s that conveying?
 - ii. What’s the significance of “catastrophic”?
 - iii. Nazi example
- c. No elaboration (at all) by Nozick himself. He hoped to avoid it.
- d. How could Nozickian side-constraints *possibly* admit of TD? The side constraints are supposed to operate rather like the rules of a game, such as chess (Nick Denyer). For example: you just must not ever move your king into check; how could that possibly be qualified with any chess equivalent of catastrophic moral horror?

3. Scale of harm

- a. Is it just about the scale of the harm that may be threatened by adherence to an absolute principle? Maybe ticking bombs (or ticking nuclear bombs).
- b. Dworkin's formulation (*NYRB*, 1978): "sometimes principle and policy argue in opposite directions, and when they do (unless the considerations of policy are of dramatic importance, so that the community will suffer a catastrophe if they are ignored) policy must yield to principle"
- c. Charles Fried, *Right and Wrong* 10 (1978) (arguing that, in cases that deserve to be called "catastrophic," "the usual categories of judgment (including the category of right and wrong) no longer apply"—cited by Richard Markovitz, 81 *Tex. L. Rev.* 1877, 1927
 - i. Fried resolves the tension between the general absolutist view of rights and the relativist approach taken in such "extreme cases" by appealing to the notion of the "catastrophic" case and regarding it as "a distinct concept just because it identifies the extreme situations in which the usual categories of judgment (including the category of right and wrong) no longer apply." [Gross 88 *Minn. L. Rev.* 1481]
- d. Important that it be a non-normal harm, like the falling of the heavens...

4. *Fiat iustitia, ruat coelum* What counts as the falling of the heavens?

- a. Philosophers make fun of moral absolutists by saying that we believe "*Fiat justitia ruat caelum.*" But since no one really knows what "*ruat caelum*" is supposed to mean, it is easy enough for either side to say that justice should or should not be done when the heavens are in danger of falling.
- b. Moore 371: "Kant's version of the famous Latin saying that justice should be done even though the Heavens fall was: "Better the whole people should perish" from the earth than that an injustice be done. This is the kind of stirring hyperbole that gets people to the barricades; but it is surely utter rubbish if taken as the kind of moral philosophy that any of us should actually live by."
- c. The imminent destruction of a whole horizon of value—of the sort that a Nazi victory in the WWII might have led to—is the closest we have come in real-world experience to the heavens really falling. "Nazism was an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful" (*Walzer* 253).

5. Symmetry?

Mischievous question: symmetry? – Might there be such a thing as threshold *consequentialism*: when the sacrifice of one or a few on the basis of a consequentialist calculus becomes “too much,” do we switch back into deontological mode?

6. Reflective equilibrium

- a. Threshold deontology exposes the flawed character of intuition / RE
- b. Ad hoc?
- c. Moore acknowledges the worry this way: “The worry is that nothing supports the existence of the thresholds posited to exist by threshold deontology, except naked, isolated intuitions in particular cases. More particularly, the worry is that the existence of such thresholds is not demanded or even supported by any deep nature of deontology but is rather an alien, ad hoc add- on posited in order to avoid the absurdity of Kantian absolutism.” (Moore 372-3)

7. Is TD a moral or a political doctrine?

- a. Analogous doctrines: Machiavellianism
- b. Deontologist as a crazy person let loose in politics, or, in Max Weber’s characterization, irresponsible

[B] POSSIBLE EXPLANATIONS IN MORAL THEORY

8. Rule- or indirect-utilitarianism

- a. TD might represent, for example, a sort of rule- or indirect-utilitarianism based on the untrustworthiness of the consequentialist calculations that act-utilitarians have to engage in. (JW absolutes)
- b. At the margins, the calculations of cost and benefit that tempt people away from moral absolutes are pretty untrustworthy and we might be better off sticking with the moral rule.
- c. But there comes a point when the apparent advantages of deviating from the moral rule are so high that they overwhelm any of the uncertainties, and that is what happens when the threshold is crossed.
- d. That is one possibility, though why we would call this threshold deontology, I am not sure. Moore seems to be convinced that it is not a consequentialist position at all, and he eschews this sort of justification.

9. Michael Moore's account

Maybe the issue is just about rival obligations: as well as familiar deontological obligations, we always have a consequentialist obligation to avoid very bad outcomes. Like all conflicts of obligation, the former will sometimes give way to the latter, depending on what is at stake. (Moore's argument).

- a. This is perhaps the best argument for TD and it is not very good. Moore's argument ends up just where any moderate deontologist would end up, balancing duties of various sorts against one another, and denying lexical priority.
- b. As opposed to starting with something like a Nozickian set of side-constraints, with lexical priority over other moral considerations, and somehow nailing TD on to that.
- a. Important to separate the issue of TD from routine critique of deontological principles. I suspect Moore's characterization of TD falls into this category—too much business as usual.
- c. Pildes and Anderson note that “escape valves” like Nozick's “are of little help in addressing the common noncatastrophic circumstances in which rights are traded off against other values, such as the refusal to spend more money on the criminal justice system to assure that no innocent defendant is ever wrongly deprived of liberty” (90 *Columbia L. Rev.* 2121, 2214)

[C] THE PSYCHOLOGY OF ADHERENCE TO THRESHOLD DEONTOLOGY

10. Not wanting to look ridiculous

- a. Larry Alexander: “an attempt to save deontological morality from the charge of fanaticism” (SEP)
- b. Or trying to avoid Moore’s line of *ad hominem* (a.k.a. “aretaic”) attack
- c. JW formulation in Torture paper.

“In these troubled times, it is not hard to make the idea of an absolute prohibition on torture, or any absolute prohibition, look silly.... I do not mean that everyone is a consequentialist. There are good deontological accounts of the rule against torture, but most of them stop short of absolutism: the principle defended by deontologists almost always turns out to be wobbly when sufficient pressure is applied. Even among those who are not already Bentham-style consequentialists, most are moderates in their deontology: they are willing to abandon even cherished absolutes in the face of what Robert Nozick once called "catastrophic moral horror." For a culture supposedly committed to human rights, we have amazing difficulty in even conceiving--without some sort of squirm--the idea of genuine moral absolutes. Academics in particular are so frightened of being branded "unrealistic" that we will fall over ourselves at the slightest provocation to opine that of course moral restraints must be abandoned when the stakes are high enough. Extreme circumstances can make moral absolutes look ridiculous, and those in our position cannot afford to be made to look ridiculous.” (1712-3)

11. Apologies for behaving badly

Is TD an instance of what G.E.M. Anscombe had in mind when she said that “modern moral philosophy ... constructs formally beautiful theories of ethics, which always allow someone to commit dreadful acts in the name of doing something that is the ‘morally right’ thing to do.”

--the logic of a “hard man” position that says, “There’s surely gotta be *someone* we’re allowed to torture!”

12. Respectable psychological discussions.

Much of what I have listed under (10) and (11) above, is just abuse, back and forth. But there might also be important and productive issues of moral psychology involved. I want to examine the positions of

- David Hume
- Michael Walzer

13. Hume: the circumstances of justice

- a. One possibility is that threshold deontology does represent a real form of deontological absolutism, coupled with a psychological recognition that, in the most extreme cases, people's will to do what morality requires may crumble and effectively all bets are off.
- b. It is a little bit like David Hume's suggestions in the *Enquiry* about what we now call (following Rawls) the circumstances of justice:

“Suppose a society to fall into such want of all common necessities, that the utmost frugality and industry cannot preserve the greater number from perishing, and the whole from extreme misery; it will readily, I believe, be admitted, that the strict laws of justice are suspended... and give place to the stronger motives of necessity and self-preservation. Is it any crime, after a shipwreck, to seize whatever means or instrument of safety one can lay hold of, without regard to former limitations of property?”
- c. Suddenly the demands of morality, which might formerly have seemed sensible, become startlingly unreasonable, and there is no basis on which we can reasonably expect people to abide by them.
- d. When the circumstances of justice fail in this way, the result is not a neat alternative set of moral prescriptions, but rather some radical uncertainty about whether we can think normatively at all. We don't say that the drowning man in a shipwreck who seizes a spar that another is clinging to, shaking him off it, is perfectly entitled or permitted to do that; we may feel an inclination in that direction, but really we do not know what to say. The bottom has dropped out of the conditions which usually make sense of our talk of entitlements, obligations, and permissibility.
- e. The threshold is a psychological one—about whether people can pay attention to morality at all.
- f. I do not know whether we should acknowledge such a threshold or, if we do, whether we should regard your common-or-garden ticking bomb hypothetical as illustrating its application. But in the interest of trying to distinguish the issues that are really at stake in the debate about absolutism from those that belong somewhere else in moral philosophy, we might want to say that the existence or non-existence of absolute norms within the domain where morality does or should sway, should be treated as quite a different matter from the further and interesting question of whether there are limits to that domain."

14. Michael Walzer on supreme emergency

- a. *Just and Unjust Wars*, ch. 16, entitled “Supreme Emergency,” canvasses the possibility that a society desperate to avoid military defeat when the stakes are very, very high, might understandably—justifiably?—resort to methods of waging war that are ordinarily forbidden.
 - i. Maybe large scale violations, such as bombing campaign against civilian areas
 - ii. Shift from absolute norms to utilitarian arithmetic (which ordinarily the laws of war are supposed to keep us away from)
 - iii. What kind of supreme emergency?
 - Objective? e.g. something like Nazi victory
 - Or agent-relative? —destruction of agent’s own community; at one point, Walzer says that “[s]upreme emergency is a communitarian doctrine”
- b. Critiques:
 - i. George Wright says that “it is important to see the supreme emergency principle as not only incomplete, logically questionable, and unnecessary, but as affirmatively dangerous as well.”
 - ii. Richard Arneson observes: “Any proposed definition of absolute catastrophe or supreme emergency would necessarily appear arbitrary. Wherever one draws the line that separates supreme emergency from a lesser problem, the question arises, why draw the line there and not elsewhere? Walzer provides no answer. A further difficulty is that wherever one draws the line, one must justify the extraordinary difference in the permissibility status of a violation of noncombatant immunity that occurs just below the line compared to a similar violation that occurs just slightly above it.”
- c. Waldron’s take on Walzer
 - i. We actually don’t get a determinate conclusion in Walzer’s presentation of the real-life supreme emergency situations. He implies that what was done was both right and wrong, but [the British] had to do it. A plurality of strident and all-things-considered normative judgments is precipitated out of our reflections and there is no escaping either from any one of them or from the tension between them. This is not conventional moral analysis. It is not trolleyology or reflective equilibrium. It is not in any way business-

as-usual for moral philosophy. I don't accept that "Walzer appears to be attempting to hold onto an absolutist moral position without being willing to accept all of its consequences." Instead we should say: when you explore the limits of what's possible in the normative regulation of human extremity, this is the sort of mess you come up with.

- ii. I think we can make best sense of the tensions and contradictions, the provocations and paradoxes that Walzer repeatedly mentions (in *Arguing* 33, 35, 45, and 50), by asking what we should expect when we explore the limits of the application of normative analysis. Supreme emergencies, says Walzer, "put morality itself at risk" (*Arguing* 33). There is a sense in Walzer's discussion that in certain circumstances, *the bottom drops out of our ability to argue our way legally or morally through a problem*, because the assumptions that normally underpin such arguments have been shaken or have otherwise evaporated.
- iii. I think he is trying to convey a sense of persons' being "overwhelmed" (*Arguing* 30), but overwhelmed with reasons rather than causally overwhelmed by the circumstances themselves.
- iv. I have no patience with any question that requires Walzer to settle on just one of them as his "real" view. We are reflecting on what it means for what I called "the circumstances of the laws of war" to fail and for the normative bottom to drop out of our ordinary processes of legal and moral deliberations. In this situation, we may be tongue-tied or we may find our agency and our reasoning tossed back and forth amidst a plethora of prescriptions, none of them determinate, none of them easily reconcilable with any of the others, certainly not reconcilable in a neat theory. There is no settled answer here and I don't read Walzer as proposing one.

d. What can be expected of us?

It sounds like I am tilting towards an understanding of Walzer on supreme emergency that is based on *the psychological impossibility* of statesmen restraining themselves when their backs are to the wall and a proposed breach of the war convention is all that stands between their community and everything that they hold dear. We need to explore the tension between the "can't" and the "shouldn't" in Walzer's account of the shattering of the war convention in the circumstances he envisages.

[D] THINKING IT THROUGH

15. Philosophical malpractice

In its most challenging form, TD is supposed to be a coherent moral doctrine, presupposing genuine constraints. But it is seldom presented as a thought-through doctrine. Anti-absolutist moral philosophers just announce it and hang on to it, avoiding as long as they can the moment when detailed elaboration and defense is required.

- a. I am afraid I have not seen any good discussion of this in the literature. The affirmative accounts that I have read simply state the position without defending it: Michael Moore simply announces that:

“It just isn't true that one should allow a nuclear war rather than killing or torturing an innocent person. It isn't even true that one should allow the destruction of a sizable city by a terrorist nuclear device rather than kill or torture an innocent person. To prevent such extraordinary harms extreme action seems to me to be justified.”
- b. But there is no argument, simply the announcement that this is a position that can be taken.
- c. Because it can be given a technical name, philosophy students just assume that “threshold deontology” is a coherent and viable position and that, in reflective equilibrium, it may capture something of our deontological views along with our unwillingness to seem too morally idealistic when the stakes are very high.
- d. Philosophically this is an unsatisfactory state of affairs, and it is unclear whether we should regard this as really a version of deontic absolutism, with some sort of “out” in the higher register, or really as a modified consequentialism, which is not really deontological in its tendency at all.

16. Thinking about thresholds.

A proper moral assessment of TD would require us to pay attention to the issue of thresholds and discontinuities. I don't mean in the sense of actually telling us (numerically or otherwise) where the thresholds ought to be set: deep moral reflection is not that sort of enterprise. But the very idea of there being differences of degree among emergencies that seem to trigger a qualitatively different approach to moral principles bears critical attention. Is that how normativity could conceivably operate in this realm? Does TD as a moral idea make sense, even if its non-administrability is conceded?

From JW on "Moral Absolutes"...

"I guess the natural question to ask is, "Well, where do we set the threshold?" Or "How do we set the threshold?" or "Who sets the threshold?" Those are all good questions. But we cannot even begin to address them unless we know something of the moral infrastructure. How is this threshold supposed to work? What is its mechanism? What does it operate upon? What is happening when the threshold—wherever it is—is finally crossed?"

17. Shape, structure etc.

It's not my job to do the threshold-deontologist's work for him (though someone has to).

Hard questions:

- a. Never mind "Where is the threshold set?" Ask: how is the threshold set?
- b. What's the mechanism supposed to be
- c. Alexander in SEP: "Threshold deontology faces several theoretical difficulties. Foremost among them is giving a theoretically tenable account of the location of such a threshold, either absolutely or on a sliding scale."

18. What sort of threshold?

- a. Bright-line or fade-in?
- b. Qualitative difference versus difference of degree
- c. Is it just the idea of there being *some* threshold, never mind where it is?
- d. Richard Arneson on the "general problem of the supposed "weirdness" of threshold deontology's treatment of cases where the bad consequences prevented are very close to the threshold"

19. What type of consequentialism is summoned up (when the threshold is crossed)?

Can we say anything about the shape of the consequentialism (the social welfare function) that TD is supposed to yield when it applies? Do the defenders of TD assume—as usual, without thinking—that it will be utilitarian in character, with aggregation and maximization, for example, not equalization of burdens.

Larry Alexander: “there is some uncertainty about how one is to reason after the threshold has been reached: are we to calculate at the margin on straight consequentialist grounds, use an agent-weighted mode of summing, or do something else?”

Should it be a form of consequentialism that is consonant—that resonates in some way—with the deontological principles being abrogated? Or are the defenders of TD happy to switch to a maximizing form of consequentialism that is utterly alien to the spirit of the principles they were working with a moment ago. (E.g., suddenly—having crossed the TD threshold—we are working with a form of consequentialism that doesn’t take individuals seriously)

20. Does TD apply in the same way to deontological norms of all sorts?

- a. For example, compare abomination norms with distributive norms
- b. Does TD apply as a qualification to all deontological norms?
 - i. Or are there exceptions—like rape, or child rape, for example?
 - ii. Analogy to derogation and non-derogation in IHRL
 - iii. If there are exceptions, can they be characterized in general terms?
- c. Does the resulting consequentialism vary depending on the character of the norm being qualified?
- d. Larry Alexander (SEP): “There are two varieties of threshold deontology that are worth distinguishing. On the simple version, there is some fixed threshold of awfulness beyond which morality’s categorical norms no longer have their overriding force. Such a threshold is fixed in the sense that it does not vary with the stringency of the categorical duty being violated. The alternative is what might be called ‘sliding scale threshold deontology.’ On this version, the threshold varies in proportion to the degree of wrong being done—the wrongness of stepping on a snail has a lower threshold (over which the wrong can be justified) than does the wrong of stepping on a baby.”

21. Moral remainder: how does TD relate to theory of moral remainder

- a. Does TD just eliminate the side-constraint when it applies or does it call for compensation, compunction, shame, etc. Is there a duty to apologize or find a way to make up to those harmed when one abandon's deontological constraints?
- b. Bernard Williams stuff about moral remainder
- c. Relation to theory of dirty hands, e.g. in Walzer's account:
- d. JW on Walzer: Despite some loose terminology, Walzer was emphatically not saying that it would have been, morally speaking, alright for Churchill to have ordered the bombing of cities and the deliberate killing of civilians during the crisis of the early 1940s. The decision never ceased to be a crime and Churchill and his colleagues (and, I guess, the British people in whose name these decisions were taken) had to bear "the burdens of criminality" (*Wars* 260). "[T]he destruction of the innocent, whatever its purposes, is a kind of blasphemy against our deepest moral commitments. This is true even in a supreme emergency, when we cannot do anything else" (*Wars* 262).