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What are moral absolutes like?

Jeremy Waldron

1. Dinner at All Souls

I sat at dinner at All Souls College, Oxford with a young philosopher a month or so ago. He said: ‘I hear you gave a presentation on torture.’ (There had been a discussion at the Philosophy Faculty of my recent book, *Torture, Terror and Trade-offs: Philosophy for the White House*.)¹ He said, in good humor. ‘I take it you are against it.’ I said, ‘Yes.’ He said, ‘Torture is wrong in all circumstances?’ I said, ‘Yes, that’s what I think.’ He paused and then he said, ‘You can’t be serious.’ I said, ‘I am.’ The good humor evaporated. He said, ‘How can it be wrong in *all* circumstances? Surely we can figure out some combination of possible circumstances where the evil averted by torturing someone would be so much greater and so much more extensive than the pain suffered by the victim of torture.’ I said, ‘No, I think it’s wrong in every case.’ He said, ‘How can you say that, in advance of some extreme cases that might come up.’ ‘Like what?’ I said. And he proceeded to set out the familiar ticking bomb scenario:

A nuclear warhead has been planted in London and it is set to go off in a twelve hours. We have one of the people we know planted it, but he won’t tell us where it is so we can disarm it. We think we can force it out of him, but we will have to torture him to do so, and this will undoubtedly involve great pain—inhuman pain—and

¹ Jeremy Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford University Press, 2010). This collection includes my paper, ‘Torture and Positive Law: Jurisprudence for the White House,’ also published in *Columbia Law Review* 105 (2005), 1681.

indignity for him. But, in the balance, think of the pain and carnage we will avert. If the bomb goes off: hundreds of thousands of people will be killed, millions maimed and irradiated, and the site of one of the greatest cities in the world will be poisoned for generations. Wouldn't it be right to torture someone to avoid this catastrophe?

I said, "No, I think torture is always wrong." He repeated the hypothetical, multiplying the number of people killed by the bomb by ten, making half of them New Zealanders, including my son and all my relatives, doing whatever he could to up the stakes, to see if there was a point—a threshold, as we say—where my deontological absolutism would crumble. He had no trouble doing this, because a philosopher can stipulate his hypothetical example however he likes. And I had no trouble resisting it, because all I had to do was give the impression of listening carefully, but still just repeat, every time he paused for breath, "No I think torture is always wrong, even in this case." Eventually, he looked at me as though I were mad—some sort of irrational fanatic—and turned away to talk to the classical historian on his left at High Table.

2. Ticking bombs and other hypotheticals

The use of these hypothetical examples has been quite common in recent debates about torture, although as you know the issue has not in the last ten years been purely hypothetical. American intelligence officials have tortured people—in some cases they tortured people to death—in order to obtain information that would promote homeland security or the security of our armed forces in Iraq and Afghanistan. Alan Dershowitz used a version of this when he mooted his idea of judicial torture warrants: a chapter in his 2002 book, *Why Terrorism Works* is entitled "Should the Ticking Bomb Terrorist be Tortured?"²

The tradition of using them goes back at least to Jeremy Bentham, and I will say something about Bentham's construction of them a little

² Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale UP, 2002), p. 131.

later in this talk.³ But it is not only torture. Elizabeth Anscombe reports that in discussion at the Voltaire Society at Oxford when her 1958 paper on “Modern Moral Philosophy” was read, “this case was produced: a government is required to have an innocent man tried, sentenced and executed under threat of a ‘hydrogen bomb war.’”⁴ (This relates to the paradigm that she was considering in her discussion of moral absolutes: not torture but the procuring of the execution of a person well known to be innocent.)

Some of my colleagues in the torture debate have condemned the use of these hypotheticals as corrupting – David Luban’s work is a good example.⁵ They make honorable points. Once one starts using these examples, the justification of torture—indeed, the justification of anything—is a matter of simple arithmetic coupled with the professor’s [Parfit-like] ingenuity in concocting the appropriate fact situation?⁶ Many of these ticking-bomb hypotheticals use unrealistic stipulations about knowledge and consequences and, as Henry Shue has argued, many of them assume a clinical image of torture—utterly unrealistic in the light of what we know about torture’s connection to other forms of violence and depravity and about its tendency to metastasize and escape legal and political control.⁷ But there are some real life cases. In years past, the Israeli security forces have sometimes received reliable information that a

³ See W.L. Twining and P.E. Twining, “Bentham on Torture” *Northern Ireland Legal Quarterly*, 24 (1973), pp. 305 ff.

⁴ G.E.M. Anscombe, “Modern Moral Philosophy,” *Philosophy*, 33 (1958), 1, at p. 17n.

⁵ David Luban, “Liberalism, Torture, and the Ticking Bomb,” *Virginia Law Review*, 91 (2005), 1425. I have tended to follow them in that: see Waldron, “Torture and Positive Law,” p. 1715.

⁶ Waldron, “Torture and Positive Law,” p. 1714. The Parfit reference is to the far-fetched hypotheticals in Derek Parfit, *Reasons and Persons* (Oxford University Press, 1984), pp. 67, 76, 80, etc.

⁷ Henry Shue, “Torture,” *Philosophy and Public Affairs*, 7 (1978) 124, at pp. 142-3 and Henry Shue: “Torture in Dreamland: Disposing of the Ticking Bomb”, *Case Western Reserve Journal of International Law*, 37 (2006), 231.

suicide bomber has entered Israel proper from the territories and have sometimes believed also that people already in their custody might be induced by coercion to give information about his likely destination, information that will enable them to save ten or twenty lives, if not the millions that are imagined by the philosophers.⁸

Today, I am going to assume that we have to entertain these hypotheticals, if not to bully us into accepting a particular policy line, then certainly to explore the nature of the challenge that is faced by anyone who wants to defend an absolutist position on torture. Because even if nothing of practical importance follows from the ticking bomb case, still it seems to have informed the position of most moral philosophers I know, which is that an action like torture cannot ever be ruled out morally for every case or circumstance. And by the way that is the sense of absolute that I using in this lecture. This is not about moral realism or objectivity. At least one of the positions I will examine is non-cognitivist. The question is about deontological requirements or prohibitions. Objective or not, can they be formulated and defended in a way that enables them to withstand the kind of consequentialist pressure that is put on them in these ticking bomb examples.

3. My work on torture

I published a long article about torture in the *Columbia Law Review* in 2005, and I gave the impression there that I was an absolutist about the prohibition on torture.⁹ But I acknowledged that I had not done anything to argue for such an absolute. My task was to identify and discuss the damage that might be done to a legal system like ours—the trauma that might be inflicted on the law—by requiring it to accommodate the possibility of torture. It was, as I said at the end of the article, second-tier

⁸ See, e.g., Tamar Meisels, *The Trouble with Terror: Liberty, Security and the Response to Terrorism* (Cambridge University press, 2008), 183.

⁹ Waldron, “Torture and Positive Law,” pp. 1709-17 (also in *Torture, Terror, and Trade-Offs*, pp. 213-22.)

work, compared to the work other people were doing on the wrongness of torture:

The most important issue about torture remains the moral issue of the deliberate infliction of pain, the suffering that results, the insult to dignity, and the demoralization and depravity that is almost always associated with this enterprise whether it is legalized or not. The issue of the relation between the prohibition on torture and the rest of the law, the issue of archetypes, is a second-tier issue.¹⁰

Charles Fried and Gregory Fried noticed this in their fine book, *Because it is Wrong*. They noticed that I came close to defending the absolutist position, and that I hinted at it in the language I used—language that was “merely evocative in [my] use of words to describe torture: *brutality, breaking the will, mutilating the will, and dignity of the victim,*” but that I had “not moved beyond rhetoric to demonstration.”¹¹ They acknowledged that it was avowedly not my aim to do so—I was really concerned with this issue about the impact on the law—but they said it still left a yawning gap in the case against torture.

I did say a little more in a subsequent article in *Theology Today* on whether the clergy might reasonably be expected to help us with our thinking on torture and complaining about the silence of most of them, during the dark years of 2002-2008; that is also reprinted in *Torture, Terror and Trade-offs*.¹² But again that was more flailing around for help than actually explaining how an absolute prohibition on torture might be defended.

¹⁰ Waldron, “Torture and Positive Law,” pp. 1749-50 (pp. 259-60). The comparison I had in mind was with articles like David Sussman, “What’s Wrong with Torture?” *Philosophy and Public Affairs*, 33 (2005) 1.

¹¹ Charles Fried and Gregory Fried, *Because it is Wrong: Torture, Privacy and Presidential Power in the Age of Terror* (W.W. Norton, 2010), pp. 33-4.

¹² Jeremy Waldron, “What Can Christian Teaching Add to the Debate about Torture?” *Theology Today*, 63 (2006) 330, reprinted in *Torture, Terror and Trade-Offs*, 261.

What I was finding in my own thought on this matter is that I didn't have much of an idea what a moral absolute was supposed to be like and how it was supposed to work. Beyond repeating "Thou shalt not..." several times in very stern tones, and using the evocative rhetoric which the Friends noticed me using the last time round, how was the absolutist position supposed to be shaped? And what exactly was the response going to be to the accusation implicit in the ticking bomb cases that the absolutist is culpably ignoring or refusing to face up to a whole array of moral considerations on the other side? Does the absolutist just turn away from those considerations (which after all are not just abstract but human considerations too, the men and women and children who will be killed and maimed by the bomb if it is allowed to go off)? Does he turn away from all that in the interest, as many people say (admiringly or accusingly), of his own moral purity? Or does he have a way of dealing with the complexities of the situation as the ticking bomb hypothetical presents it. What we want is some sense of moral infrastructure here. And that's what I would like to explore in this lecture.

4. Not just torture

So it is going to be a general inquiry into moral absolutes, though the torture case will never be far from our attention. Anscombe mentioned the example of procuring the execution of an innocent in order to save the lives of many others; so there's another sort of case. She thought that the unthinkability of absolutes in contemporary moral philosophy indicated a startling contrast between the positions taken by most of her contemporaries and what she called "the Hebrew-Christian ethic."

For it has been characteristic of that ethic to teach that there are certain things forbidden whatever consequences threaten, such as: choosing to kill the innocent for any purpose, however good; ... treachery (by which I mean obtaining a man's confidence in a grave matter by promises of trustworthy friendship and then betraying him to his enemies); idolatry; sodomy; adultery; The prohibition of certain things simply in virtue of their description as such-and-such identifiable kinds of action, regardless of any further

consequences, is certainly not the whole of the Hebrew-Christian ethic; but it is a noteworthy feature of it; and if every academic philosopher since Sidgwick has written in such a way as to exclude this ethic, it would argue a certain provinciality of mind not to see this incompatibility as the most important fact about these philosophers, and the differences between them as somewhat trifling by comparison

Some of her examples will not be taken up here. I will not explore the issue of absolutes in strictly personal ethics, an issue which she seems willing to explore in her reference to adultery, for example.¹³ Under pressure from the Frieds, I have repented of my sin of concentrating too much on law and not enough on the moral issue. But I am still going to continue to focus on cases which are in some sense about law and policy, even if the question now is what ought to the law to be, or what are the moral considerations that underpin particular legal positions.

My title asked, ‘What are moral absolutes like?’ I shall stick rather closely to that. (But if you are skeptical about moral absolutes, if you are a consequentialist on these matters, you might want to rephrase it as “What *would* moral absolutes be like, if there were any?”) Even that is slightly ambiguous. I could be asking, “What do (or what would) moral absolutes look like, e.g. propositionally? Are they like rules or are they like other kinds of normative proposition? What normative or evaluative predicates do they use? How exactly is the element of the ‘absolute’ conveyed or formulated” Or I could be asking that question I intimated before, “How exactly will they operate? What kind of thing does their operation resemble?—particularly in their response to considerations on the other side? What actually happens with the facts arrayed against them in the ticking bomb hypotheticals?” I am going to explore both these versions of my question. Let us begin with the question of what they look like.

¹³ This case is also explored at great length by John Finnis in his neglected little book, *Moral Absolutes: Tradition, Revision, and Truth* (Catholic University of America Press, 1991), pp. 27 ff.

5. Analogies with legal prohibitions

We know what legal absolutes look like; and it does no harm to begin with the law, even though we do not want to finish there. In the United States we have a statute forbidding torture. The statute makes it an offense punishable by up to 20 years' imprisonment (adding that this is punishable by life imprisonment or death if the victim of torture dies as a result).¹⁴ Now this works as an absolute in our law, simply by virtue of the fact that it is a categorical prohibition; no specific defenses are provided which would reflect the supposed moral power of other considerations e.g. in a ticking bomb case. Some have speculated about an implicit "necessity" defense: just as you can sometimes exculpate yourself from a speeding ticket by pleading that it was necessary to travel at a certain speed in order to get an injured person to the hospital in time, so the suggestion has been that intelligence officials might exculpate themselves from a torture rap by pleading necessity to protect the lives of others. But legally it is a very shaky proposition. For one thing, in the international law provisions on which our Anti-Torture Statute is modeled there is an implicit rejection of any exception for emergency circumstances. Many of the rights set out in the International Covenant on Civil and Political Rights (ICCPR), for example, are made specifically vulnerable to derogation: they may be set aside, in times of crisis or emergency threatening the life of the nation.¹⁵ But that in turn is qualified by a non-derogation clause, which says that no derogation from certain specified articles may be made under this provision, and the list includes the Article 7 prohibition on torture. Effectively, then, the right to torture is made absolute by being non-derogable in contrast to other rights from which derogation is permitted. But in fact with Anti-Torture Statute, we don't need any of this laborious apparatus. As in the case of other

¹⁴ 18 USC 2340 and 2340A (2000). I shall refer to this as the "Anti-Torture Statute."

¹⁵ ICCPR, Article 4 (1): "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation."

criminal prohibitions—on murder, for example, or rape—there is just a straightforward prohibition, which applies *a fortiori* in all circumstances. There does not need to be anything there saying “in no circumstances” or “whatever the consequences.” The law is simply: “No one is to torture.”

Presumably a moral proposition might be stated simply in exactly the same way. That is, the simplest moral structure is just a set of unqualified “Thou shalt not”s, standing alone without any addition. If we assume that these do not conflict with one another—e.g., because they are all prohibitions on action, a million of which can be satisfied at once—then the obvious inference from their mere presence in a moral code would be that they are to operate categorically and without exception. That would go without saying. And maybe in a moral code these are just basic, as prohibitions are the basic building-blocks of law. Maybe we just begin our morality with simple categorical rules like the rule against torture.

You will respond: “Yes, but the prohibition can’t be the starting point. There must be a *reason* why torture is prohibited.” But reasons come to us already bearing normative shape. Reasons are not just facts; they are facts made relevant by something like a want, an interest, or a principle. Some reasons come to us in the form of value considerations: this kind of feature—suffering for example, counts against an action. But must we assume that all reasons have the same shape and that they always enter into our morality in a consequentialist way? Maybe some of the basic reasons are deontological, as others are teleological. I don’t think we can reject that possibility out of hand, not without begging the question.

A couple of other points about the legal analogy—and remember that at this stage we are just asking: what do moral absolutes look like? How do they present themselves propositionally? Are they going to have anything like the same look, feel, or structure as legal absolutes?

I actually misspoke when I said that our anti-torture statute contains a simple categorical prohibition. It does not. The Anti-Torture Statute does not say, “Thou shalt not torture.” Like almost all criminal law norms it just defines an offense and tells you what the punishment is. You are supposed to infer from that that this something that is not to be done.

(Legal philosophers vary in their analytic estimation of the significance of this form. Hans Kelsen thought it was tremendously important. H.L.A. Hart thought it was not. Fortunately we don't have to decide that in this discussion.)¹⁶ For the moral context, this emphasis on penalty brings to mind the difference between (i) a moral argument for not doing X and (ii) a moral argument for preventing or punishing the doing of X. Plainly (i) and (ii) are not the same. When we say there is an absolute prohibition on torture, are we committed to recommending morally that torturers should always be punished in all circumstances? Maybe not. We do not have to buy into the position of (say) John Stuart Mill, who said, in one of the later chapters of his *Utilitarianism*, that “[w]e do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it.”¹⁷ And anyway even Mill thought that this definitional feature of duty might be satisfied by the mere compulsions of conscience.

I mention this only because a number of people have toyed with the idea that torture might be absolutely prohibited and yet, if we find someone who has conducted torture in response to the pressures of a ticking bomb situation, we might reasonably refrain from denouncing him or urging his prosecution. We might leave the wrongness in place as matter for him and his conscience—he might have revealed himself to be one of those who, in the words that Weber attributed to Machiavelli, preferred the salvation of his city to the salvation of his soul.¹⁸ I am not saying I embrace that position; but it is important to be clear what the

¹⁶ See Hans Kelsen, *The Pure Theory of Law* (Peter Smith, 1989), 55 and H.L.A. Hart, *The Concept of Law*, Revised edition (Oxford University Press, 1994), pp. 26-42.

¹⁷ J. S. Mill, *Utilitarianism*, chap. 5, in *Utilitarianism, On Liberty, Essay on Bentham*, ed. M. Warnock (London: Fontana, 1962), pp. 303-4.

¹⁸ Weber, “Politics as a Vocation,” in H.H. Gerth and C. Wright Mills (eds.) *From Max Weber* (Routledge and Kegan Paul, 1948), p. 126, citing Machiavelli’s *History of Florence*.

operational effect of an absolute prohibition is supposed to be, morally speaking.¹⁹

6. The formulation of an absolute prohibition

Let us turn now to the words in which an absolute is formulated. When John Finnis writes about moral absolutes, he refers to “norms which have a precise content which is immutable and unconditional.”²⁰ A precise content? Does this mean that a moral absolute has to be simple and uncomplicated—three or four one-syllable words like “Thou shalt not kill” in the second table of the Decalogue? I see no reason why we should agree to this.

The U.S. Anti-Torture Statute reminds us that, in law at least, absolutes can be quite complicated. For one thing, torture has an elaborate definition. To be condemned by the legislation, the action must be (a) by a person acting under the color of law, (b) upon another person within his custody or physical control, (c) be specifically intended to inflict severe physical or mental pain or suffering, and (d) not be intended to inflict pain or suffering incidental to lawful sanctions.²¹ The definition in the U.N. Convention against Torture, which is also binding law, adds a fifth element: (e) the act must have a specific motivation, such as obtaining from him or a third person information or a confession.²² That whole complicated thing may be what is intended as an absolute. Any act that satisfies these five conditions is absolutely forbidden.

I don't think it is a cheat to build all this into our analysis. Moral absolutes may be precise in Finnis's sense, but there is no reason why they have to be simple. It would be a cheat if we built into the act

¹⁹ See Meisels, *The Trouble with Terror*, pp. 226-7 for a thoughtful discussion.

²⁰ Finnis, *Moral Absolutes*, p. 2.

²¹ USC Chapter 18, section 2340A.

²² U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in force since June 26, 1987 (ratified by the United States, October 21, 1994), Article 1.1.

description every single thing about the circumstances of a forbidden act-token—the conditions of its performance, and its short, medium and long term consequences. Then, I think, everyone would count as an absolutist. But the statutory formulation avoids triviality, by identifying some conditions rather than others, and some consequences rather than others, and some motivations rather than others. It does so in complicated but finite terms, specified in advance. When those conditions and consequences are present, then the suggestion is that the act is forbidden, whatever *other* conditions may surround its performances, whatever *other* intentions or purposes are associated with it, and whatever *other* consequences may accrue.

This is true in law and I think it can be true in morality also. It is no part of the absolutist position that absolutes have to be simple. But provided we are still working at the general level of act-types, then a prohibition can meaningfully be called absolute—or its absoluteness can meaningfully be debated—despite the fact that it is quite specific in its characterization. Opponents of the absolutist position should not think they can win the debate simply by challenging our ability to come up with a single predicate or a simple set of Decalogue-style predicates associated invariably with wrongness.

Moreover—and still sticking with Finnis’s emphasis on precision—it seems to me that although sometimes the terms used in an absolute may be simple terms, still it is possible that they are vague and difficult to define, or they may be defined using vague terms (like the use of the phrase “severe pain” to help define “torture” in the American statutory definition). My philosophical interlocutor at All Souls thought this was conclusive against absolutes. (We did actually continue the conversation.) He used a Derek Parfit sort of example to question whether I could define an exact threshold of pain where the prohibition on torture would kick in. (Parfit imagined a case in which each of a thousand torturers presses a button and each button causes an imperceptible increase in the victim’s pain; the result is that he ends up suffering excruciating pain. Is it possible to say whose button caused the victim’s maltreatment to pass

from something short of torture to torture?)²³ This, my interlocutor thought, showed that the prohibition on torture couldn't be a moral absolute. I said I didn't think it showed that at all. It showed that the prohibition might be difficult to apply in borderline case, but still in clear cases the question of whether something was torture or not (and thus absolutely prohibited or not) could be clearly stated and answered. I think my All Souls friend believed also that the postulated existence of a bright-line threshold on a continuum of severity would tend to discredit the idea of an absolute, by suggesting that something so morally striking could just come to apply owing to a very slight shift along the continuum. The moral relevance of a continuum of severe pain, inflicted by a tormentor, would surely be better captured by a model of balancing the pain caused at any point on the continuum against the pain that we hoped to avert by tormenting our victim. It is a fair point, but it does not quite address the situation where we acknowledge a gray area where there is uncertainty whether a moral absolute applies and yet point to a clear and central case where (we say) it undoubtedly does. The gray area may be quite large. (And by the way the grey area is often covered by other morally stringent requirements such as the requirement against hitting people, or more strikingly the requirements forbidding cruel, inhuman, and degrading treatment, whether that treatment amounts to torture or not.)

A related question is about the use of morally-loaded terms in the formulation of the prohibition. Consider one of Anscombe's examples: deliberately setting out to procure the execution of someone widely known to be innocent. This is one of her "Thou shalt not" absolutes, but "innocent"—one of the terms in which it is formulated—is hardly a morally neutral term. The description of the action supposed to be prohibited is already morally loaded. Aren't we in danger of tautology here? Isn't "Don't execute the innocent" equivalent to "Don't execute those who are not supposed to be executed," just as Anscombe's other example, "Don't commit adultery" can be read tautologically as "Don't sleep with those you are not supposed to sleep with"? Well, not quite.

²³ Parfit, *Reasons and Persons*, p. 80.

“Innocent” has a specific meaning relating to the commission of an offense. So: “Don’t procure the execution of the innocent” means something like “Don’t procure the execution of those who have not committed an offense.” It may be morally loaded; but its moral loading does not prejudice the force of the overall prohibition.

That was a point about thick moral terms in the protasis of a conditional statement—“If someone is innocent...” What about the apodosis, the conclusion of the conditional? Is that always a straightforward prescription—“...then don’t execute him”? When we talk about moral absolutes are we always talking about norms framed using the most direct normative language—“Thou shalt not...” or “This ought not to be done” or “This is wrong”? Consider this passage, again from Anscombe:

[I]f a procedure is one of judicially punishing a man for what he is clearly understood not to have done, there can be absolutely no argument about the description of this as *unjust*. No circumstances, and no expected consequences, which do not modify the description of the procedure as one of judicially punishing a man for what he is known not to have done can modify the description of it as unjust. ... [T]his is a paradigm case of injustice.²⁴

Is this the assertion of a moral absolute—“Judicially punishing a man known to be innocent is unjust”? Or is that too easy for the absolutist? Do we perhaps not even get to a candidate for moral absolute until we add: “And because it is unjust, it ought not to be done, whatever the circumstances”? I am not sure how to answer this question. It depends, I think, on how the challenge to the idea of moral absolutes is being posed.

7. Rights and violations

A similar point can be made about rights. We say not only that torture is wrong but that people have a right not to be tortured: it is outlawed, for example, in Article 7 of the ICCPR. Now suppose the opponents of moral

²⁴ Anscombe, “Modern Moral Philosophy,” p. 16.

absolutes—the ticking bomb crowd—believe that sometimes torture is permissible, despite what Article 7 says. They believe that it may be morally right to torture, even though people have a legal right not to be tortured. Might they also say this about moral rights? How would the consequentialists—the opponents of moral absolutes—want to phrase their position? Do they want to assert a moral equivalent of Article 7 and then say that sometimes torture is justified even though it infringes individual rights? In other words, do they want to say that moral rights and moral rightness might come apart? Or do they want to deny that, in those circumstances, people have a moral right not to be tortured? I don't particularly care either way. I am just reminding them of how complex the moral landscape is, and putting them to their choice.

Or think of another idea that might be deployed—the idea of a violation. We might say, “To torture someone is always a violation of him and his moral personality.” Does the opponent of absolutism have to deny that? Can't he just say, “Yes, yes, it's a violation of him and his moral personality. But sometimes because of this ticking bomb situation, that is what has to be done. Sometimes we have to grit our teeth and violate people.” Is that a coherent position?

There hasn't been much discussion of the idea of violation.²⁵ There is an interesting discussion by Arthur Applbaum on this matter.²⁶ Applbaum makes the point that to violate a person is not the same as

²⁵ “Violate” has several senses. Sometimes it just means the wrongful or unlawful infringement of a rule. The *Oxford English Dictionary* (OED) gives this meaning as “to break, infringe, or transgress unjustifiably; to fail duly to keep or observe” such things as an oath or promise, or a law, commandment, or rule. A stronger sense, however, refers to the violation of a person—some sort of deep and comprehensive assault on a person's dignity. To violate some thing can be to treat it irreverently, or in the words of the dictionary “to desecrate, dishonour, profane, or defile” something held precious or sacred. And the most common use applied to persons—the violation of a person—is, as the OED puts it, to ravish or outrage a woman or to destroy a person's chastity by force. “Ravishment, outrage, rape” is one of the meanings given to the noun “violation.”

²⁶ Arthur Isak Applbaum, “Are Violations of Rights Ever Right?” *Ethics*, 108 (1998), 340.

violating a norm regarding a person (though both are no doubt important); but you can violate a norm regarding a person—for example, by lying to them—without violating *them*. On the other hand, or present purposes we may want to focus on the idea of violating a person. Applbaum gives the example of rape: “to rape a woman is to violate her, quite apart from violating her right not to be violated.” The person—the victim of rape—is violated; this is something that happens to her.²⁷ Her body is violated. She is torn apart by the rape, she suffers the intrusion of another’s will and body, she is used in the most intimate and devastating way. The phenomenology of rape has been developed in feminist writing and I refer you to that.²⁸ I want to be very careful in characterizing and developing this point, because this is not an easy subject to deal with properly, and for many people it is not an easy subject to hear discussed in the context of a glib philosopher’s hypothetical.

Bishop Butler reminded us that everything is what it is and not another thing. Rape is rape; and torture is torture. Though it is worth adding that rape is often torture and torture often involves rape, or at any rate involves pornographic and prurient aspects of defilement. (This is an aspect of the corruption that torture sometimes involves; and it is also an

²⁷ Ibid., p. 344. In the example of rape, we might want to say also that the woman’s word has been violated, her rule, her commandment in the sense of her refusal of consent. That is important. But it is important also to see the element of personal violation that accrues additionally and by virtue of the violation of her word. One point worth noting, though, is that the violation of consent is not just a momentary incident at the beginning of the crime; it is continual throughout, every second, involves the refusal to take seriously that this is a person with a will of her own whose will is entitled to control every moment and every aspect of this sort of interaction with another. So violation of her word—her refusal to consent—is pervasive, with all that that conveys about the rapist’s attitude towards the personhood of the woman he is assaulting.

²⁸ See, e.g., Miranda Horvath And Jennifer Brown (eds.) *Rape: Challenging Contemporary Thinking* (Willan Publishing, 2009), Sandra Lee Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (Routledge, 1990), and Susan Estrich, *Real Rape* (Harvard University Press, 1988), and Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Simon and Schuster, 1975).

aspect of the violation that torture sometimes involves.)²⁹ Still, rape is rape and torture is torture, and little would be gained by saying that the two y are moral equivalents.

Nevertheless, light may be shed on the wrongness of torture and on the character of the norms that define it as wrong, by careful (albeit partial) analogy with rape. For torture surely involves a similar sort of assault, not just the violation of a legal rule, but the comprehensive and intrusive violation of the body and person of another. And it would be interesting to consider whether the opponent of absolutism has to think of himself as denying this. Can he say: “Yes I acknowledge that in all circumstances, torture is the comprehensive violation of a person. It is simply that in some cases such comprehensive violation is necessary.” Or does he intend the ticking bomb hypothetical to drive us away even from the perception that torture is the violation of a person. And the absolutist, for his part: Can he rest content with the acknowledgement, that in all circumstances, whatever the consequences torture is a moral violation of a person? Or does he necessarily have to drive towards the hard prescriptive conclusion: “... and therefore it should never be allowed to happen.”

Let me take this one step further. In debates about torture, I have often found myself saying—by way of appeal to my interlocutors, the consequentialists, the ticking bomb crowd—that surely *some* things are absolutely ruled out as wrong and giving rape as an example—or if my hard-ass opponents shrug that off, the rape of a child (to persuade the child’s mother to tell us where the ticking bomb is). It doesn’t change anything. Of course you know how these things work. We talk as though the methodology used here is that of intuition. But really there is not an appeal to anything properly described as “moral intuition” at all. Don’t be fooled by what your professors say: in modern moral philosophy, as a

²⁹ We might consider here the element of sexual depravity in the Abu Ghraib scandal: see Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York Review Books, 2004). For a historical account of the role of rape and sex in French torture in Algeria, see Marina Lazreg, *Torture and the Twilight of Empire: From Algiers to Baghdad* (Princeton University Press, 2007), pp. 127 ff.

matter of professional practice, intuition is just the disposition to say something in order to sustain a view. So I bring up the rape example. And the consequentialist, if he wants to remain a consequentialist, just shrugs it off. He doesn't consult anything, like conscience or intuition (whatever that is). He just says, "Sure, if the stakes are high enough, nothing is ruled out—torture, rape, rape of a child, whatever..." But I watch his face. He is the tiniest bit shaken, and he starts to look shifty, he feels sure such extreme measures would not normally be necessary; he hopes his mother is not listening. This is a case I think where the facial description of the action in question as the deep and comprehensive violation of a person does surely give us pause.

8. How absolutes operate: simply ignoring the consequences?

I said that a second question was this: how are these absolutes supposed to operate (or how would they operate if there were any)? Here I have in mind particularly, the question of how a proposition forbidding an action or characterizing it in negative terms as an injustice or a violation deals with the considerations that are arrayed on the other side in the ticking bomb case.

I suppose one possibility—a sort of limit for our inquiry—is that, having set one's face against torture or whatever the forbidden action is, one simply *ignores* the considerations on the other side, refuses to deal with them at all. R.M. Hare, a former holder of the White's Professorship of Moral Philosophy at Oxford, imagined a figure whom he called "the fanatic."³⁰ The fanatic was someone willing to commit himself prescriptively to certain actions irrespective of their net impact on serving human wants or interests: he just has this ideal, he's committed to it, and in light of that commitment he is willing a priori to accept all and any consequences of its universalization. The cases that Hare imagined included a fanatical racist, who would maintain his racism even if his friends, relatives, loved ones, or even he himself turned out to belong to

³⁰ R.M. Hare, *Freedom and Reason* (Oxford University Press, 1963), pp. 105 ff. and 173 ff.

the disfavored group. He is unmoved by these considerations of the universalization of his ideal. In Hare's words, the fanatic "does not mind if people's interests—even his own—are harmed in the pursuit of" his ideal.³¹ Hare, who himself favored a sort of utilitarianism so far as substantial moral commitments were concerned, conceded that there might be nothing to say that could dislodge a fanatic from his position. He was inclined to doubt whether fanatical pursuit of an ideal really counted as moral commitment—there was a debate that used to go on in the 1960s about the exact import of the meaning of the word "moral" (moral principle, as opposed to some other sort of principle)³²—but at any rate Hare conceded that there was no formal irrationality in the fanatic's position. He couldn't be shaken from it by argument. No matter what fancy hypotheticals we dreamed up, the fanatic could always respond by saying hard-hearted things like, "Then they too should be denied a vote if they turned out to be black," or "Then they too should go to the gas chambers if they turn out to be Jewish." Hare thought we should simply disengage from such people, warn others against them, and comfort ourselves, in the midst of our shared utilitarianism, that we were not fanatical like they were.³³

Usually we don't think of the opponents of torture as fanatics, and Hare himself did not make the connection. He did not cite as an example of fanaticism someone who would oppose like torture in all circumstances irrespective of the human cost (i.e., irrespective of the interests of the people who were going to get blown up by the ticking bomb). He did once apply the designation to someone who believed in the absolute sanctity of contracts; that was in the context of a discussion of the parable of the unforgiving debtor in Matthew 18: 23-34. Such a person, he said, might be fanatical in his allegiance to "an ideal of abstract justice, of the *fiat*

³¹ Ibid., p. 105

³² See, e.g. G. Wallace and A.D.M. Walker (eds), *The Definition of Morality* (Methuen, 1970).

³³ Hare, *Freedom and Reason*, p. 185.

justitia, ruat caelum variety.”³⁴ But the connection here was made, once again by Elizabeth Anscombe, in “Modern Moral Philosophy.” As she deplored the rejection of the possibility of moral absolutes by most of her contemporaries, she had this to say about Hare’s position:

Mr. Hare, for example, while teaching a philosophy which would encourage a person to judge that killing the innocent would be what he “ought” to choose for over-riding purposes, would also teach, I think, that if a man chooses to make avoiding killing the innocent for any purpose his “supreme practical principle,” he cannot be impugned for error: that just is his “principle.”³⁵

And I think that’s the position. The opponent of absolutism has no choice but to concede that the absolutist position is coherent. The only logical constraint on the possible shape of a moral prescription is that it *can be followed* (“ought” implies “can”)—so any package of actions and omissions that can be followed can form the subject of a valid prescription. Most consequentialists should not try to deny that one *can* be an absolutist in this sense: it doesn’t involve one in any contradictions. It just seems hard-hearted when you consider all those innocent people scared and crying, strapped to the ticking bomb.

³⁴ Ibid., pp. 104-5. What Hare said was that such a person “might be moved, not by any weight which he might attach to the interests of other people, but by the thought that to enforce contracts of this sort is necessary in order to conform to some moral or other *ideal* that he has espoused. ... He might be moved, for example, by an ideal of abstract justice, of the *fiat justitia, ruat caelum* variety. We have to distinguish such an ideal of justice, which pays no regard to people’s interests, from that which is concerned merely to do justice between people’s interests. It is very important, if considerations of justice are introduced into a moral argument, to know of which sort they are. Justice of the second kind can perhaps be accommodated within a moral view which it is not misleading to call utilitarian ... But this is not true of an ideal of the first kind. It is characteristic of this sort of non-utilitarian ideals that, when they are introduced into moral arguments, they render ineffective the appeal to universalized self-interest which is the foundation of the argument that we have been considering. This is because the person who has whole-heartedly espoused such an ideal (we shall call him the ‘fanatic’) does not mind if people’s interests—even his own—are harmed in the pursuit of it.”

³⁵ Anscombe, “Modern Moral Philosophy, p. 10.

Now Hare is a well-known non-cognitivist.³⁶ He believed that moral propositions do not purport to be descriptive of any reality; they are like universalized imperatives rather than indicative statements. He himself is a utilitarian, but his recognition of the possibility of deontological fanaticism is part of the price he pays for a meta-ethic of prescriptivist voluntarism. Ultimately we all *choose* our moral positions, according to Hare. I guess most people might be unwilling to simply posit this fanaticism as their own voluntarily chosen position. I don't go round saying at High Table at All Souls or anywhere else that I just *happen to have chosen* this absolutism about torture. But then again, that is not necessarily something a consistent non-cognitivist has to be willing to say.³⁷

9. God's fanaticism

Some people adopt the absolutist position by attributing the fanaticism to God: they are simply echoing divine commands which tell us that torture is out of the question, just like idolatry or adultery or any of the other actions that Anscombe mentioned. The theory would be that God gives these as categorical, unqualified and unyielding commandments and that is that. The idea of a moral absolute is just one instance of the fact that any set of actions that may be performed can be commanded—and there is no telling what God requires of us. I don't mean that all God's commandments have to be conceived in this light. Fidelity to God's word could have made us consequentialists or threshold deontologists or any kind of meta-ethicist. The New Testament is replete with stories of Christ preaching the infringement of what were previously regarded as categorical and inviolable laws—for example, by healing people on the

³⁶ See R.M. Hare, *The Language of Morals* (Oxford University Press, 1952).

³⁷ See Simon Blackburn, *Essays in Quasi-Realism* (Oxford University Press, 1993) for the position that a non-cognitivist can use the same terms as a cognitivist uses to frame his moral position.

Sabbath.³⁸ But there might be some uncompromising divinely-commanded absolutes still in play

Divine command theory is hardly flavor of the month these days in moral philosophy. But even if you grant the underlying theism, this is an unsatisfactory position. We can imagine God commanding all sorts of things. But the thing is: can we make sense of His commands? It is no use saying that it is not for us to do that (“Where wast thou when I laid the foundations of the earth?” etc.)³⁹ The fact is that God often does provide us with reasons—for example, in *Genesis*, for the law against killing, the reason is that man was made in God’s image.⁴⁰ And we want to know what that provision would amount to if, not unreasonably, we were to expect reasons here as well. We don’t want to be obeying the commands of a whimsical god.⁴¹ And the point is that the reasons that we need here, need to be reasons that address the sources of normative pressure that bear on our principle against killing or torturing or whatever it is. Remember that our question is: how does a moral absolute work to dispel, disarm, or defuse the sources of that pressure? It is not enough to say, “It just does” or “God does it, we know not how.”

In some cases, the considerations that tempt us away from an absolute might be characterized as unholy: unbridled lust, for example, tempting us away from the rule against adultery. But that is not the case with the rule against torture in the ticking-bomb hypothetical. No doubt some torturers, including those who act our name, are motivated by unholy impulses of sadism and power. But in the formal presentation of the ticking bomb, the considerations that tempt as away from the absolute are in fact also consecrated by religious norms. They include the lives and well-being of many innocent people. So the demand for reasons here

³⁸ See, e.g., Mark 3: 1-6.

³⁹ Job 38: 4.

⁴⁰ Genesis 9: 6.

⁴¹ Compare the argument in Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press), pp. 341-4.

is not necessarily a challenge to God from a secular position but a challenge to God's commandment in this one instance, from the perspective of other values or considerations that God surely also regards as important.

10. The real problem

And here we get to the heart of the problem. The real difficulty with moral absolutes—I guess I should have said this earlier—is not the difficulty of imagining the commandment. It is the difficulty of making sense of our sticking with the commandment even when so much of value is stacked on the other side. That is the importance of the products of the consequentialists' fevered imagination. Their hypotheticals, ticking bombs and all, give us a vivid sense of an overwhelming array of moral considerations—the lives, the suffering of all those who will be affected by the bomb—that need somehow to be displaced from the forefront of our responsibility if a moral absolute is to function. So when I ask, how are moral absolutes supposed to operate, answering, “Just like a command” is not enough. We need to know how does the alleged moral absolute dispose of or relieve the burden of the considerations which the consequentialists seem, quite reasonably, to find overwhelming.

One way it cannot do that is simply by intensifying the stakes on the side of the prohibition. It is no good offering rich and intense description after rich and intense description of what is awful about torture—whether it is the notion of the brutality and the mutilation of human agency that I talked about in my 2005 article,⁴² or the idea of the violation of a person that I was toying with in section 7, or the notion that torture offends the bedrock premise “that every human being is a locus of inestimable value” and that it does so by distorting, destroying and impairing the physical envelope that contains, enables, and expresses the person's soul—this is language from the Fried's book, *Because it is*

⁴² Waldron, “Torture and Positive Law,” pp. 1726-8 (pp. 232-4 of *Torture, Terror, and Trade-Offs*)

Wrong.⁴³ I don't mean that it is not important to say things like that—it is—but they don't address the central difficulty of explaining how an absolute works.

This is because the opponent of absolutism, if he knows his business, can duplicate anything we want to say about the badness of torture on his side of the argument. We have Jeremy Bentham to thank for this difficulty. Bentham was an ingenious contriver of ticking bomb hypotheticals. Consider this one:

Suppose an occasion to arise, in which a suspicion is entertained ... that at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which if inflicted by the hand of justice, would universally be spoken of under the name of torture. For the purpose of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practicing or about to be practiced, should refuse to do so.⁴⁴

Here it is not just lives at stake, as in the common-or-garden ticking bomb example. What Bentham does is wait until the absolutist has given his best and most horrifying characterization of the evil that he has set himself absolutely against, and then Bentham takes *that very description* and puts it in the scales on the other side. Torture is forbidden because it is so brutal; but what about instances where it is necessary in order to prevent a hundred cases of exactly such awful brutality? Violation is awful, but what about cases where violation is necessary in order to prevent a large number of exactly such violations? Distorting, destroying and impairing the physical envelope that contains, enables, and expresses

⁴³ Fried and Fried, *Because it is Wrong*, p. 55.

⁴⁴ Bentham manuscript Box. 74b, p. 429, (27 May, 1804), quoted by Twining and Twining, "Bentham on Torture," *op. cit.*, p. 347n.

a person's soul is awful, as the Frieds have explained; but what if that is the only way we can prevent some gang of Benthamite criminals from distorting, destroying and impairing the physical envelopes that contain, enable, and express the souls of hundreds of people.

I don't pretend it is easy to come up with the exact screenplays for these hypotheticals. But the broad formula is straightforward. You take the absolutist's favorite description of the thing he thinks is absolutely forbidden and you postulate the performance of that by someone else to a large number of people, adding the stipulation that it can be prevented by doing the forbidden act in just one case. It is just algebra. All the rest is cinematic detail.

To meet this challenge, then, we can't just keep coming up with better and better (or rather more and more horrific) characterizations of the allegedly forbidden act. Instead we need to explain how those who take seriously the alleged prohibition are to be relieved of the burden of responding to the cases on the other side, cases that seem to involve exactly the same concerns as those that motivate the absolutism. If we can't do this—we the absolutists—then we are guilty of not just fanaticism but fanaticism that can't even keep faith consistently with the values we are supposed to be fanatical about. You see I want the absolutist to be responding to the hardest challenge that can be posed to his position. That's why I seem to be bending over backwards to make the consequentialist critique the best it can be.

11. Possible Accounts

For the remainder of this lecture, I want to consider a number of different ways of responding to this challenge, and relieving the absolutist of this burden.

(i) "You leave it to God"

The first possibility gives God one last chance. I don't know whether you have seen the Clint Eastwood movie, *Million Dollar Baby*.⁴⁵ There is a

⁴⁵ Clint Eastwood (director) *Million Dollar Baby*, Warner Brothers and Lakeshore Entertainment, 2004.

character played by Hilary Swank, a woman boxer who is so badly injured in the ring that she is paralyzed and wants to die. She asks Frankie Dunn her trainer and father-figure (played by Mr. Eastwood) to help her die, and he goes to a priest to ask for advice. The priest, predictably, tells him he can't do this:

Frankie, I've seen you at mass almost every day for twenty-three years. Only person who goes to church that much is the kind who can't forgive himself for something. Whatever sins you're carrying, they're nothing compared to this. Forget about God or Heaven and Hell. If you do this thing, you'll be lost; somewhere so deep you'll never find yourself again."

Frankie says: "All she wants to do is die, and all I want to do is keep her with me. And God forgive me but it feels like I'm committing a sin by doing it. By keeping her alive, I'm killing her. How do you find your way out of that?" And the priest says: "You don't. You step aside, Frankie, you leave it with God."

That is one way of thinking about how the moral absolutist position takes care of the considerations on the other side. Leave it to the issuer of the command—to the law, if it's a legal prohibition; to God if it is conceived as a divine command. We have been commanded not to do this, whatever the consequences. Alright then, let God or whoever the commander is take care of the consequences. It sounds like a cop-out. In the movie, the Clint Eastwood character responds to the priest: "She's not asking for God's help. She's asking for mine." Indeed it sounds like exactly the dead end we encountered in section 8. But of course "cop-out" is not quite the full story. There is nothing in the absolutist position that counsels or requires us to turn our back on the circumstances which are tempting others away from the absolute. We must still continue to do everything licitly within our power to avoid the bad consequences, to relieve the boxer's pain and debilitation in *Million Dollar Baby* if we can, to hunt down the terrorists and the ticking bomb in the customary hypothetical, or to find and close down Bentham's torture factory, by any and all means that we morally can, to our utmost effort. There is just this

one forbidden method that we may not use, and the idea is that we leave the specific consequences of that inhibition to God.

Does anything like this make sense for someone who does not believe there is a benign ruler of the universe who can be entrusted ultimately to make everything come out alright? Well, there is a negative version of it; I mean the position that cautions people against “playing God” with consequences, choosing who lives and who dies, choosing to inflict suffering here rather than allow it there, thinking that we can be so securely in command of the future and of the future consequences that our calculations are trustworthy. For the sake of argument in the classroom, the hypotheticals artificially stipulate what the consequences will be. And in television presentations, like the Fox show “24,” the dramatist’s omniscience conveyed to the viewers also does the work of an artificial stipulation: we know there is a bomb; we know that this man knows where it is; and so on.⁴⁶ But often the wise response is to buck that stipulation, and to insist that all our experience with the law of unintended consequences counsels us to proceed very cautiously with these cases.⁴⁷

This is especially so in situations where we imagine our calculations being at the mercy of the terrorists who have set up the hard choice: the Nazi commander in *Sophie’s Choice*, the terrorist leader in Bernard Williams’s case of “Jim and the Indians,” the foreign power in Anscombe’s hypothetical that requires us to have an innocent man tried, sentenced and executed under threat of a “hydrogen bomb war.”⁴⁸ But

⁴⁶ See Kate Kovarovic, “Our ‘Jack Bauer’ Culture: Eliminating The Ticking Time Bomb Exception To Torture,” *Florida Journal of International Law* 22 (2010) 251.

⁴⁷ I think that is partly also what is going in so-called pragmatic absolutism, where concerns about the long term consequences of infringing a moral rule now—setting a precedent and so on—are such that we decline to allow our decision to turn on calculations of immediate marginal advantage. See Oren Gross, “Are Torture Warrants Warranted? Pragmatic Absolutism and Judicial Disobedience,” *Minnesota Law Review*, 88 (2004) 1481, at pp. 1501-3, and Waldron, “Torture and Positive Law,” p. 1717 (p. 221 of *Torture, Terror, and Trade-Offs*).

⁴⁸ See William Styron, *Sophie’s Choice* (Vintage Books, 1992), pp. 413 ff.; Bernard Williams, “A Critique of Utilitarianism,” in J.J.C. Smart and Bernard Williams,

even if the consequences are not being devilishly manipulated, still they may be tangled and unpredictable in ways that defy our calculative morality.

I think this is what is going on in what we might otherwise call the batty reasoning that Immanuel Kant uses in his late essay “On a Supposed Right to Lie from Benevolent Motives.” Kant says you must not lie, not even to the mad axe-man who comes in looking to murder your roommate (who is hiding in a closet) and asks where he is:

[I]f you had lied and said he was not at home, and he has actually gone out (though you are not aware of it), so that the murderer encounters him while going away perpetrates his deed on him, then you can by right be prosecuted as the author of his death. For if you had told the truth to the best of your knowledge, then neighbors might have come and apprehended the murderer while he was searching the house for his enemy and the deed would have been prevented. Thus one who tells a lie, however well disposed he may be, must be responsible for its consequences ... however unforeseen they may have been....⁴⁹

This is as good an example of “bucking the hypothetical as you are likely to find in the philosophical literature. But Kant has a point. The apparently benevolent violation of the principle of truth-telling is based on a sort of hubris—that I can foresee all the consequences, certainly better than those who formulated the principle, and that I have everything in my view and under my control. Such God-like confidence is encouraged by the way we set up our hypotheticals and perhaps it is a good idea to buck

Utilitarianism: For and Against (Cambridge University Press, 1973), pp. 98 ff.; Anscombe, “Modern Moral Philosophy,” p. 17.

⁴⁹ See Immanuel Kant, “On a Supposed Right to Lie from Philanthropy,” in Mary Gregor (ed.) *Kant: Practical Philosophy* (Cambridge University Press, 1999), 606, at pp. 612-13.

them from time to time and concentrate on what we do have control over, not on distant consequences over which our control may be tenuous.⁵⁰

On the other hand, whether we accept Kant's position "if you have held rigorously to the truth" then, since you haven't taken on the burden of consequentially calculations, you can't be held responsible for the unforeseen way in which events develop, is I guess a matter of debate. Maybe everyone has to think as hard as they can about the consequences of their actions and principled commitment is no excuse for refusing this burden.

(ii) Other people's responsibility

A second line of possibility looks to the fact that, in most of these hypotheticals, responsibility for the consequences that tempt us away from the moral absolute is properly assigned to the terrorists or whoever, who set the situation up. We are not guilty of the tortures taking place in Bentham's torture factory; in fact we oppose those on the grounds of exactly the principle we are holding as an absolute and we do everything licitly in our power to put a stop to them and bring the perpetrators to justice. But the prime responsibility for those consequences or for the carnage that might be wrought by the ticking bomb is not ours; it is the terrorists'. (This won't always work. With enough Parfit-like ingenuity we can perhaps imagine natural ticking bombs. Thomas Nagel in a famous hypothetical in his 1979 Tanner Lectures imagined a car wreck on a lonely road which caused great suffering that could be relieved only if

⁵⁰ This may help us evaluate the familiar claim, often made by consequentialists, that those who believe in moral absolutes are preoccupied with their own clean hands to the exclusion of the well-being of others. I think absolutists are preoccupied with the condition of their hands. It is our hands, above all, that we can control; who knows what happens when we start meddling with further consequences. The reason why I am preoccupied with what my hands do is that the actions of my hands—in connecting electrodes and pushing torture buttons—unlike the blowing up of the bomb are directly subject to my free will. But this does not mean that I am preoccupied with their cleanliness.

we used a mild amount of torture on a child to induce an old lady to give us the keys to her car so we could go for help.)⁵¹

In general, however, we have to be a little bit careful with these assignment and reassignments of responsibility. In every situation, whether others are involved or not, each of us must accept responsibility for the possible world whose actuality our choices define. Suppose that, in a ticking bomb situation, whether the relevant detainee is tortured is up to me and I choose not to torture him and the bomb goes off (knowing or reckoning with a high degree of probability that if he had been tortured we would have been able to disarm the device). Then I have chosen a world W_1 in which the detainee is not tortured and the bomb goes off over a different world W_2 in which the ticking bomb is stopped but only because the person in our custody is tortured. Both those possible worlds have a ticking bomb that was set up wrongfully by someone else; and for that, someone other than me is responsible. But at the crucial fork in the road, it is my free choice between those two subsequent possible worlds, W_1 and W_2 , that settles what will actually happen and I have to take responsibility for that.

There is a further point for the consequentialist, which I am afraid I have to draw attention to, which makes this abdication of responsibility even more difficult to sustain. The usual hypothetical invites me to consider whether I would torture the terrorist in order to get information to disarm the ticking bomb. I played along with that in the last two paragraphs. But one response might have been to say, “Well, no. I wouldn’t torture the terrorist. I don’t know how to do it, and I wouldn’t be any good at it.” But that is kind of beside the point. Apparently, there are plenty of people around, able and willing to torture, if only we—the politicians, the lawyers, the legal scholars, and the voters—judge that it is alright to permit them to do it.

This leaves an important opening for the builders of ticking bomb hypotheticals. As the hypothetical is usually set up, there is a familiar

⁵¹ Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1989), pp. 176 ff.

asymmetry between doing and allowing: the proposal is that either we torture or we allow the bomb to explode. We didn't plant the bomb; the terrorists were responsible for the doing of that. But by failing to torture the terrorist we have in our custody, we in effect allow the bomb to explode by not taking the only means available to prevent it. And sometimes moral absolutists take refuge in this distinction between doing and allowing. By not torturing, they say, they have not done anything awful, though they will acknowledge that they have allowed something awful to happen. But, they will say, it is only the doing of it that was forbidden to them. That's how many absolutists propose to rescue themselves from the central difficulty we outlined in section 9. But if our choice really is what I said it was a moment ago, then this asymmetry being doing and allowing disappears. The alternative is not that I torture the terrorist but that I *allow* him to be tortured by the hard men on our side who have the know-how and who apparently have no scruples about their integrity. I allow that to happen and the relevant information is extracted from the terrorist along with his finger-nails; or I allow the bomb to explode—two alternative things that I allow, and no asymmetry between allowing and doing.

Indeed we can use the Bentham hypothetical to sharpen the choice even further. In Bentham's example, remember, there is no ticking bomb, there is just a torture factory where a hundred people are being subject to just the suffering and violation that it is proposed our hard men should inflict on the one guy we have in custody. So it looks as though our choice is simply between allowing one event of torture to happen or allowing a hundred events of torture to happen. Both are cases of allowing.

Again, I am bending over backwards to state the anti-absolutist position as strongly as I can. But what about a response? Is there an equivocation, here, perhaps on the idea of "allow"? I am not sure; I think there may be. On the one alternative, we allow something to happen in the straightforward negative causal sense of failing to do what is necessary to prevent it. On the other side, our allowing has something more to do with permitting or authorizing. We permit, we authorize, we may even order

the hard men on our side to go ahead with the torture. That is something we do, and they act in our name pursuant to that authorization.

It may not be like that of course. They may go ahead even without authorization and they may be deaf to our protestations and forbiddings. Maybe we have to physically intervene to stop them, just as we are going to have to physically intervene to stop the bad guys in the torture factory, if we get the information from their accomplice in our custody. But here we seem to find once again symmetry in regard to allowing. We either permit—that is, refuse to interfere with—the torturer’s activity or we permit—that is, refuse to interfere (in the relevant way)—with the terrorists’ activity. To sustain any sort of *asymmetry* here, all the weight would have to go on the fact that on the one alternative the torture being allowed was being done in our name, whereas in the other alternative what was being allowed was something we would utterly repudiate and put a stop to if there were a morally licit way of doing so.

(iii) Tainted goods

Lawyers are familiar with the doctrine of the fruit of the poisoned tree. If we search a person’s house without a warrant or if we coerce someone during interrogation, the fruits of our efforts are tainted by the process we used to get them, and such tainted fruit may not be presented as evidence in a courtroom.⁵² That’s a rule we have, and—as several conservative justices on the Supreme Court constantly remind us—it is a rule that other countries do not have and that we could vary if we liked.⁵³ Might there also be something analogous in the moral situation? I think it is possible. This is one of the arguments which I said was worth exploring in that *Theology Today* piece, because often this poisoned fruit or tainted goods approach has a religious flavor.⁵⁴

⁵² *Weeks v. United States* 232 U.S. 383 (1914).

⁵³ See, e.g., Justice Scalia, dissenting in *Roper v. Simmons* 543 U.S. 551(2005), at 624.

⁵⁴ Waldron, “What Can Christian Teaching Add to the Debate about Torture?” p. 339 (pp. 270-1 of *Torture, Terror, and Trade-Offs.*)

Defenses of torture depend upon belief that certain goods—like safety from being blown up—can be attained by problematic means and that whatever else we might say about a particular means being prohibited, we cannot deny the affirmative value of what its violation might secure. If we might secure safety by torture, then our use of this means might be objectionable, but at least no one can deny the value of the safety. At least lives are saved. But perhaps we need not accept this point about unequivocal value. Perhaps we should say that a violation of the absolute rule against torture means that the goods we secure thereby are objectively tainted on account of the immoral methods used to achieve them. The enhancement to our homeland security may be contaminated by the murderous or torturous methods used to bring them about. And a morally sensitive people will be alert to that fact and perhaps unwilling to shoulder the burden of “enjoying” goods that we have secured in this way. Living safe in the knowledge that our “security” was purchased on the back of a waterboard, at the muzzle of a snarling dog, or at the live end of an electrode is a hideous thing.

Let me put this more affirmatively. A lot of our affection for due process and the Rule of Law is bound up with the character of our enjoyment of the goods and the safety that law provides? Having committed ourselves to the Rule of Law, we know this about the character of the goods we enjoy: they have not been secured for us brutally, arbitrarily or oppressively. But if we take away the Rule of Law and introduce brutality and the infliction of torment into our national security policy, then the result may be that our personal safety or the safety of our streets becomes a reproach to us, a tainted and clammy form of satisfaction that we can enjoy only with our consciences turned off.

Again, it is not easy to secularize this reasoning, which may seem like a sort of magical thinking. I have attempted to deal with it at length in a long analysis of the nature of security in the *Torture, Terror and Trade-offs* volume.⁵⁵ I cannot go into that here. But let me try one

⁵⁵ Waldron, “Safety and Security,” *Nebraska Law Review*, 85 (2006), 454 (reprinted in *Torture, Terror, and Trade-Offs*, 111).

analogy. It is sometimes said that the goods we aim at by their nature place limits on the means that may be used to attain them. For example, if national independence is attained in an insurgency struggle using a terrorist campaign, then the leadership that comes into power if our campaign succeeds will be a leadership of hard men and assassins accustomed to operating in ruthless and clandestine ways. And it may be not be easy for them to change their habits of thought, conspiracy and action or to sanction the empowerment of those accustomed to gentler methods more appropriate to a free polity.⁵⁶ The insurgents may assure us that the end—national independence—justifies the means. But the end if generic—national independence is a very complex multi-faceted good—and its complexity suggests that there are many ways in which it might be affected or modified by the character of the means that were used to secure it. It may come to us in a variety of different characters, depending on the means used to attain it. Some of these characters may be more comfortable for us than others. If we value national independence of a certain kind (e.g. the national independence of a free and constitutional democracy) then it may be important to prefigure that in the means used to attain it. And there may be no other way of ensuring that we get this version of the end than by placing limits on what we are prepared to do or permit to bring it about.

Or consider his example, more closely related to the war on terror. Suppose we can secure homeland security only by operating a frankly discriminatory policy, subjecting Muslims, for example, to much greater intrusions on their liberty than non-Muslims. That method may make us safer, but it will be safety-in-a discriminatory-polity that we now enjoy, with glimpses of Muslims being rounded up or beaten as the rest of us remain safe. This may not be the sort of safety we were looking for. We now have to think of our safety, not as the safety of Americans, but as the safety of white Americans or else we have to accept the costs and dangers

⁵⁶ See David Miller, “The Use and Abuse of Political Violence,” *Political Studies*, 32 (1984), 401.

of turning a blind eye to this characteristic of the end we have achieved.⁵⁷ Again, none of this is conclusive. It is just an exploration of the conceptual space for making sense of an absolute.

(iv) The rules of the game

A fourth line of thought is more abstract, and it is developed through an analogy between moral absolutes and the constitutive rules of a game. For this I am indebted to an old article by Nicholas Denyer entitled “Chess and Life: The Structure of a Moral Code.”⁵⁸ Denyer invited us to reflect on the rules of chess and the considerations that might tempt us to violate them in the course of a game. Imagine that you are developing this really interesting line of attack, which will be devastatingly effective as well as fascinating to generations of chess aficionados; but someone points out that in the early stages this strategy involves moving your king into check. And they say, “You can’t do that; it’s against the rules.” You point out all the advantages that might accrue if you are allowed to break the rule just this once, and you say to the person who is restraining you, “How can you be so insensitive to the advantages that might accrue?” But the stickler for the rules will be adamant. The point of the analogy is that in a game we must not let the rules be infected by considerations derived from the goals that a person is supposed to secure in playing the game. We insulate the rules from goal-based considerations, and accordingly we are able to treat them as absolutes.

We mustn’t even use Benthamite reasoning. We must not say, for example, that breaking the rule in this case is a good way of minimizing its violation for other cases: “If I leave my king in check this move I’ll subsequently be able to keep it safer from check than it would be if I now remove it from check.” The point is that leaving the king in check is what

⁵⁷ See Waldron, “Safety and Security,” pp. 495-6 (pp. 152-3 of *Torture, Terror, and Trade-Offs*).

⁵⁸ Nicholas Denyer, “Chess and Life: The Structure of a Moral Code,” *Proceedings of the Aristotelian Society*, 82 (1981-2), 59.

Denyer calls a “deontic impossibility.”⁵⁹ It cannot be used as a strategy to minimize check time or to discourage others from moving their king into check or anything like that.

Denyer thinks this is an important result. It shows, he says, that the idea of a moral absolute is not incoherent, even for what we would recognize as the Benthamite cases. But does it really help us with relieving the burden of the consequences on the other side? Denyer assigns those consequences to the domain of goal-based play of the game, but he says they cannot be allowed to infect the domain of the rules of the game itself. That domain-distinction seems fine for chess, but maybe it is a little artificial for the game of life. And the consequentialist about morality, who is unconcerned with chess, may challenge the distinction on that basis.

I am actually not sure what to think about this. The structure that Denyer lays out is more or less exactly the moral structure that Robert Nozick associated with “side-constraints” in Chapter Three of *Anarchy, State and Utopia*.⁶⁰ There Nozick drew a familiar contrast between that approach to rights and what he sometimes called a “utilitarianism” of rights (which seems to be what’s going on in the Bentham hypothetical)

In contrast to incorporating rights into the end state to be achieved, one might place them as side constraints upon the actions to be done: don't violate constraints *C*. The rights of others determine the constraints upon your actions. ... This view differs from one that tries to build the side constraints *C* into the goal *G*. The side-constraint view forbids you to violate these moral constraints in the pursuit of your goals; whereas the view whose objective is to minimize the violation of these rights allows you to violate the rights (the constraints) in order to lessen their total violation in the society.⁶¹

⁵⁹ Ibid., p. 62.

⁶⁰ Robert Nozick, *Anarchy, State, and Utopia* (Basil Blackwell, 1974)

⁶¹ Ibid., p. 29.

But even Nozick acknowledges that the fact that this “is a consistent position does not, of course, show that it is an acceptable one.”⁶² And his own rationalization of it commits the fallacy we noted earlier: it points to the awfulness of the violation of an individual when his rights are attacked, saying that this is the only life he has; he has a conception of life’s meaning; he mustn’t be used simply as a means to the well-being of others; and so on.⁶³ That is all very fine, until you remember that in Bentham’s hypothetical, something like this can also be said about each of the people who are being tortured in the torture factory, the unique individuality of whose view on life will be vindicated if only we do this one bad thing that puts us in a position to rescue them.

The difficulty is that there does not seem to be anything in Nozick’s structure that can really play the role of Denyer’s impenetrable fire-wall between the rules of the game and the goals of playing it. Indeed often in games—rugby is a good example—we place the rules under continual revision to reflect the pressure that they have been put under by players trying to play the game the best they can. (You may remember that in the 1970s, Ronald Dworkin suggested that we might even want to subject the question of the proper interpretation of the rules of a game—I think he used the tournament rules of chess as an example—to input from the players’ perspective of what made for better play or a better tournament.)⁶⁴

If there is anything to glean from the Nozick/Denyer position, it may be this. The idea of individuals as inviolable bearers of human

⁶² Ibid., p. 30.

⁶³ Ibid., pp. 30-1: “Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable. ... A specific side constraint upon action toward others expresses the fact that others may not be used in the specific ways the side constraint excludes. Side constraints express the inviolability of others, in the ways they specify.”

⁶⁴ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), pp. 101 ff.

dignity may be a natural or objective one; but in social life, to be effective, it has to be something of an achievement, a construction, something we build for ourselves. And maybe this moral construction involves something like a fire-wall between the goals of moral life and the rules that constitute the persons who are engaged in it. We say definitively,

Here are the ways in which people are to be treated. Here are the rules for treating people; abiding by these rules qualifies you as a player in this game of dignity and respect that we are defining here. And we hold these rules sacrosanct, because we know that once we start messing with them, all bets will be off, and individuals will start once again being treated simply as means to each others' ends.

Something like that might be going on, and that may yield—constructively—a sufficiently robust version of a fire-wall between the rules of the game and the goals of play within those rules to enable us to speak confidently of moral absolutes. Only now, the game will be presented not just as a limited and artificial recreation, but as a deadly serious and pervasive basis for all social and political interaction.

(v) “Threshold deontology”

There is one last maneuver I want to consider, though I am not sure whether it is a maneuver for the absolutist or not. But it is in play in the philosophical debate about these matters, and something needs to be said about it or some questions asked about it.

It is a conception called “threshold deontology,” which as I understand it acknowledges treating certain moral rules—such as a rule about torture—as a near-absolute but indicating a willingness to abandon it when the consequences piling up on the other side pass a certain threshold.⁶⁵ So, for example, the rule against torture may not be shaken by

⁶⁵ The term seems to have been invented by Michael Moore in “Torture and the Balance of Evils,” *Israel Law Review*, 23 (1989) 280, at 327. There are good critical discussions in Heidi M. Hurd, “Liberty in Law,” *Law and Philosophy*, 21 (2002) 385, at pp. 405-8 and Larry Alexander, “Deontology at the Threshold,” 37 *San Diego Law Review* (2000), 893.

a ticking bomb hypothetical that involves the lives of ten people imperiled by the terrorists, but it may be shaken by a hundred or a million.

Nozick famously hinted at something along these lines. He said, of the rules or rights we considered a moment ago, “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.”⁶⁶

There is a hint of a similar idea in some of Michael Walzer’s musings on supreme emergency as permitting actions that would otherwise be forbidden by the laws and customs of armed conflict.⁶⁷ And I guess there’s an element of ordinary moral common sense in this as well. For example, Joseph Raz’s conception of the exclusionary reason associated with promise-keeping is supposed to mean that although promises may not be broken whenever there seem to be good reasons for doing something other than what has been promised, still the exclusionary apparatus is properly held vulnerable to considerations of overwhelming moral importance. We break our promise to save lives, even though we don’t break them because lunch with someone else would be marginally more productive.⁶⁸

For our present purposes, the idea is that threshold deontology indicates a way of coping with the burden of the humanitarian considerations that oppose a moral absolute. The threshold deontologist sticks to his principle up to a point, but he is absolved from the charge of utter heartlessness by being willing to switch sides in the stand-off when the stakes on side get big enough—that is, when they pass the threshold that his version of deontology enshrines.

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

⁶⁶ Nozick, *Anarchy, State, and Utopia*, p. 30n.

⁶⁷ Michael Walzer, *Just and Unjust Wars*, Second edition (Basic Books, 1992), p. 251.

⁶⁸ Joseph Raz, *Practical Reason and Norms* (Princeton University Press, 1999), pp. 69-71.

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?

I am afraid I haven't 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.⁶⁹

But there is no argument, simply the announcement that this is a position that can be taken. Because it can be named, people just assume that “threshold deontology” is a coherent and viable position and that, in reflective equilibrium, it may capture something of our deontological instincts and also our unwillingness to seem too morally idealistic when the stakes are very high. Philosophically this is an unsatisfactory state of affair, 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.

It 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. 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.⁷⁰ But there comes a point when the apparent

⁶⁹ Moore in “Torture and the Balance of Evils,” p. 328.

⁷⁰ See note 47 above on “pragmatic absolutes.”

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. 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.⁷¹

The other possibility is that threshold deontology does represent a real form of deontological absolutism, but is coupled with a recognition that in the most extreme cases, people's will to do what morality requires may crumble and effectively all bets are off. It is a little bit like David Hume's suggestions in the *Enquiry* about what we now call (following Rawls) the circumstances of justice:⁷²

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?⁷³

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. The threshold is a psychological one—about whether people can pay attention to morality at all. I don't 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

⁷¹ Moore, "Torture and the Balance of Evils," p. 330.

⁷² See Rawls, *A Theory of Justice*, Revised edition (Harvard University Press,

⁷³ David Hume, *An Enquiry Concerning the Principles of Morals*, edited by L.A. Selby-Bigge (Oxford University Press, 1902), 186.

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.⁷⁴

11. Conclusion.

It is time to finish. I am conscious that I have not produced any final answer to the question how the absolutist deals with the burden of the humanitarian considerations that seem to motivate the infringement of his absolute principle. If anything, I have made matters worse for the absolutist by indicating—with the connivance of Jeremy Bentham—just how heavy that burden is. My discussion is frankly inconclusive at best.

In section 10, I suggested one or two lines of promising argument, particularly (i) the caution against “playing God,” (ii) an insistence on the proper allocation of responsibility, (iii) the notion of tainted goods, and (iv) the idea of the inviolability of persons as one of the constitutive rules of the constructive moral “game.” But none of these is more than suggestive, though I think their suggestiveness helps enrich the debate.

The last line of argument we explored—(v) threshold deontology—we found pretty much a dead-end. It adds nothing in the way of argument. It simply shows that an intermediate position can be stated without incoherence and perhaps also reconciled with the intuitions of some people (namely those who, like Michael Moore, announce it as their position). But we know both from the example of the law and models of morality—divine command theory and the account of the moral fanatic in the framework of Hare’s universal prescriptivism—that various coherent positions can be stated in this matter. The challenge is to make sense of them, and I am afraid that the threshold deontologists have done nothing to make sense of the alternate ways in which they require a moral agent to respond first—and dismissively—to the burden of one set of humanitarian considerations and second—and submissively—to the burden of a larger

⁷⁴ See also the discussion in Hurd, “Liberty in Law,” 405-8.

set. Simply stating positions and comparing intuitions is not get us anywhere in this enterprise. Both sides—and the middle—can play that game all night long.

Since no conclusive answer has been furnished to our question—How are moral absolutes supposed to work?—it is tempting to say pessimistically that the absolutist must admit defeat. This is inferring too much, I think, except in the ordinary sense that the absolutist concedes right here and now that he has not done what he would like to have done. But nothing has been done to show that the question we have posed for the absolutist cannot be answered. And, if I say so myself, a certain amount of progress has been made in indicating, first, what such an answer *cannot* be like, and secondly what it *may* be like. Both kinds of progress are important—the first, for indicating threads worthy of further exploration, and the second for redeeming us from wasteful excursions that do not really address the heart of the problem.