

Heaven: What Sense Can It Make to Say That Something Is Absolutely Wrong?

Charles Fried



ABSTRACT

Democratic legal systems and international human rights norms hold generally that torture can never be justified, however urgent the need. Many, but not all, thinkers about morality agree with this consensus. But the certainty breaks down in the face of catastrophic, “ticking bomb” hypotheticals, and lawyers and moralists retreat to arguments about the unreality of such hypotheticals and about the uncertainty as to whether torture is sufficiently likely to work to justify its use—all of which concedes that in principle torture is not always wrong. This Essay argues that it is always wrong—period. It then locates such an argument in a general moral landscape, showing how that and some other such absolutes are not as fanatic as they are made to appear. Rather, this argument is connected to a system of other moral concepts and commitments that we would be loath to unravel and does not depend on some supernatural guaranty that moral behavior will always have a happy outcome—in this world or the next: hence the title.

AUTHOR

Charles Fried is Beneficial Professor of Law, Harvard Law School. This Essay is an adaptation of the second annual Herbert Morris Lecture, delivered at UCLA School of Law on April 8, 2011.

INTRODUCTION

In *Because It Is Wrong: Torture, Privacy and Presidential Power in the Age of Terror*,¹ Gregory Fried and I argue that—unlike illegal surveillance, for example—torture is always wrong and cannot be condoned no matter how urgent the reason for resorting to it. Torture has been the subject of much reflective writing ever since our own territory was spectacularly shown on 9/11 to be vulnerable to terroristic attack by a well-organized and determined enemy. The interest was only heightened by the revelations that our government authorized and carried out torture in response. In this context, it is impossible to avoid mentioning the spur to such reflection provided by the popular television series, *24*, with its now iconic protagonist, Jack Bauer. There is nothing unusual about condemning torture. What is less standard is refusing to allow even in theory any exceptions to the moral prohibition against torture: not for ticking bombs, not for child kidnappers, not for anything or anyone.

To be sure, many—perhaps most—commentators have ended up condemning torture in terms that leave little or no room for any justified use, though on reasoning that seems to leave some room for it after all. Henry Shue's 1978 essay² exemplifies the type. Having set out what is so morally awful about torture and also having distinguished it from killing in combat—distinguishing it in terms very like ours—Shue concludes by acknowledging that what he calls *interrogational torture* might in theory be justified, although *terroristic torture* could never be.³ But he locks this theoretical door with a practical key, one which many invoke in a strategy of confession and avoidance: Interrogational torture almost always has a terroristic element to it. We cannot have the requisite certainty that this is a ticking bomb case in the sense that the bomb will go off unless defused in time, that we do not have other means to defuse it, that we have the right person and that he was culpably involved in planting the bomb, that the torture will reliably produce the needed information, and, most important of all, that the use of torture can be institutionally confined to just such a rare case—that it will not have institutional, social, and psychological metastatic effects. Jeremy Waldron expressed the last concern most powerfully in his article *Torture and Positive Law: Jurisprudence for the*

1. CHARLES FRIED & GREGORY FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR* (2010).

2. Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978).

3. *Id.* at 140–41; *see also* ELAINE SCARRY, *THE BODY IN PAIN* 27–59 (1985).

White House.⁴ He argues that torture cannot be allowed by law because then law becomes corrupted in its essence.⁵ But in the end, even Waldron's account is about law, leaving open the possibility that if one were willing to sacrifice—or risk sacrificing—law, there may be occasions when an individual or an official may be justified in torturing, perhaps even be morally obliged to torture.

Others are more forthright. Alan Dershowitz famously and with admirable rigor concludes that because there will be instances in which torture is justified—and more importantly, will be used whether it is allowed or not—the law and society are best protected against the metastatic effect of allowing torture by regularizing it in a judicial warrant procedure: his torture warrant proposal.⁶ It should be said that this is not so far off what actually happened in the George W. Bush Administration. The highest levels of government—perhaps the President himself—gave explicit permission to use certain techniques in some very limited cases. Surely this was a higher bar than a magistrate's warrant. And yet, we know that even then the metastasis took place, and quite virulently.⁷ Richard Posner, on the other hand, acknowledging the evil of torture but also its necessity on rare occasions, concluded that it would be best to ban it outright but to make unacknowledged exceptions in rare cases, because any regularized procedure would lead to routinization and overuse.⁸

Implicated in this controversy is a line of argument that goes back at least to Machiavelli and has been restated and honed by Max Weber in his essay *Politics as a Vocation*,⁹ discussed further by Michael Walzer in his remarkable *Political Action: The Problem of Dirty Hands*,¹⁰ and definitively surveyed by János Kis in his *Politics as a Moral Problem*.¹¹ Machiavelli, Weber, Walzer,

4. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005). Waldron has recently carried his argument further to reach the same conclusion as I do in this Essay, and with very generous acknowledgment to Gregory Fried's and my *Because It Is Wrong*, note 1, *supra*. Waldron's essay can be found at <http://ssrn.com/abstract=1906850> and is forthcoming in Volume XVIII of the *Harvard Review of Philosophy*.

5. *Id.* at 1718–20.

6. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 158–60 (2002).

7. I refer to the Abu Ghraib debacle.

8. Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION 291, 297–98 (Sanford Levinson ed., 2004).

9. Max Weber, *Politik als Beruf* (1918), in GESAMMELTE POLITISCHE SCHRIFTEN 396–450 (1919), reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77–128 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946), available at <http://media.pfeiffer.edu/lridener/dss/Weber/polvoc.html>.

10. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973).

11. JÁNOS KIS, POLITICS AS A MORAL PROBLEM (Zoltán Miklósi trans., 2008).

and Kis all affirm that certain acts are morally wrong (none talk about torture; lying and killing innocent persons are the examples they use), but concede that political actors may be justified in committing them if done in the public interest.

The thesis of *Because It Is Wrong* and of this Essay is more radical: Torture is never morally permissible—not under any circumstances, and not by any person, private or official; not because allowing it sometimes might lead to other bad consequences, but because it is always wrong. Even if it led to nothing other than itself. Even if it led to very good consequences. Even if it averted disastrous consequences. In order to make the point as emphatically as possible, the book puts at the head of the introductory chapter Leon Golub's painting, *Interrogation I*, by way of ostensive definition: You must never do *that*; you must never order that it be done—no matter what. In that painting, a naked man hangs from the ceiling by his feet, his hands tied behind his back. On either side of him stands a jackbooted soldier, one of whom holds a truncheon, poised to strike the body before him. The faces of the two soldiers are business-like, indifferent. The victim's face is indistinct because his head is bent backward and his teeth clenched in pain.

It is this absolute position against torture that has met with objections even from sober, thoughtful, humane individuals. Surely, it has been objected, if an atomic bomb on a delayed fuse were planted somewhere in Chicago and a terrorist who knew where it was had been captured, it cannot be that the President would not (and should not) authorize that the man be tortured if necessary to find and defuse the bomb. Particularly disturbing is the fact that, in 1978 in *Right and Wrong*, I wrote:

[W]e can imagine extreme cases where killing an innocent person may save a whole nation. In such cases it seems fanatical to maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall. And so the catastrophic may cause the absoluteness of right and wrong to yield, but even then it would be a non sequitur to argue (as consequentialists are fond of doing) that this proves that judgments of right and wrong are always a matter of degree, depending on the relative goods to be attained and harms to be avoided. I believe, on the contrary, that the concept of the catastrophic is a distinct concept just because it identifies the extreme situations in which the usual categories of judgment (including the categories of right and wrong) no longer apply. At the other end of the spectrum, there is the concept of the trivial, the *de minimis* where the absolute categories do not yet apply. And the trivial also does not prove that right and wrong are really only a matter of degree. It is because of these complexities and because the term absolute is really only suggestive of a more complex structure, that I also refer to the norms of right and wrong not as absolute but as categorical.¹²

I was wrong in 1978.¹³ I argue here and in *Because It Is Wrong* that torture is morally a clearer case than killing. Many think this is compounding the unrea-

12. CHARLES FRIED, *RIGHT AND WRONG* 10 (1978).

13. Roy Sorensen, in a review of *The Philosophy of Deception*, offers this thought:

Did Kant ever lie? I know of only one report: "In his last years his conscience troubled him, because at one time, in order to decline a disagreeable invitation, he pretended to be already invited for the time designated." . . . [I was left] wondering whether ageing improves some aspects of intellectual performance. Just as prisoners "age out" of crimes, thinkers may "age out" of fallacies. Someone in his prime has the motive and metal agility to engage in back-pedaling and sophistry. At the age of seventy-three, Kant had neither the motive nor the energy to wriggle out of unpleasant commitments.

Roy Sorensen, *Fooling Ourselves*, *TIMES LITERARY SUPPLEMENT*, Mar. 4, 2011, at 22.

sonableness of our position. As Moshe Halbertal pointed out, when the torture is over, you are still alive. Who would not rather be tortured than killed?

Look again at Golub's painting. "God created man in his own image, in the image of God he created him."¹⁴ That is the image of God that hangs between the two jackbooted officers. Many find this line of argument disturbing, not because it substitutes evocation for argument but because it seems to make the argument depend on religious premises that many do not share, rather than on weaker—that is, more general—premises. The argument about the absolute prohibition of torture does not depend on such religious premises—premises that in any event I would be quite reluctant to affirm. Hence the title of this Essay. Is an absolute prohibition on torture plausible, apart from an appeal to a heaven in which everything comes out for the best after all? The appeal to heaven, it should be said, is a kind of supernatural utilitarianism after all, while the energy in the argument is to reject a universal, overriding consequentialism. More to the point is an appeal to the sacred, a value than which none is greater.

I.

Now, ticking bombs and Jack Bauer notwithstanding, the absolute prohibition of torture is not so far-fetched as not to be worth reflecting on. After all, not only has such a prohibition been adopted in international treaties¹⁵ and a federal statute¹⁶ and proclaimed in the 1993 Papal Encyclical *Veritatis Splendor*¹⁷—which, given the Catholic Church's long association with torture, is a problematic authority—but, most compellingly, the prohibition was included in the 1863 Lieber Code, the first codification of the laws of war and promulgated on the orders and authority of Abraham Lincoln. In Article 15, the Code states quite realistically that "military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war;" but in the next Article the Code states categorically that "military necessity does not

14. *Genesis* 1:27 (King James).

15. *E.g.*, United Nations Convention Against Torture; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; Inter-American Convention to Prevent and Punish Torture.

16. 18 U.S.C. § 2340 (2006).

17. Pope John Paul II, *Veritatis Splendor* ¶ 80 (June 8, 1993), available at http://www.vatican.va/edocs/ENG0222/_P8.HTM.

admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.”¹⁸ And if this might be thought not to refer to torture for life-saving rather than judicial purposes, here is what Francis Lieber, author of the Code, said in his lectures on the law and usages of war at Columbia Law School:

[C]ruelty consists of inflicting pain for the sake of pain . . . We mean by “cruelty” in the law of war unnecessary infliction of pain, pain for its own sake to satisfy the lust of revenge or a fiendish hatred; we even call cruel in modern law of war infliction of pain though it were considered necessary. No doubt the whole world would condemn it as cruel, if pain were inflicted upon an enemy to extract an important secret—e.g., by application of torture. Nay, we go further in modern times. Although the salutary fear of retaliation is one of the most efficient regulations and curbs in modern Law of War, yet would we not approve of cruelty by way of retaliation against savages or those who have sunk back into this state. The late proclamation of General Halleck, declaring himself ready for retaliation concerning destruction of property, where necessary, but distinctly telling his officers and soldiers not to retaliate cruelly, is in the true spirit. Can we roast Indians, though they may have roasted one of our own?

Simple infliction of death is not considered cruelty.¹⁹

Nor is torture the only act that is absolutely wrong. I would include in such a list judicial killing of an innocent person (judicial murder),²⁰ abuse of children, sexual violence and degradation, and more complexly the enslavement of innocent persons. But let torture be the stand-in for all of these. I want first to set out the logical structure of such absolute prohibitions. This is best introduced by a plausible, but incorrect, account of all such evils. Might it not be said, on this account, that they share the characteristic that they are all very bad? That is, the harms they do are exceptionally *weighty*.

18. Francis Lieber, Instructions for the Government of Armies of the United States in the Field, U.S. War Dep’t General Orders No. 100, § 1, art. 15 (1863), *available at* <http://www.civilwarhome.com/liebercode.htm>.

19. Francis Lieber, Lecture at Columbia Law School: Law and the Usages of War (Dec. 17, 1961); Francis Lieber Papers, 1780–1873, Box 2, Notebooks III & IV, Special Collections, Milton S. Eisenhower Library, The Johns Hopkins University. I am grateful to John Witt for calling this material to my attention and providing me with it.

20. See G.E.M. Anscombe, *Moral Philosophy*, 33 *PHILOSOPHY* 1, 10 (1958) (using judicial murder as an example of something that may not be done, no matter the harm avoided).

This account is wrong for several reasons. First, I would not want to say that there is no good that can outweigh evils, as if outweighing were the issue. Take slavery: If it were a matter of outweighing, might not some enormous accomplishment—say, the construction of a road system that will serve millions for decades to come—outweigh the enslavement under mild conditions for a limited time of a not-large number of people? And as for torture, might not the waterboarding²¹ of a single individual to save a city present a balance of good and bad such that the former far outweighs the latter? But that is just the claim I deny. Nor can the outweighing be accomplished by giving a very large weight to the evil aspect of the equation.

All this seems a philosopher's game about how to reformulate a puzzle so that it may seem to be made to disappear. But of course it does not disappear. The perfectly understandable response of reasonable people is to dismiss what Gregory Fried calls hypertheticals as so unrealistic that they are the equivalent of asking about the laws of physics in some alternative universe. Another way of dealing with such hypertheticals²² is the one I took in *Right and Wrong*: At the margins there are cases either so trivial or so extreme that our ordinary ethical reflexes and premises do not apply.²³ János Kis makes the point that deontological constraints (because that is what we are talking about) “admit of a threshold.”²⁴

To make an analogy to physics: Within the range of ordinary experience, Newtonian addition of velocities works very well; it is only when we pass certain thresholds that relativistic analyses must be invoked. And so also with quantum mechanical indeterminacy. But these analogies in fact should intensify, rather than assuage, our perplexities and unease. After all, relativistic and quantum mechanical physics cannot be and have not been relegated to the laboratory or the lecture hall: They are in daily use in practical applications, applications on which we have come to rely. Similarly, there is a burgeoning literature on the analytics of very low probability, high value (positive or negative)

21. On the debate over whether waterboarding constitutes torture, see FRIED & FRIED, *supra* note 1, at 65–66.

22. See Anscombe, *supra* note 20, at 13 (“Finally, the point of considering hypothetical situations, perhaps very improbable ones, *seems* to be to elicit from yourself or someone else a hypothetical decision to do something of a bad kind. I don't doubt this has the effect of predisposing people—who will never get into the situations for which they have made hypothetical choices—to consent to similar bad actions, or to praise and flatter those who do them . . .”).

23. FRIED, *supra* note 12, at 10.

24. KIS, *supra* note 11, at 262.

events—for instance, an asteroid impact that would have an effect similar to the great Cretaceous extinction.²⁵

But less fantastically, the threshold thesis is vulnerable to probabilistic probing. How certain must the threshold-crossing catastrophic threat (ticking bomb) be to authorize an otherwise morally forbidden act? As the certainty goes down—and the standard confession-and-avoidance responses depend on the uncertainty either of the event or of the efficacy of torture as a response—do we then re-cross the disaster threshold so that ordinary moral prohibitions obtain?

The threshold analysis is also vulnerable along another axis: Just how many persons must be threatened by the terrorist's bomb? It has been suggested that saving even one innocent life might justify recourse to torture. The famous case is that of the German police officer who successfully threatened to torture a kidnapper in order to discover his young victim's whereabouts.²⁶ The officer was disciplined and the victim sadly was already dead. Did the officer really do the wrong thing? Would he have been wrong to carry out his threat? Would it have mattered if there had been not one but several victims? How many? Finally, there is another qualitative, not quantitative, axis: Even if it were justifiable to torture the terrorist himself, what if for some reason he were immune to torture—psychologically hardened to it or beyond reach? Would it then be justifiable to torture his young child, if that might work? And of course, this case too can then also be moved along the several quantitative axes.

II.

So neither the threshold analysis nor the confession-and-avoidance response truly avoid the confrontation between the strong moral intuition against torture and the permissibility, even the duty, to order torture in order to avert a severe harm to many. It is the confrontation between what Weber called *Verantwortungsethik* (the ethics of responsibility) and *Gesinnungsethik* (the ethics of conscience). Nor should we try to avoid the confrontation because it displays

25. See RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* (2004); CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2006).

26. See Richard Bernstein, *Kidnapping Has Germans Debating Police Torture*, N.Y. TIMES, Apr. 10, 2003, at A3, available at <http://www.nytimes.com/2003/04/10/world/kidnapping-has-germans-debating-police-torture.html>.

some deep truths about our humanity—what Kant called our status as rational beings, albeit embodied beings.

III.

Our humanity is a conception. Like a Leibnizian monad, it has several separately articulable elements, but they only work and make sense as they make a coordinated whole. The elements are: the formal distinction between a constraint and an end, and how these two elements relate to each other; the related concepts of agency and responsibility—what Weber noted in the distinction between *Verantwortungsethik* and *Gesinnungsethik*; and the articulation with each other of what Ronald Dworkin has recently usefully designated as ethics—the kind of life we make for ourselves, our responsibility for making the best life we can for ourselves—and morals—how we relate to others, our responsibility to others.²⁷ Dworkin binds them together in the concept of dignity.²⁸ This is a concept that embraces a certain aesthetic as well as an ethic and morality. Kant's quite equivalent concept is respect, respect for humanity in one's own person and the persons of all others.²⁹

Although one can break into this circle of concepts almost anywhere, I start with Weber's contrast between *Verantwortungsethik* and *Gesinnungsethik*, the ethics of responsibility and the ethics of conscience. This is the familiar contrast between consequentialist and deontological ethics, although Weber's account is both richer and less abstract. The responsible political leader weighs consequences and decides accordingly what will produce the best outcome for the people for whom he is responsible—what will assure safety and prosperity, what will avoid suffering and ruin. The person of conscience, described by Weber as a utopian prophet, is moved by ideals and pursues them no matter the cost to the people for whom he is responsible. This does not correspond exactly to the consequentialist/deontological distinction. Weber's utopian may in fact be as ruthless as Pol Pot in the pursuit of his idea. What distinguishes him from the responsible leader is his refusal to accommodate to reality, his ruthless willingness to see his project and his people end in ruin rather than compromise. But in that single-minded pursuit, the utopian may be ready to lie, cheat, steal, murder the innocent, or torture. It all depends, of

27. RONALD DWORIN, JUSTICE FOR HEDGEHOGS 13–15 (2011).

28. *Id.*

29. *See, e.g.*, IMMANUEL KANT, 4 GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN [GROUNDWORK OF THE METAPHYSICS OF MORALS] 429 (1785).

course, on what his utopian vision might be, what his conscience demands of him. The contrast does not quite bring out what I and others in the dirty-hands line of discussion have in mind. The political leader who Walzer, Kis, Machiavelli (perhaps), and I have in mind is one who considers consequences but stops short at the use of certain means.

Weber's two categories contrast an unworldly, unreasonable, perhaps fanatic prophet-leader with the practical, pragmatic, and hard-headed politician. The former may be inspiring but is likely to bring down ruin on his head and the heads of all around him. The latter may end up doing some fairly unsavory things, but he and his people will prosper in the long run or live to fight another day. As Weber writes, "[H]e who seeks the salvation of the soul, of his own or of others, should not seek it along the avenue of politics."³⁰ Machiavelli's example is of Lorenzo de Medici, who preserved the independence of the people of Florence, but at the cost of his and their excommunication.³¹

This contrast puts one in mind of the criticism of Kant's moral philosophy, current from almost the moment that it was published: The demands and status of the categorical imperative are unreasonable, inhuman, and, worst of all, empty or circular. The criticism sees Kant as proclaiming that nothing is of intrinsic value except a good will; that is, the determination to have one's conduct governed by a will to comply with the categorical imperative, with maxims that one can will as universal laws—laws governing one's own and every rational being's will. But, so goes the criticism, if only compliance with universal laws is of intrinsic value, then what are the universal laws supposed to be about—except themselves? And in that case, people have no material motives, no goals to pursue, such that the categorical imperative can judge them. And it must be said that some of Kant's account lays him open to this criticism. But it is an ungenerous reading of the great man's works, and like all ungenerous readings it misses an opportunity to deepen understanding.³²

The better way to read Kant is to acknowledge, as he does in many places, that human beings have material needs and aspirations, whose fulfillment is a proper end of human striving. Indeed, without that premise, the many passages

30. See Weber, *supra* note 9.

31. NICCOLO MACHIAVELLI, HISTORY OF FLORENCE bk. III (1901), available at <http://ebooks.adelaide.edu.au/m/machiavelli/niccolo/m149h>.

32. I might say that this ungenerous, debunking spirit animates in an analogous way and with less excuse the work of many of John Rawls's critics, who claim that his original position is either empty or a trick in which material conclusions are put into a philosophical hat only to be triumphantly pulled out as if they had not been there all along.

that condemn the unnecessary or improper frustration of that striving—like a person’s indolent or quietistic abandonment of his own such striving—is a violation of a duty to oneself and others. The correct way to understand Kant is to see the categorical imperative—in its three formulations—as imposing what in modern parlance are called constraints on the person’s human striving. That conception would not only allow, but would celebrate, those strivings and their satisfaction, so long as that striving does not transgress the moral law and the striving is carried forward in ways that are consistent with the striving—whatever their goal might be—of other human beings.

I would add the observation that neither Kant nor his followers, whether they be Ronald Dworkin or Robert Nozick or John Rawls, claim that all striving is morally equivalent: Some striving is acceptable, some humanly degraded, and some sublime.³³ But whatever the judgment on humanity’s material ends, the categorical imperative requires that those ends be pursued subject to the constraints of the moral law. This is the old distinction between the right and the good, and the misunderstood claim that the right is prior to the good. The good refers to the ends of our striving, the right to the constraints on that striving, and the latter has priority over the former only in the sense that the urgency of the good cannot override the constraints. But in a real sense, the good has priority over the right because without some ends for our striving, there would be nothing to constrain. Indeed the two are coordinated and together make up a single moral monad. Weber, in his somewhat rambling but deep discourse on politics as a vocation, may be taken to see this point, for in his peroration he proclaims:

I am under the impression that in nine out of ten cases I deal with windbags who do not fully realize what they take upon themselves but who intoxicate themselves with romantic sensations. From a human point of view this is not very interesting to me, nor does it move me profoundly. However, it is immensely moving when a *mature* man—no matter whether old or young in years—is aware of a responsibility for the consequences of his conduct and really feels such responsibility with heart and soul. He then acts by following an ethic of responsibility and somewhere he reaches the point where he says: “Here I stand; I can do no other.” That is something genuinely human and moving. And every one of us who is not spiritually dead must realize the possibility of finding himself at some time in that position.

33. See CHARLES FRIED, *MODERN LIBERTY: AND THE LIMITS OF GOVERNMENT* (2007).

In so far as this is true, an ethic of ultimate ends and an ethic of responsibility are not absolute contrasts but rather supplements) which only in unison constitute a genuine man—a man who *can* have the “calling for politics.”³⁴

But is this not just what Kant and the Kantians are saying? You must feel responsible for the consequences of your choices, but there are things you must refuse to do: “[The mature person] then acts by following an ethic of responsibility and somewhere he reaches the point where he says: ‘Here I stand; I can do no other.’” Is that not just the Kantian pursuit of the good, but subject to constraints? I shall come to a discussion of what those constraints might be and why they have the moral hold on us they do: “‘Here I stand; I can do no other.’” But here I continue to display the structure of this argument, its articulable and articulated parts.

IV.

A frequent objection to the constraints view goes this way: Some acts are so vile—for instance, torture and the killing of innocents—that they are categorically precluded. But if they are so vile, surely a virtuous political leader may, must, turn to these if he responsibly and reasonably concludes they are necessary to head off a regime in which such evils and worse will become the general rule applied to whole nations and continents. Our leaders in World War II must have believed that the reign of systematic, mechanized, pervasive, and unrestrained barbarism threatened by the Axis powers justified any such things in order that there not be vastly more of them and for decades to come. However compelling such reasoning may seem, it does not contradict—though it may undermine—the analysis I put forward. Such reasoning mistakes the terms of the analysis. A constraint is not an evil of the same sort as is calculated and weighed in casting the balance of good and evil in a course of action. The balance is cast within the frame of the constraints, and that frame is not part of the picture. Whether in the end you are convinced by this analysis, it is not vulnerable to this logical, this formal, objection. The categorical wrongs and the constraints are, to be sure, evils, but they are not weighed up with other evils to arrive at a balance of advantages. It misses the point of calling torture categorically wrong to argue that because torture is very, very evil therefore we should have as little as possible of it in

34. Weber, *supra* note 9.

the world. If that were the correct analysis, then it would be permissible—indeed required—on occasion to resort to torture in order to reduce the overall sum of torture in the world: for instance, to torture a single torturer into revealing where his henchmen in a torture ring are hiding.

This formal feature of the argument articulates with two other elements: human freedom and personal responsibility. If the categorical quality of the right applied as well to the good, then we should not cease—not for a moment, though perhaps only to rest so we could start up again with renewed energy—to act to minimize the instances of that evil in the whole world. And more, if the evil of torture or the killing of innocents is quantifiable and must be reduced by this calculation, then so must the corresponding good be weighed against it: the good of human delight, warm relationships, the glories of the arts and sciences, and the whole cast in one vast balance. Never mind how this calculation even theoretically, approximately, or locally, could be cast; think what this would do to our human freedom.³⁵ For if there were a moral obligation to minimize evil and to maximize the good everywhere and for everyone, then no one would be allowed moral space or time for his own projects. However weighty a person's project might be, it could not be that it was weighty enough to override the compound claims of all humanity. At best it would have just the weight of one project among many billions. Indeed, the entailment is more radical even than that—for if the greater well-being alone is the only overriding project of all, the very concept of an individual project disappears—for just as the greatest good of the greatest number must be my overriding project, so must it be the overriding project of everyone beside me and the notion of an individual project, or an individual good, disappears in an endless loop of utilitarian universal benevolence. Nor is it any good to say that every individual is liable only to devote X percent of his energy to the well-being of others, the remainder being reserved to himself and his own projects—like disposable income after payment of all one's taxes. Whatever that percentage might be, is it the same for all? Or is there perhaps progressive obligation, with the more fortunate bearing a larger obligation, as with a progressive income tax?

The objection might then be made that if our own projects have this transcendent weight, why should anyone stop at anything in pursuing them? From counting some things as so evil—wrong—that we must not do them no

35. See generally FRIED & FRIED, *supra* note 1, at 44–49; FRIED, *supra* note 12, at 7–29.

matter what, we seem to have come to a point where we might say that a person may do anything in pursuit of his individual project. And this is just the mirror image of the contention that a person may do nothing in pursuit of his individual project. If it is indeed the case that some things are so evil that we may not do them no matter what, how do we arrest the logical slide to an all-encompassing obligation to stop all such evils in the world: all torture, all killing of innocents, all suffering of children? It is only by marking a sharp distinction between what we do and what we allow to happen through the doing of others—or no one—that the value of particular personal projects can be rescued from being gobbled up by a kind of consequential absolutism. Attributing special significance to personal agency provides a coordinated solution to two problems we have been looking at: the categorical prohibition of torture or killing of innocents, and the consuming obligation of universal good. While there is no obligation to devote every personal resource and every waking moment to minimizing the amount of torture in the world, there is an absolute prohibition on becoming the *agent* of torture (a torturer) oneself. The former leaves room most of the time for personal values and projects. The latter (the absolute prohibition) may sometimes entail great, even final, costs to oneself and others. One's projects are in the realm of the good. The absolute prohibitions constitute the frame in which the good is pursued, the frame of the right.³⁶

Finally, it should be clear that the good need not on this view be seen as a matter of mere subjective preference leaving no ground for judging the relative value, as Jeremy Bentham put it, of push-pin or poetry.³⁷ Rawls, in *A Theory of Justice*, offers a preliminary sketch of a theory of the good.³⁸ His version of push-pin is counting blades of grass in well-trimmed lawns,³⁹ and Dworkin's is collecting matchbook covers⁴⁰—except, unlike Bentham, they view these as obvious refutations of Bentham's thesis. I shall not try to offer a comprehensive theory of the good, nor how it articulates with the right. Kant, Rawls, and Dworkin all make proposals and the subject is of surpassing interest, difficulty, and importance. Instead, I want to come back to the dilemma

36. See generally DWORKIN, *supra* note 27, at 271–99; FRIED, *supra* note 33; FRIED, *supra* note 12; Anscombe, *supra* note 20, at 11–13.

37. JEREMY BENTHAM, THE RATIONALE OF REWARD 206 (1830) (“Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry.”).

38. JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

39. *Id.* at 432–33.

40. DWORKIN, *supra* note 27, at 257.

with which we started: Can it really be required that we not torture one person in order to save a city; and does the answer differ depending on whether we act on our own or as political leaders responsible for the welfare of society?

V.

There is an appeal to the idea of the sacred and the violation of the image of God to account for and justify the absolute prohibition on torture. Account for it, it may, but how—in secular terms—does it justify the absolute prohibition? Is there a secular version of the sacred? For Kant, as I have said, it is the concept of respect—respect for humanity in one’s own person or the person of another—and for Dworkin, it is dignity. The articulated unity of the right and the good are the argument behind these formulations. We are striving, valuing, judging, thinking beings and not just—as a simplified Benthamite utilitarianism would have it—loci of pleasure and pain. It may be thought old hat, but it is worth remembering Rawls’s rejection of Benthamite utilitarianism as a principle of social justice in favor of his two principles of justice. I draw passages from § 6 of *A Theory of Justice* (“Some Related Contrasts [To Utilitarianism]”):

[W]e distinguish as a matter of principle between the claims of liberty and right on the one hand and the desirability of increasing aggregate social welfare on the other . . . Each member of society is thought to have an inviolability founded on justice or, as some would say, on natural right, which even the welfare of everyone else cannot override. . . .

. . . [I]f we assume that the correct regulative principle for anything depends on the nature of that thing, and that the plurality of distinct persons with separate systems of ends is an essential feature of human societies, we should not expect the principles of social choice to be utilitarian . . . To do this is not to take seriously the plurality and distinctness of individuals . . . All ethical doctrines worth our attention take their consequences into account in judging rightness. One which did not would simply be irrational, crazy . . . The principles of right . . . put limits on which satisfactions have value. . . . A just social system defines the scope within which individuals must develop their aims . . . The priority of justice is accounted for, in

part, by holding that the interests requiring the violation of justice have no value.⁴¹

Although Rawls makes his argument in the cooler context of principles of justice, more specifically distributive justice, it extends naturally and inevitably to all aspects of the limits on how we may treat each other. If we must not accept the lower welfare of some as a price for the greater prosperity of the whole—if, for instance, the enslavement of a portion of the population cannot be justified by the greatly increased well-being, safety, or delight of the whole—then the same argument would forbid torturing a few—or even one—to procure that well-being and security. And don't say, "But we are not talking about torturing the innocent, only the terrorist we have captured, who . . .," and so on. Remember the terrorist proof against pain but not against the suffering inflicted on his child, and watch your objection unravel.

This conception does not ignore or devalue the ends we pursue, or the pains and pleasures we experience—it is not, in Rawls's word, "crazy"—but it does put them in a frame; it does constrain them, and sometimes the constraints bear down hard. It does not ignore our ends as human beings, but by putting them in the frame of right, it gives them a value they could never have in a global, undifferentiated aggregation of satisfaction. Rawls relates that framework conception to the distinctness of persons. I would gloss that with the Kantian notion of persons as judging, choosing, valuing entities—what Kant calls free, rational beings. The frame and its content are correlated, and the standard locution of the priority of the right over the good misleads. The right, the constraints, without the good—that is, the projects, affections, pains, and pleasures, the pursuit of which is constrained—is empty; the ends, the pursuits, without the framing constraints is formless and incoherent. Each alone is valueless. And what are those constraints? They are described variously by Rawls, Kant, Dworkin, and many others, but the conception, the argument on which these accounts converge, makes the very capacity to choose ends, to choose one's good within the constraints of the right, as constituting a person's distinctive humanity. It is that capacity that makes one's projects valuable, makes the persons pursuing those projects valuable, and for that reason makes us all valuable in the same way and to the same degree. Finally, it is the congeries of frame and content that explains why our individual projects have value as our projects and not as infinitesimal contributions to

41. RAWLS, *supra* note 38, at 27–29.

some global soup of generalized value. All this is summed up in the Kantian conception of respect: respect for humanity whether in our own person or in the person of another.

To disrespect another is to disrespect oneself, to devalue one's own projects, or to treat oneself merely as a goldfish one feeds rather than a human person with human ends. Rawls and Dworkin write of relatively civilized forms of disrespect, the kinds we meet with in an active democratic society. Torture, killing of innocents, and frank enslavement should be easier, but they stymie us for another reason. Injustices of the sort Rawls and Dworkin talk about are generally structural and institutional and admit of considerable nuance—after all, Rawls takes us down three steps of generalization before we get to an individual act (original position, constitution, legislation).⁴² My claim is that there are particular acts that are categorically wrong no matter what the constitutional or institutional setting: No legislature may authorize them; no higher level official may order them; no officer may inflict them. And no threat can justify them. That is not a kind of case my authorities put to themselves.

How do we explain—other than by what I have described as confession and avoidance—a result where the suffering visited on one (or 100,000) will avoid the suffering of many? Let us concede that we and many will survive, but we must go on to ask—what shall we survive *as*? This is a shorthand way of suggesting that, for instance, the physician who saves several young, vigorous patients by killing an older, infirm patient to allow the transplant of his organs is no longer a physician and decent man, but a murderer; and his patients survive, but survive as cannibals. The nation that survives by treachery and inhumanity in warfare survives and prospers, but survives no longer as a democracy constituted by principles of humanity and decency. Athens, on Thucydides's account of the famous Melian Dialogue in the *Peloponnesian War*,⁴³ prospered, but as a predator state, an historic paradigm of shame and lost honor. If survival were the ultimate criterion of choice, men and women would never risk, or indeed give, their lives in service of an ideal. Mortality as the frame for our choices means that all living (well or ill) is an expenditure of life and not its prolongation. All living is dying.

42. See generally *id.*

43. THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR bk. 5, at 84–116 (Richard Crawley trans., 1874), available at <http://classics.mit.edu/Thucydides/pelopwar.5.fifth.html>.

But evocative as that may be, it is not quite an argument. Casting the evocation in cooler terms, I come back to the frame analogy. If an action, a choice of pursuit of the good, has value only within a frame, and if an act of torture can be shown to be outside the frame—not just an evil to be endured but a wrong not to be committed—then the argument of the balance of advantage does not go through. So why is torture wrong? Compare torture to violence up to the point of killing in battle. In battle, the combatants seek nonlethal goals but are prepared to use force to the point of killing to attain them, and the opponent both defends against the attack and correspondingly seeks to attain his goal in battle. Both may entail killing, and in both to shrink from killing may be to abandon one's goal in the face of resistance by an adversary. Section 15 of the Lieber Code—just before the one quoted at the outset—states:

Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the Army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.⁴⁴

The Kantian point is that we cannot morally be required to give up our peaceful and moral goals because of the wrongful violence of an enemy, for to do so would make our moral right to pursue goals, to have a good we embrace, hostage to the unjust violence of an adversary. Pacifism may be a choice, a good we embrace, but it is not a moral requirement. The military concept that expresses this system of permissions and constraints goes by the archaic but still invoked concept of chivalry.⁴⁵ Torture, by contrast, aims not simply to stop an enemy—even by killing him—but seeks to defeat him by

44. Lieber, *supra* note 18.

45. See SCARRY, *supra* note 3, at 60–157.

causing his physical nature to overwhelm his mind with pain and to overwhelm his will so that he becomes inhabited by pain. The morally recognizable person is suspended, and he is turned into a mere physical entity, an animal constituted by pain who retains human faculties—of speech and choice—only as they are mastered by pain. The frame of right and wrong is the frame of our humanity, our moral anthropology. Torture seeks to destroy that humanity in a quite precise way: A moral being is one capable of choice, of moral deliberation. It is the point of torture not to destroy the person—as in killing—but to destroy him as an entity capable of choice. Making an offer the victim cannot refuse is to mobilize the capacity of choice; torture intends to overwhelm it.⁴⁶ Thus, torture quite literally contravenes the injunction to respect humanity, whether in one's own person or the person of another. The ugliness of the torture pictured in *Interrogation I* is quite different from the ugliness of, say, Thomas Eakins's *The Gross Clinic*, which shows the distinguished surgeon operating before an amphitheater of students and observers—with one squeamish participant off to the side shielding his gaze. But what Eakins portrays is not moral ugliness; it is not the moral destruction of a human being.



Thomas Eakins, *The Gross Clinic* (1875), Philadelphia Museum of Art, Philadelphia, <http://www.philamuseum.org/collections/permanent/299524.html>

46. Threat of torture is a difficult intermediate case.

Now back to heaven and the principal conundrum I present. Does not my reference to these depictions really make the point against me? Is not the public officer who will not use torture when it may save many not just displaying a moral squeamishness akin to that of the person at the left of the Eakins painting? And just as a surgeon who cannot stand the sight of blood is not fit to practice surgery, is not a statesman who will not—when necessary—order torture or the dropping of the atom bomb unfit to lead? Maybe such squeamishness will be rewarded in heaven and the innocents who suffer as a result will find solace there too, but one is entitled to insist that such hard results be explained here below. After all, it is a matter of survival. But surviving as a torturer, as a monster, is not to survive at all. But exactly what does that mean? Truman did drop the bomb; the allies did engage in terror bombing during World War II; and the Bush Administration did waterboard. And here we all still are. Is that not the analogy to Samuel Johnson's famous response upon hearing Bishop Berkeley's argument about the immateriality of material objects: "Johnson answered, striking his foot with mighty force against a large stone, till he rebounded from it—I refute it thus."⁴⁷

To argue that there are practical, factual sequelae to these moral transgressions—lost prestige or greater liability that torture will be used against our captured personnel—is to revert to a form of argument I have tried to eschew. But notice the "and here we all are" refutation is, strictly speaking, beside the point, or at any rate circular. It assumes the validity of the consequentialist thesis in offering a consequentialist response, or by demanding a consequentialist justification for the moral prohibition. Notice how strong the consequentialist thrust is: It causes us to seek desperately for consequences after all, somewhere, somehow for transgressions we know to be wrong, whether there are bad consequences or not. That is why I entitle this Essay *Heaven*, after that desperate urge. But heaven does not solve the dilemma; it spoils it.

I want to confront us at the end with the stark fact that the only certain consequence, the only necessary and morally sufficient consequence of a wrong act, is the condemnation of that act as wrong, and that is just the correlative of what Kant calls acting for the sake of the moral law alone. We may very well accomplish nothing more, nothing else than that we do right and avoid wrong in refraining from torturing a terrorist, in freeing a man unjustly accused whom it would be convenient to punish. Even to say that, in making

47. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 238 (1763).

those choices, we affirm our moral humanity almost misses the point—as if we made these decisions in order to affirm that humanity. It is better to say that in acting thus we *are* moral men and women. Max Weber’s essay is so moving not just because of the depth of his realization of the difficulties and moral heroism that politics as a vocation requires, but because he saw that, at the end of the line, calculation runs out:

[I]t is immensely moving when a *mature* man—no matter whether old or young in years—is aware of a responsibility for the consequences of his conduct and really feels such responsibility with heart and soul. He then acts by following an ethic of responsibility and somewhere he reaches the point where he says: “Here I stand; I can do no other.” That is something genuinely human and moving.⁴⁸

Torture is that point. Lincoln’s Code, as John Witt has recently called General Orders No. 100, the code drafted by Lieber,⁴⁹ is a hard-headed and even violent code. It is a code for warriors, but like Weber’s mature man—and Lincoln and Lieber were mature men—it reaches a point where it says, in effect: “Here we stand; we can do no other.” Here again is Article 16:

Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.⁵⁰

VI.

Finally, by way of coda, let us reflect on whether those who ordered and made way for torture should be prosecuted and punished. One view is straightforward. They committed crimes, crimes more serious than most we do prosecute and condemn. To draw back is to deny the very thing that the whole argument proclaimed. This is a Burkean argument about national character and how devastating it can be to meddle with shared ethical instincts

48. Weber, *supra* note 9.

49. John Fabian Witt, *Lincoln’s Code*, Speech at the Harvard Law School Legal History Workshop (Feb. 21, 2011), available at <http://www.law.harvard.edu/faculty/faculty-workshops/witt.legal.history.workshop.spring.2011.pdf>.

50. Lieber, *supra* note 18.

cultivated over generations. Torture is the habit of tyranny, not of free republics, and it cannot simply be switched off and on. But another view has it that the precedent of an administration prosecuting the high officers of its predecessor regime—the sordid history of the independent counsel law—is itself contrary to the practice of democracies; we do not have a revolutionary regime punishing the criminals of a tyranny it overthrew and replaced, but an orderly democratic succession that repudiated the previous one; and the crimes—though crimes they may have been—were committed not in a war of aggression but in order to protect us against an enemy who did not hesitate to use torture and mass killing of innocents.⁵¹

The first view, requiring punishment, appears to be a consequentialist, causal argument, but the causation is what many years ago I called “moral causation”: It follows into action the entailments of a moral argument.⁵² Indeed, Kant is more on that side than the second. In *Rechtstehre*, he famously proclaims:

[W]oe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: “It is better that one man should die than that the whole people should perish.” For if justice and righteousness perish, human life would no longer have any value in the world.⁵³

Certainly the last clause affirms that no consideration of advantage (what I have called the good) can justify a violation of right. This is Kant’s answer to the ticking bomb hyperthetical—as it is mine. But this argument is embedded in a larger argument that urges that justice condemn even *not* punishing the guilty, rather than condemn only punishing, as the Pharisees might, the innocent. Kant is emphatic in finding justice in society’s response to injustice, for example, in the form of the execution of the murderer:

His death, however, must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable. Even if a civil society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves

51. This is the disagreement between Gregory Fried and myself in the last chapter of *Because It Is Wrong*. FRIED & FRIED, *supra* note 1, at 163–69.

52. See Charles Fried, *Moral Causation*, 77 HARV. L. REV. 1258 (1964).

53. IMMANUEL KANT, RECHTSLEHRE [SCIENCE OF RIGHT], pt. 2 (W. Hastie trans., 1790), available at <http://ebooks.adelaide.edu.au/k/kant/immanuel/k16sr/>.

throughout the whole world—the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.”⁵⁴

The best I can make of this is: If you have a system of just punishment and condemnation as part of a system of justice in an organized society and that society assumes the right to use force against the unjust in order to maintain justice, then withholding of punishment so contradicts and undermines that system of justice—to which persons have willingly and rightly submitted—that it cannot absolve for any reason a wrongdoer from just punishment. Perhaps the victim, who may now be dead, may do that, but the society that undertook to protect him may not.

Any unease may be connected to a more general unease about Kant’s theory of punishment. I am of course convinced that personal culpability is a necessary condition of punishment. I am less sure that it is a sufficient condition. Rather, culpability is the condition that justifies using force against the offender in certain ways: for deterrence or incapacitation. As to the death penalty, in the same section just quoted and in which Kant proclaims the retributive necessity of executing the last remaining convicted murderer in a disbanding society, Kant insists that “[h]is death . . . must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable.”⁵⁵ Now, I believe there is *no way* that the state can put to death a prisoner wholly in its power that would not “make the humanity suffering in his person loathsome or abominable.” And execution by lethal injection, a gruesome parody of medical treatment, is by no means the least offensive means of execution. But that is a topic for another day. Kant’s Mikado-like⁵⁶ insistence that the punishment not only fit the crime, but mirror it, is a reversion to consequentialism, such that crime after all be answered by condign punishment—that here on earth there be consequences to right and wrong that mimic what Dante imagined would happen in heaven and

54. *Id.*

55. *Id.*

56. The Mikado in Gilbert and Sullivan’s eponymous operetta proclaims, “My object all sublime / I shall achieve in time — / To let the punishment fit the crime — / The punishment fit the crime.” WILLIAM S. GILBERT & ARTHUR SULLIVAN, *The Mikado or the Town of Titipu*, in *THE WORKS OF SIR WILLIAM GILBERT AND SIR ARTHUR SULLIVAN* 18 (2005).

hell. Here—I would say confidently only that society is morally obliged—we are morally obliged—to shame and condemn those who have tortured, those who have ordered torture, and those who have justified it. By treating as honored fellow citizens those who have dishonored themselves as human beings, we dishonor ourselves.