

PLACING BLAME

A General Theory of the Criminal Law

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3. *Non-Absolute Moral Norms: Threshold Deontology* Apart from the exceptions that the content of moral norms must have for them to be plausible, a third modification of absolutism is the softening of the 'whatever the consequences' aspect mentioned earlier. This aspect of absolutism is often attributed to Kant, who held that though the heavens may fall, justice must be done. Despite my non-consequentialist views on morality, I cannot accept the Kantian line. It just is not true that one should allow a nuclear war rather than killing or torturing an innocent person. It is not 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 actions seem to me to be justified.

There is a story in the Talmudic sources that may appear to appeal to a contrary intuition.¹²² It is said that where the city is surrounded and threatened with destruction if it does not send out one of its inhabitants to be killed, it is better that the whole city should perish rather than become an accomplice to the killing of one of its

¹²¹ See the discussion of the criteria used by the 'Seattle God Committee', which for a time decided who would live and who would die in Seattle, in Katz, *Bad Acts*, *supra* n. 11, at 53–6.

¹²² *Tosefta*, *Trumot* 7, 23; Jerusalem Talmud, *Trumot* 8, 4(46b).

inhabitants. Benjamin Cardozo expressed the same intuition in rejecting the idea that those in a lifeboat about to sink and drown may jettison enough of their number to allow the remainder to stay afloat. As Cardozo put it:

Where two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by the killing of another. There is no rule of human jettison. Men there will often be who, when told that their going will be the salvation of the remnant, will choose the nobler part and make the plunge into the waters. In that supreme moment the darkness for them will be illumined by the thought that those behind will ride to safety. If none of such mold are found aboard the boat, or too few to save the others, the human freight must be left to meet the chances of the waters.¹²³

There is admittedly a nobility when those who are threatened with destruction choose on their own to suffer that destruction rather than participate in a *prima facie* immoral act. But what happens when we eliminate the choice of all concerned to sacrifice themselves? Alter the Talmudic example slightly by making it the ruler of the city who alone must decide whether to send one out in order to prevent destruction of the city. Or take the actual facts of the lifeboat case¹²⁴ to which Cardozo was adverting, where it was a seaman who took charge of the sinking lifeboat and jettisoned enough of its passengers to save the rest. Or consider Bernard Williams's example, where you come across a large group of villagers about to be shot by the army as an example to others, and you can save most of them if you will but shoot one; far from choosing to 'sink or swim' together, the villagers beg you to shoot one of their number so that the rest may be saved.¹²⁵ In all such cases it no longer seems virtuous to refuse to do an act that you abhor. On the contrary, it seems a narcissistic preoccupation with your own 'virtue'—that is, the 'virtue' you could have if the world were ideal and did not present you with such awful choices—if you choose to allow the greater number to perish. In such cases, I prefer Sartre's version of the Orestes legend to the Talmud: the ruler should take the guilt upon himself rather than allow his people to perish.¹²⁶ One should

¹²³ Cardozo, *Law and Literature and Other Essays and Addresses* (New York, 1931), at 113.

¹²⁴ *United States v. Holmes*, *supra* n. 55.

¹²⁵ Smart and Williams, *Utilitarianism*, *supra* n. 31, at 98–9.

¹²⁶ Jean-Paul Sartre, 'The Flies', in *No Exit and Three Other Plays* (New York, trans. L. Abel, 1955).

feel guilty in such cases, but it is nobler to undertake such guilt than to shut one's eyes to the horrendous consequences of not acting.

I thus have some sympathy for the Landau Commission's conclusion that 'actual torture . . . would perhaps be justified in order to uncover a bomb about to explode in a building full of people'.¹²⁷ If one does not know which building is going to explode, one does not have the consent of all concerned to 'sink or swim' together. On the contrary, one suspects that like Williams's villagers, the occupants of the building, if they knew of their danger, would choose that one of their number (to say nothing of one of the terrorist group) be tortured or die to prevent the loss of all. In any case, the GSS interrogator must choose for others who will pay the costs for his decision if he decides not to act, a cost he does not have to bear; this situation is thus more like my variation of the Talmudic example than the original.

Many think that the agent-relative view just sketched, allowing as it does consequences to override moral absolutes when those consequences are horrendous enough, collapses into a consequentialist morality after all. Glanville Williams, for example, in his discussion of the legal defence of necessity, recognizes the agent-relative view that 'certain actions are right or wrong irrespective of their consequences' and that 'a good end never justifies bad means'.¹²⁸ Williams nonetheless concludes that 'in the last resort moral decisions must be made with reference to results'.¹²⁹ Williams reaches this conclusion because, as Williams sees it, the agent-relative slogans just quoted reduce to the claim 'that we ought to do what is right regardless of the consequences, *as long as the consequences are not serious*'.¹³⁰

Contrary to Williams, there is no collapse of agent-relative views into consequentialism just because morality's norms can be overridden by horrendous consequences.¹³¹ A consequentialist is committed by her moral theory to saying that torture of one person is justified whenever it is necessary to prevent the torture of two or more. The agent-relative view, even as here modified, is not committed to this proposition. To justify torturing one innocent person requires that there be horrendous consequences attached to not torturing that person—the destruction of an entire city, or, perhaps,

¹²⁷ *Landau Report*, *supra* n. 1, at 60.

¹²⁸ Williams, *Criminal Law*, *supra* n. 11, at 729.

¹³⁰ *Ibid.* (emphasis added).

¹²⁹ *Ibid.*

¹³¹ Nagel, 'War and Massacre', *supra* n. 45.

of a lifeboat or building full of people. On this view, in other words, there is a very high threshold of bad consequences that must be threatened before something as awful as torturing an innocent person can be justified. Almost all real-life decisions a GSS interrogator will face—and perhaps *all* decisions—will not reach that threshold of horrendous consequences justifying torture of the innocent. Short of such a threshold, the agent-relative view just sketched will operate as absolutely as absolutism in its ban on torturing the innocent.¹³²

Despite this logical difference between agent-relative views of morality with a threshold, and consequentialist views of morality, there is of course a real danger that as a matter of psychological fact people will tend to confuse the two. As Bernard Williams has noted, it is very easy to slide from ‘the idea that there was nothing that was right whatever the consequences’—the non-absolutist but agent-relative idea I have defended here—to ‘the idea that everything depends on consequences’—the consequentialist view I reject.¹³³ For the threshold of exceptionally awful consequences is bound to appear as a somewhat arbitrary line wherever it is drawn. By the familiar process of adding just one more straw to the camel’s back, people may thus push back the line further and further until the exceptional becomes the usual, and the balance of consequences always determines what it is right to do.¹³⁴

¹³² As Amartya Sen has observed, a threshold-deontology will *in some sense* be a consequentialist system: ‘Such a threshold-based constraint system must rest ultimately on consequential analysis, comparing one set of consequences (badness resulting from obeying the constraint) with another (badness of violating the constraint itself, given by the threshold), and its distinguishing feature will be the particular *form* of the consequence-evaluation function.’ Sen, ‘Rights and Agency’, *supra* n. 34, at 187–223, 190–1, n. 8. This will particularly be true of a threshold deontology that varies the threshold (where consequences begin to count) directly with the degree of wrongness of the act to be justified by its consequences. (That is, the greater the wrong to be done, the higher the threshold of bad consequences averted has to be to justify the action as right.)

Saying all of this still does not collapse threshold deontology into consequentialism. Even if the goodness of consequences is always relevant to the rightness of actions for a threshold deontologist, the goodness of consequences does not determine the rightness of actions as it does for a consequentialist. Contrary to Sen, the degree of (agent-relative) wrongness of an action does not translate into some degree of (agent-neutral) ‘badness of violating the constraint’. The threshold deontologist does not think that the wrongness of *his* doing a certain act is just another bad consequence that can be outweighed by the better consequences of preventing like acts by others.

¹³³ Smart and Williams, *Utilitarianism*, *supra* n. 31, at 93.

¹³⁴ *Ibid.*, at 91–2.

That this is a psychological danger is a reason not to tell people that there are thresholds of awfulness that justify *prima facie* immoral behaviour. It is not a reason to doubt that there are such moral thresholds for consequential calculation. It is the truth of this last proposition that governs the retrospective question with which I am here concerned. How one handles the psychological danger I pick up when I discuss the prospective question of new rules for GSS interrogations.

Even if threshold deontology does not collapse into consequentialism, many think such a view of morality to be arbitrary and irrational. Why should goodness of consequences not count at all and then, at some point, count enormously in the sense that it fully determines the rightness of action? What is overlooked by those convinced by this suggestion is that the threshold deontologist is not committed to denying that consequentialism is one moral principle among others. As Tom Nagel concedes, 'there is one important component of ethics that is consequentialist and impersonal'.¹³⁵ If our behaviour does not violate a moral norm like 'don't torture' (and is not excepted by a moral permission like 'you need not give away all of your money'), goodness of consequences does determine the rightness of actions.

Thus, for a threshold deontologist consequences always 'count'. For behaviour violating deontological restraints, however, until the threshold is reached the principle that makes such consequences count—the consequentialist principle itself—is outweighed by other moral principles. As the consequences get more and more severe, the consequentialist principle becomes of greater weight as applied to this situation, until at some point (the threshold) the consequentialist principle outweighs competing principles of morality. Even before such a threshold was reached, consequences counted but were of insufficient weight to determine the rightness of actions. An analogy may help here: imagine water slowly rising behind a dam until eventually it spills over. There is nothing arbitrary about thinking *both* that there is no spillover until the threshold of the dam's height is reached, and that each bit of water always counts in determining whether water will spill over the dam or not.¹³⁶

If the rationality of a threshold-deontological view of morality is to be questioned, it will have to be on grounds other than these.

¹³⁵ Nagel, *View*, *supra* n. 35, at 164–5.

¹³⁶ I owe the analogy to Joseph Raz.

Perhaps the worry is not the apparent suddenness with which consequences seem to count for everything where before they counted for nothing; rather, the worry may be that any point we pick for a threshold beyond which consequences determine the rightness of action may seem arbitrary. Do we need there to be 500 people in a building about to be blown up by a bomb before we may torture an innocent to find the bomb's location, or will 450 do?

Although this worry can surely give rise to quite genuine perplexity and anxiety when we make practical decisions, it is not the basis of any very powerful objection to threshold deontology as a moral theory. For this is no more than the medieval worry of how many stones make a heap. Our uncertainty whether it takes three, or four, or five, etc., does not justify us in thinking that there are no such things as heaps. Similarly, preventing the torture of two innocents does not justify my torturing one, but destruction of an entire city does. And if an actual case arises where I have to say whether preventing the death of 450 people in a building is sufficiently good to justify the torture or killing of one innocent, I would want to know more details as to what was done to the innocent to extract the information—for where the threshold lies depends in part on the degree of wrong done.