

"Should Terrorists Negotiate With Us? Non-Ideal Theory, the Problem of Extorted Justice and a New Preemptive Role for the Diplomat Cadre"¹

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Abstract and Introduction: When we say we shouldn't negotiate with terrorists, what we're really saying is we shouldn't concede anything to terrorists. I argue that many of the reasons for this view are bad, bad not least because sometimes the grievances of terrorists are just; because, depending on the nature and conditions of the grievances, sometimes the method of extorting redress of injustice by violent means is a just method; and because, whether they are wholly just in grievance and method or not, if we are not prepared to concede anything to terrorists, it is not reasonable to expect them to stop. I then comment on when negotiation would not be appropriate. Along the way I reflect briefly on how the relation between ideal and non-ideal theories of justice should figure in negotiations (theories of the ideal distribution of goods, and theories of how to move from non-ideal to ideal distributions), suggesting that the correct general theory of both would be whichever one could succeed in brokering a stable peace among everyone. This means the test case of negotiating with terrorists is data for both the correct ideal and the

¹ As always I'm deeply indebted to LW for discussion of nearly every point in this paper. My thanks also to Sheldon Wein, and to a colloquium audience at Dalhousie University to which an earlier version was presented. Finally, my thanks again to Claire Finkelstein and the rest of the people at the Center for Ethics and the Rule of Law for creating the detailed concept of the conference for which this paper was prepared.

correct non-ideal theory. I conclude with some proposals about how to redeploy the world's diplomatic cadre in pre-emptive work to prevent future terrorism.

Preamble

Is justice extorted justice still? What if it is extorted by a madman?

One of the most difficult scenarios in which to work out what one's ethical position ought to be is this: you are party to group A, and you or other parties to group A have harmed parties to group B (e.g., by stealing their land; or, out of entrepreneurial zeal or from fear of alternative ideologies, by backing a strongman friendly to your enterprises or your ideology, a strongman who wound up committing atrocities against his own people; or parties to group A have discriminated against parties to group B on grounds of their sex, gender, race, class, national origin, language, religion, tribal affiliation or whatnot, thereby oppressing them and impairing their life prospects; or group A has directly killed some of them, or has maneuvered without due regard for their life in, for example, combatting encroachments of other ideologies); or you and other parties to group A have profited from historical harms to parties to group B, whether wittingly or not (e.g., by inheriting wealth your ancestors stole from their ancestors, or by living in social arrangements that systematically favor you over them). Suppose that the harmed parties cannot get attention to their grievance without resorting to harms to parties to group A (e.g., by blowing up innocent civilians in their restaurants, or kidnapping and beheading their journalists or aid workers). Perhaps this is B's only recourse because they do not have state-hood; or because, lacking militaries, they are otherwise so weak that the methods of terrorism are their only powers; and because the rule of law now prevails and such rule is inherently conservative, protecting the status quo distributions of goods. Let

us say that the harms to the group B parties were unjust. And taken out of context, the harms to the group A parties are unjust.

The harms the parties to group B inflict under the foregoing conditions might well be called terrorist-inflicted harms. But the term needs careful definition. Some people define a terrorist as someone engaged in illegitimate violence. I shall stipulate it to mean only someone who commits violence against civilians to advance a political cause. This definition leaves it open whether all terrorists and terrorist acts are illegitimate.² I justify this definition by the fact that one person's terrorist is often another person's noble rebel; and this implies that there is room for disagreement about the morality of the actions in specific cases. Actually even this claim is controversial: someone might use the term noble rebel only for those who restrict their violence to figures of authority, not civilians. But I shall argue that this isn't necessarily right.

Next there is the issue whether all terrorists are in effect engaging in advocacy for those against whom some injustice has been perpetrated. Some will say that no one who engages in violence against civilian populations is such an advocate.³ The actions are so utterly morally unhinged that really the person must be acting out a sociopathy in an action that is purely criminal, or must be plagued with some other sort of mental illness.⁴

² My thanks to Tom Vinci for pressing me on this. For more on the significance of this sort of naming, see M.V. Bhatia, *Fighting words: naming terrorists, bandits, rebels and other violent actors*, Third World Quarterly 26 (2005), 5–22.

³ Thanks to Susan Sherwin for pressing me on this issue.

⁴ Thanks to Francois Baylis for this idea.

I don't believe this is correct. For even major powers at war sometimes deliberately target civilian populations for violence – the atomic bombing of Nagasaki and Hiroshima in WWII, and so on – and it is certainly not obvious that these were necessarily sociopathic, criminal actions.

No doubt some terrorist acts are merely sociopathic, however. And even the ones that are at least ostensibly engaged in out of a justifying political manifesto might be thought evidence that there is something psychologically wrong with the people who engage in them, especially if the actions involve very intimate harm -- think of what would have to be true of the psychology of someone who could cut off a man's head with a knife.

Nevertheless, I shall take it that many of these actions would not have been performed were it not for the availability of a prima facie morally justifying pretext. Sometimes that may be a legitimate motive for the agent, other times perhaps only a manifesto of convenience for someone who just wants some pretext or other to commit violence; and on the latter occasions, perhaps the person is engaged in a truly evil act, one defined, say, by being the willful inflicting of great harm on a person who does not deserve it, where the perpetrator either knows she's doing wrong, or would know it were it not for her being self-deceived about this, that is, ignorant of the wrongness but responsible for her ignorance.⁵ Other times perhaps the actions are done by mercenaries for financial compensation or as part of a life-style those attracted to the profession of

⁵ Thanks to Todd Calder for discussion on this point; the conception of evil I'm working with is a variant on one developed by him.

mercenary enjoy⁶; or the actions may be done from religious hope (of a better afterlife) or religious conviction (conviction that the act is demanded by God), or under duress, or from despair, or as part of a quest for a life of affiliation and meaning, a quest that finds meaning in a Manichean conflict and in a high stakes mission for the advancement of one side in the conflict. Either way, sometimes the agents who perform these actions are acting under the orchestration of someone else arguably sane, rational, and possibly moral, but possibly instead merely cynically avaricious, and who in any case bears some responsibility for the action of the person he orchestrates. Moreover, sometimes the people who engage in these actions are able to be influenced by less violent representatives of the aggrieved group the terrorist purports to act in aid of. And these people in turn will be in some degree responsive to the wishes of the rank and file in the group. Next, all of this often occurs in the context of a country where people in power could do a good deal to alleviate the complaint of the aggrieved, and so to eliminate terrorism by assuaging the purported pretexts of those who would do terrorist actions.

The foregoing list of those implicated in one way or another in a terrorist action is relevant to another question, namely, who is it that we are imagining negotiating with when we imagine negotiating with terrorists?⁷ Put another way, what sorts of things done by who counts as negotiating with terrorists?

⁶ Thanks to Oriel MacLennan for this thought.

⁷ My thanks to Jobin Kanjirakkat for encouraging me to clarify this, and for some of the other ideas in this note. A further question is who we imagine to be doing the negotiating – here I’m assuming it will be the legal representatives of the states against which

Obviously it would count as negotiating with terrorists if one tried to negotiate with a person about to perform a terrorist act – taking him into taking off the suicide vest, for example, with the promise of compassionate treatment, or the promise of change in the policies to which he objects. But I shall count as negotiating with terrorists also negotiating with their master-minds, with the political leaders of the cause which the terrorist ostensibly seeks to advance, with the rank and file of that group, with the political leaders of the country in which resides the group the terrorist purports to be trying to help, and with the political and community leaders of the countries from which terrorists are recruited. That is, I shall count it as negotiating with terrorists if one does anything to try to assuage the grievance of any party on whose behalf a terrorist

terrorists conduct their activities. And either way, we must be careful of overly contrasting “us” and “them” when thinking about negotiating with terrorists. Both parties in a negotiation share enormous commonalities as people, and fostering the idea that they share natures, needs and interests can be a help in negotiations. Another related issue is whose conception of justice we are using when we negotiate, when deciding whether to negotiate, and when trying to find common ground for negotiation (thanks to Richmond Campbell for this issue) – the conception of the negotiator and the conceptions of the people being negotiated with or of the people we are negotiating on behalf of might differ on whether a given concession is a concession towards or away from justice. There is also the question whether it is plausible to think there is such a thing as non-culturally-relative justice. Thanks to Austin Booth for pointing out that I’m assuming that justice is non-relative throughout this paper.

ostensibly acts, or tries to improve the lives of the social group from which terrorists are recruited, provided that this is done in response to or with the aim of preventing terrorist acts.

Suppose, for example, that terrorists who purport to be advancing the cause of establishing a radical Islamic state themselves spring from the ghettos of major Western European cities, ghettos full of young middle-class men raised in Europe, unable to find meaning in their lives or to form affiliations, young men unable to get jobs and admission into prosperous society and so who self-radicalize into the cause of forming a Caliphate. And suppose various Western governments then resolve to improve the lives of the people in this recruitment base (if not the lives of those who have already engaged in terrorist acts). Then this should be seen as kind of negotiation with terrorists, because it involves a concession sourced in response to terrorist acts or to the threat of them. I don't have to be talking to someone to be in effect negotiating with them. If someone were to protest that this should really be seen as maneuvering in light of the problem of terrorism rather than as an act of negotiation with terrorists, I won't fight over a definition. But I will point out that such maneuvering would still be in the realm of extorted justice, since it would not have happened without terrorist activity.

To Negotiate or Not Negotiate: Objections and Replies

What are the standard reasons offered for not negotiating? I now review these and discuss possible problems with them.

1. If we negotiate we'll just encourage more violation of the rule of law.

Reply: people will violate the law if they don't respect it, and they won't respect it if they feel that the rule of law will not address their grievance. Negotiating is respecting their grievance, and it will bring the aggrieved into the system of respect for rule of law.

1.1 Won't they just keep committing violence, encouraged by the fact that now they're getting up-take? Reply. Maybe, but the lesson here isn't to refuse to negotiate; the lesson is to negotiate faster.

2. No one has a right to make demands while threatening violence.

Reply: But this is false -- the police have the right to negotiate while threatening violence, for example, as do countries at war.

3. Well, but they threaten justly. Terrorists do not.

Reply: terrorists are typically party in some way or other to grievances which have some basis in justice -- their causes are the elimination of the hegemonic influence of Western powers, or of discrimination and oppression in their countries on grounds of religious affiliation, race, tribal membership, caste, language, national origin; or they seek the overturning of regimes that are little more than vertically integrated criminal organizations for the extraction of wealth from non-elites⁸, or the restoration of land unjustly taken or occupied in acts of, for example, colonialism or outright conquest, or the end of social arrangements that inordinately advantage those who acquired status and goods by predation; and even when their stated cause is unjust, as when they seek to impose on unwilling others a radical religion or an unjustly patriarchal social or moral

⁸ See Sarah Chayes, Thieves of State: Why Corruption Threatens Global Security (New York: W.H. Norton, 2015) for more on this.

system, the fact that they have been tempted into such an enterprise is sometimes itself evidence that they have been victims of injustice, namely, the injustice that is exclusion from full and equal benefits of society. Not always, of course: sometimes they may be seeking to impose this in order to protect advantages they don't deserve. But this is only to say that whether what they do is evidence that they have themselves been victims of injustice varies from case to case – perhaps some of the organizers of ISIL terrorist acts are seeking the preservation of an unjust patriarchy. Yet others may be acting in a fight for a just share of social goods (and this plurality of motives can complicate the question whether a given organization is a force for justice or injustice). In general, however, people who have good lives typically don't attack others; only people who have unjustly bad lives.

4. But even if terrorist causes are just, and even if terrorists finding themselves disposed to terrorism is itself evidence that they have been experiencing injustice, it is wrong in itself to use violence in seeking redress.

Reply: well, violence is a bad thing in itself, but that doesn't mean it should never be used, for some things are worse or just as bad. Arguably violence is wrongly used only if it isn't necessary, that is, if the injustice could have been ended in some other way. Suppose it cannot be ended in any other way. Is it then permitted? And if so, how much is permitted. A full treatment of the matter might be thought to require exploring three issues. First, there is the question what the ideal just distribution of goods in the world ought to have been. (In philosophy this is a matter of "ideal theory".) Then there is the question how goods should now be distributed given that they were once mis-distributed. Here there are several possibilities: a) the status quo, a course that will require repression

of the insurgency, possibly resulting in something worse than what existed pre-insurgency; b) restoration of what was originally taken; c) that plus additional compensation for the trouble caused. Lastly there is the question how justly to advance from the unsatisfactory state to the satisfactory state. (The latter two questions are part of “non-ideal theory”.)

Non-ideal theory is a very understudied part of the theory of justice. But many theories of ideal and non-ideal justice would appear to say that when violence is the only thing that would work, its threat and use is permitted to move the world from an unjust status to a just status. On Robert Nozick’s theory⁹, for example, you may use violence to recover things stolen from you; on David Gauthier’s theory¹⁰, if you are in effect in a state of lawlessness, a Hobbesian state of nature, a state which everyone is in prior to being party to a contract for social arrangements agreed to for their expected mutual advantage, a pre-contractual state which arguably you are in if you have been left out of such a deal others who are party to the deal seek to enforce, then you have a natural right to advance and protect your interests with violence, a right to demand membership in a deal to benefit you as well; on John Rawls’ theory¹¹, you may use very extreme civil disobedience to bring about justice if you exist in a nation state that is not even partially just (although only much less extreme forms if your state has a more or less just

⁹ Robert Nozick, Anarchy, State and Utopia (New York: Basic Books, 1974).

¹⁰ David Gauthier, Morals By Agreement (Oxford: Oxford University Press, 1986).

¹¹ John Rawls, A Theory of Justice (Cambridge, Massachusetts: Belknap Press of Harvard University, 1971).

constitution); on Herbert Marcuse's theory, you may violate laws against violence if the law itself protects injustice; and so on. These theories are a fair sample of the political spectrum, spanning radical right-wing, centrist and left-wing political perspectives. So for what it's worth, there appears to be broad agreement about the permissibility of some degrees of violence in certain contexts. Justice extorted appears to be justice still.

4.1 But what of the passive, violence-eschewing theories of Gandhi, or Mandela or King? These are our greatest examples of the right way to move societies to a more inclusive justice. Is this not proof of the wrongness of terrorist violence as a method to justice?

Reply: Arguably these men and the people they spoke for were supererogatory (above and beyond the call of moral duty) in their preparedness to absorb harm while advocating for change. It would be hard to argue that it is the duty of people to accept their chains until their captor decides to set them free. And in any case, Gandhi, Mandela and King had parallel cohorts always threatening violence, giving greater urgency to their more peaceful initiatives and incentivizing their opponents into agreeing to a new peace.

No, the only times non-violent resistance is the obligatory path is a) when it is more likely to bring about change, and more likely to bring about a universally more just and so more stable change; or b) if the recourse to violence will make matters even worse for the oppressed than they already are; or c) if the cost in violence to the oppressor would be so great as to exceed the harms of oppression – plus or minus: surely if I must hurt you a little more than you are hurting me to get you to stop hurting me, and you are hurting me unjustly, I may inflict the extra hurt to get you to stop, exactly how much hurt being a central problem in the idea of extorted justice. In the case of terrorists acting to

redress injustice, this may wind up being a lot. For they are typically protesting conditions and arrangements that have resulted in thousands or millions or billions of dollars' worth of reduction in life prospects, or thousands of deaths. So arguably they would be morally permitted to do a lot of damage in seeking redress. And even if we thought that, short of rule of law, the amount of damage you're morally allowed to do is not up to the amount done to you or to your party, but some discounted variant of that, 50%, say, or 10%, or 1%, that's still going to be a lot given the number of people who have grievances and the magnitudes of their individual grievances.

One or more of the foregoing considerations against use of violence may often apply in the cases of those oppressed peoples – for example, in Western society, women, blacks, religious and sexual minorities, and descendants of indigenous peoples in colonized countries -- who nonetheless exist within a society that affords them a great many advantages, the advantages that accrue from stability, large societal wealth (however imperfectly equitably distributed), a developed and shared infrastructure, access to at least some sorts of justice by the means of appeal and recourse featured in such rule of law as may govern them, and so on. And it will be true of oppressed peoples so perfectly oppressed that violent resistance would do nothing but get vulnerable people killed, and so be a kind of gratuitous violence against such unjustly advantaged people who might be targeted for terrorism. At this point, the only advantage of terrorism would be symbolic – a suicidal protest that may have its own dignity, but whose value must be considered in the overall context of the resistance. A further factor, of course, will be the sympathy of the oppressed for the oppressors – they live among them, no doubt love some of them, and so on.

At any rate, one must not too quickly point to the oppressed groups in Western societies who do not protest as examples of people who believe such protest would be unjust, as if their so believing was proof of its injustice. For it can be part of their predicament that they are socialized into thinking they do not fully deserve to be whole participants in the benefits of society and so are really too easily settling for their current lot. Or it may be that they have been socialized into underestimating their own power, and into an excessive fearfulness of those who oppress them. Or their own historical traditions may have had no need to develop a culture of resistance and protest, so that they have no precedents of rebellion with which to identify and by which to be moved to make demands.¹²

Another point about negotiating under extortion: we've seen good reason for doubting that extorted agreements must always be unjust. They can be just if the extortion was the only way to get to justice. Putting the matter this way implies that what justice is pre-exists both extortion and negotiation, and that the latter two things are merely means to the former. But the relationship between those things and justice may be more intimate. For a rough and ready measure of whether a state of affairs is just is that all parties to it are content. I'll develop this point in a moment. But first, an important qualification: I said earlier that people who have been oppressed take generations to throw off their oppression. This means they may be too easily contented by a given state of affairs, thinking they deserve no more. A correct theory of justice in states of affairs

¹² My thanks to WL, LW and Sheldon Wein for discussion of material in the preceding section.

must acknowledge this phenomenon. I'm not sure quite how to do that, but for now I suggest we acknowledge it in the following way: a state of affairs is just only if, had all parties full information about it and experience of relevant alternatives, upon full reflection, they would still be contented.¹³ Otherwise we have a state of affairs that only seems just because there is no overt conflict in it. Next, this criterion has actual practical application. Because as formerly oppressed people make the gains that leave them more contented, these gains will tend to be the foundation for yet more gains. If these people receive the education they've been denied for generations, for example, with the attendant greater information, experience and reflection, they may find themselves demanding yet more change; that is, they (and we) may discover that they still had not attained full justice.¹⁴ This means that contentment is only a pro-tem guide to justice; it is

¹³ This is a standard idea in the philosophical literature. It is designed to aid in distinguishing between what you really want and what in inexperience, ignorance or haste you may only think you want. See Gauthier (1986) for more. Some object that different people might want different things on full experience, etc. so that this is not a true test for when they are wanting what they deserve or ought to want. I try to solve this problem in my **Error! Main Document Only.**"Categorically Rational Preferences and the Structure of Morality", in Peter Danielson, Ed., Modeling Rationality, Morality and Evolution; Vancouver Studies in Cognitive Science, Volume 7 (New York; Oxford: Oxford University Press, 1998), pp. 282-301.

¹⁴ Thanks to Katie Stockdale for reminding me of this point. For more on the issue, see my **Error! Main Document Only.**"Categorically Rational Preferences and the Structure

liable to being controverted by later developments; and any given conjecture to the effect that a state of affairs is just can be controverted by speculation about what would happen had the parties had more information, experience and reflection.

Alright, suppose a state of affairs is just if all parties to it would be content with it under the aforementioned conditions. Now suppose extortion leads to negotiation, and thence to the contentment of all parties. It would then appear that what can be got by extorted negotiation is data for what counts as a correct theory of justice. That is, it may be that you can't know what the correct theory of justice is – whether the correct ideal theory or the correct non-ideal theory -- until you find out what extorted negotiation and reconciliation can produce. Reciprocally, a good theory of justice would have the singular characteristic that, if you didn't know how to feel about a situation morally speaking, and you read the theory, it would dispose you to act as it recommends – you'd find yourself persuaded by it and inclined to enact it. A final point about this: views on how to negotiate and resolve conflict are extremely evolved both theoretically and as effective tools. They have enormous powers to reconcile people and make them content. Add these points together and we have the rather striking idea that the truth of a proposed theory of justice and the efficacy of a method of conflict resolution, even under extortion, are somehow the same thing. If a state of affairs were such that you couldn't negotiate people into it, it wouldn't be just. And if a state of affairs were just, you should be able to

of Morality", in Peter Danielson, Ed., Modeling Rationality, Morality and Evolution; Vancouver Studies in Cognitive Science, Volume 7 (New York; Oxford: Oxford University Press, 1998), pp. 282-301.

negotiate people into it. I conclude that the case of terrorism needs more attention in the formulation of ideal and non-ideal theories of justice.

5. But if we negotiate with terrorists while they threaten violence, they'll get more than they deserve.

Reply: this would depend on the terrorist and the context, of course. But suppose the terrorists in question are party to a group that has had vastly less than they deserve; and even negotiating with a gun they'll never get what they deserved, never mind more than they deserved. They are negotiating with a gun precisely because they are dispossessed, and weak; and even if they get concessions, the injustices that have plagued the people to whom they are party will be disadvantaged for generations as they try to throw off the circumstances of oppression and the learned self-suppressing tendencies of people who have been oppressed.

6. If terrorists have a grievance, they should go through due process rather than using violence to seek an exemption from it.

Reply: sometimes there is no due process to avail. And sometimes they have already exhausted all reasonable measures: they have complained, then protested, then engaged in civil disobedience, then in the destruction of property, then in violence against the official representatives of authority, and now, finally, they engage in violence against civilians. At all prior points they have been refused and repressed, typically by means of extreme violence.

6.1 But there are recourses within the rule of law.

Reply: This is often false. Often the rule of law in a given region is nothing but a protection racket for the preservation of gains from predation by elites.¹⁵

7. But surely the only justified use of violence is self-defense.

Reply: this is not true – violence is also sometimes permissible in defense of others, or in defense of property, or of rights to ways of life, or in the restoration of property or of rights to ways of life; and sometimes it is not permitted even in self-defense, for example, not if you had it coming. But at any rate, typically terrorists are parties to groups that have been subjected to all manner of violence – that is their grievance. And so there is a perfectly good sense in which the violence with which they lash out is defensive violence against injustice and therefore just even on the conception of self-defense as the only just pretext for violence.

8. But it is not reasonable to expect people to willingly concede anything because of fear of violence.

Reply: it is perfectly reasonable to expect this, and we act in this expectation all the time – recall the examples of the police and of countries at war, above. Besides, we needn't think of ourselves as giving in to threat of violence if we decide to negotiate with – concede things to – terrorists. Instead, invoking the doctrine of double effect, we can, and should, think of terrorists' threats of violence as evidence that there has been an injustice, the injustice that led them to threaten violence, and then think of ourselves as seeking to correct that injustice when we negotiate. Besides, typically the people who will be tasked with such negotiation are not the people directly threatened by terrorist

¹⁵ See Chayes (2015) again on this.

violence, so in an important sense they won't be giving in to threat of violence to themselves, only trying to prevent violence against others.

9. If we have the option of killing terrorists rather than negotiating with them, it is outrageous to expect us to negotiate.

Reply: No, it's the most normal thing in the world. Think of all the countries we conceive of as dealing with justified rebellions and insurgencies. In many cases we encourage the leadership in those countries to negotiate, to seek a settlement of the conflict by peaceful means, to make concessions. But those countries think of their insurgents as terrorists. So apparently we think it the most reasonable thing in the world to negotiate with terrorists, just not under that description. And of course it's very hard to think of the aggrieved in our countries as rebels with a cause – no one happily sees themselves as unjust.

9.1 But how are we to tell who is a legitimate rebel and who merely a gangster without a conscience, or a social discontent who stands for nothing but the misery of his own life?

Reply: two ways, first, preeminently, by listening to his grievance in a spirit of trying to understand. Second, you could use the methods of international law: people are regarded as engaging in legitimate insurrection rather than in outrageous criminal acts if a) they have the military power to cause significant damage, b) they are able to control a region of land, c) there's a lot of them, d) they fight in a force that has a command structure, e) they fight in uniform, f) they don't seek to merge with the civilian population gorilla-style when fighting, and g) they respect the principles of distinctness, necessity and proportionality – that is, they don't directly aim to kill civilians, they kill only when

necessary to attaining important goals, and they kill only as many as are needed to attain their goals. Terrorists typically fail several of these standards, of course, but rarely all of them, and should be taken seriously as legitimately aggrieved the more of them they fulfill. This is especially so when they represent a more diffuse population of aggrieved persons not confined to a demarcated geographical region. Note that ISIL satisfies or is on the verge of satisfying, a great many of these criteria; that is why there is such a pitched battle right now – once they satisfy all of the above criteria, they will have to be treated as a legitimate state with whom negotiation would be the appropriate way of dealing with them; for they will then be beyond the charge that they are merely criminals. (Note too that these criteria may need revisiting once it becomes possible for one person controlling a fleet of robots and drones to cause significant damage, control a geographical region, and so on.¹⁶)

10. But terrorists typically target innocents. And surely our first duty is to protect the innocent.

Reply: In the first place, the terrorists and the groups to which they are party were once innocent themselves, and remain so in many morally relevant ways – they continue to be victims of one kind or another of oppression, for example. So our negotiating with terrorists would be a form of protecting some innocents, namely, them. Second,

¹⁶ See Sasha Radin, “Possible Impact of AWS on the Threshold of a NIAC”, paper presented to the workshop, Autonomous Legal Reasoning? Legal and Ethical Issues in the Technologies of Conflict, co-sponsored by the International Committee of the Red Cross and Temple University Law School, Philadelphia, October 23, 2015.

negotiation is likely to reduce violence and so reduce the likelihood of harms to the so-called innocents whom terrorists target. Third, just because someone is innocent in the sense that she is not engaging in direct violence does not mean she ought to be thought of as innocent in the sense of not ever being properly liable to terrorist violence. One can be properly liable to such violence by engaging in directly oppressive acts, by voting for policies and regimes that so engage (the Bin Laden argument), by being the benefactors of past such actions¹⁷, policies and regimes, and, arguably, even by virtue of having coldly done nothing while the groups to which terrorists are party suffered natural calamity, bad luck or political oppression.

11. That's outrageous: if I never harmed you, you are not permitted to harm me.

Reply: Suppose harming you (a handful of innocent citizens in a café) is the only way to initiate a process that will alleviate harms to millions: then harming you may be the lesser evil and therefore justified. In fact, this is precisely the argument nation-states use in justifying collateral damage to civilians in enemy countries in war. It would be sheer hypocrisy to object to terrorists on this ground. Indeed, nation-states have used all the pretexts listed in item 10, above, as pretexts for being morally permitted to harm enemy civilians.

11.1 But the harms terrorists commit are particularly outrageous and therefore to be repudiated with violence. They deliberately target innocent civilians, they don't just kill them collaterally while officially targeting something more

¹⁷ Thanks to Todd Calder for pointing this out to me.

appropriate to target; and they kill in ways that are outrageous, by means of indiscriminate weapons, by means of beheading and torture in gruesome spectacle.

Reply: They are merely engaging in warfare by the method of moral injury, in this case by the method of an injury that is perceived by us as beyond the pale only because we have a false moral outlook.¹⁸ We think it worse to kill a baby in a café than to kill thousands of soldiers or police. This is frankly ridiculous – soldiers may be more properly liable to attack because they are trained, armed, and are justly charged with or have volunteered without coercion to take the risk, but even allowing a discount factor for this, for example, one civilian death equals five soldier deaths, or ten, or any number you please, there will be some number such that killing a civilian is not worse than that number of soldier deaths. In fact, looked at that way, terrorists means are more

¹⁸ We sustain moral injury when our moral codes and expectations are so extremely violated that we experience crippling fear, mistrust, apathy or an urge to suicide, depending on the specifics of the injury. (One form of such injury is self-inflicted: the suicidal guilt one may feel as a soldier for killing someone in a war, violating one’s normal civilian moral code and feeling that one must therefore be a monster undeserving of life.) For more on this concept, see my **Error! Main Document Only**. “PTSD Weaponized: A Theory of Moral Injury”, presented to the Center for Ethics and the Rule of Law conference, **Error! Main Document Only**. Preventing and Treating the Invisible Wounds of War: Combat Trauma and Psychological Injury, held at the University of Pennsylvania Law School, December 3-5, 2015.

proportionate in relation to their objectives than are the methods of conventional warfare by legitimate nation states.

12. But look, if we negotiate with terrorists, we'll have to negotiate with every nut case who thinks he's got a legitimate grievance.

Reply: and well we should – there is no such thing as a nutcase without a grievance – either he has a good point, or his action is evidence of a social problem of which he is the product. If he's nutty enough he may be unappeasable and have to be captured or killed¹⁹, but even he may represent an injustice worth attending to – a failure in our mental health care system, for example.

13. But there is no point in negotiating with terrorists. The people who are committing acts of terror don't want to stop committing them. They are sociopathic.

Reply: it is perhaps true of some terrorists that they want only to engage in violence. “Some men just want to watch the world burn.”²⁰ But in this case there is still negotiating to do, namely, with whatever representatives you can find of the causes the terrorists purport to represent, and with whatever powers so control the conditions of these people's lives that terrorists have those people's miseries as their pretexts for violence. If you kill the body the head will die. If you alleviate the pretext of violence, you'll extinguish the violence – people won't support terrorists anymore since they'll have no more pretext for violence, people won't be able to justify joining terrorists on

¹⁹ Thanks to Steven Burns for discussion on this.

²⁰ A line from the movie The Dark Knight.

ideological grounds, and won't want to anyway because they will be busy leading the better lives that negotiation will secure.

13.1 even if terrorist aren't sociopathic, many of them are devotees of a religions and ideologies that are incompatible with the Western way of life and with the ways of the more loving and moderate Islamic paradigms.²¹ And there is no reasoning with these views, and so no point in negotiating.

Reply: In the case of at least some ideologies, especially religious ones, we should not think it decisive that their holders think something categorically opposed to what we think. For it is in the nature of these things that no one can be accurately seeing a self-evident truth as their motivation for holding their views -- such views are inherently not self-evident. Therefore there are always logically external reasons for why the views are held -- psychological, cultural or practical reasons. And here we are likely to be able to get traction: if we change the conditions making a given religious view attractive, people will renounce it, or at least the part that is making their lives a ruin in conflict with others. Like a virus that must become less virulent or risk extinction when it kills all its hosts, so the religions and ideologies associated with terrorism must become less virulent. The Catholic Church is an example: to avoid losing all its followers, it has had to become more moderate and therefore more inclusive. There is a lesson here: we must distinguish

²¹ For a fascinating and important comparison of the values shared by Christianity, Islam and even secularism, see Rudolph C. Barnes, Jr., [“Religion, Law and Conflicting Concepts of Legitimacy”](#), a paper prepared for the Center for Ethics and the Rule of Law conference on The Ethics of Negotiation in Armed Conflict, April 2016.

between religious precepts and the people who hold them. The precepts may be a preaching of intolerance, but the people who hold them can be made more tolerant. Moderated and recovering Catholics are the proof.

14. What of negotiating with pirates and kidnappers? Won't that just encourage more piracy and kidnapping? And wouldn't a correct theory of justice say that, however much we might want to negotiate with a kidnapper to save our loved ones, the better policy is one that doesn't reward terrorists for this? There will be less of such activity if it never gets traction, and so it would be less likely that your relative would have been kidnapped. Moreover you have a duty to other people's relatives not to do things that would have the effect of encouraging more kidnapping. Further, negotiating with kidnappers and paying ransoms just gives more power to terrorists – it allows them to finance their operations, to buy weapons, air-plane tickets, and so on. It has the effect of multiplying injustices.

Reply: first, these events occur in small numbers, so this is a relatively non-urgent issue, one different policies on which will not make a huge difference in overall outcomes for nations. But a policy permitting ransom payments will make an enormous difference in the lives of people who are victims of kidnappings and of those who love them, as well as in the functioning of the corporations whose employees are so targeted.

Second, no policy can be a good policy if people can't make themselves comply with it; and it is very difficult for people to make themselves comply with policies that prevent them from saving their loved ones.

Third, it isn't generally true that one is not allowed to engage in activities that increase risks to others – a great many of the things we do have this effect, things like

driving cars, buying alcohol and so supporting an industry that makes noxious substances, running businesses that contribute to the despoliation of the commons, performing actions as role models that induce others to take unsafe risks (think of race-car drivers, over-training athletes) or engaging in extreme sports where the enthusiast puts herself at risk and so puts those others at risk who would feel compelled from altruism mount a rescue (for example, amateur ocean sailors and mountain climbers).

So should we allow people to pay ransoms to rescue loved ones or not? Several solutions have been proposed. One is to make it outright illegal to pay ransoms. This is unlivable for the relatives of victims, and unworkable for companies who need to recruit people for work in areas where such forms of terrorism are a risk.

Another proposal is to permit ransom paying by private citizens but also increase the penalties for kidnapping. This proposal by Claire Finkelstein ingeniously tries to have it both ways – individuals are allowed to try to save their loved ones, the denial of permission to do which would be an unreasonable demand to suspend partiality, and yet kidnapping is still deterred.²²

But there is a downside: it may put hostages at greater risk since it means kidnapers will be more likely to kill them for fear of facing a higher penalty if captured.

And anyway, if the terrorist cause is just, and if the person kidnapped were properly liable to harm because of having a status like that described in point 11, above,

²² See Claire O. Finkelstein, “Reason and Morals in Hostage Negotiations”, paper for the Center for Ethics and the Rule of Law conference, The Ethics of Negotiation In Armed Conflict, held at the University of Pennsylvania Law School, Philadelphia, April, 2016.

then arguably the transaction of paying ransom is a just rebalancing, a moving of goods from people who shouldn't have them to people who should – it is a Robin Hood act of highwayman justice. I don't say this is decisive, but it does complicate the idea of having more extreme penalties for the act. The people who engage in such acts are typically themselves in some sense victims, too, and have resorted to it out of desperation.

Taking all these considerations into account, I propose a hybrid solution: legally permit paying such ransoms, keep the penalties for kidnapping relatively moderate, have state sponsored insurance schemes to cover this, and/or permit private such insurance schemes, try hard for rescue of victims and capture of kidnappers where possible, and meanwhile work hard to address the causes of terrorism.

When Should We Not Negotiate?

I have so far been giving extreme defenses of an extreme policy dictating negotiation with terrorists in almost all circumstances. Is there no circumstance where we should not negotiate, where instead we should use violence?

Some say we should refuse to negotiate when to do so would be to abet unacceptable moral evils being inflicted on ourselves or others, or would be to allow persons dangerous to the public safety and violent out of proportion to his cause to have liberty to continue in unrestrained violence. Here we have the mesmerizing case of Hitler, and the enormous examples of Chamberlain versus Churchill on negotiating with Hitler, and on Churchill negotiating with Stalin. Avishai Margalit argues that Chamberlain's negotiating with Hitler was wrong because he was a dehumanizer, which, so far as I can tell, means he aimed at genocide, denying the very humanity of those he killed. But Margalit thinks Churchill negotiating with Stalin was right because he had as his aim the

improvement of life for all humans but chose to kill those intransigent to the collectivization of land that this involved.²³

I don't buy this distinction Surely if someone is embarked on genocide and I can reduce their success rate from 80% to 30% by negotiation, but would lose the fight if I fought, resulting in a 70% success rate at genocide, I should negotiate; and surely even if I could negotiate with Stalin, the argument could be made that I should fight instead given that he was prepared to break far too many eggs to make his omelet, and given that perhaps he too denied the humanity of those who insisted on farming the land they'd lived on for generations. We need more subtlety in a theory of justice in negotiation than just these examples afford – although I'm not sure I disagree with Margalit about the cases, only about the lesson.

Conclusions:

No doubt there are times when we should not negotiate. But I have argued that the mere fact that someone has resorted to violence against us in order to get a grievance addressed should not by itself mean that it is inappropriate to negotiate with them. The fact that large groups of people are taking up arms against us probably means that we have directly or indirectly harmed them, or that we have profited from harms to them, or that their lives are otherwise bad in ways we are abetting or in any case have some duty to improve. In general the occasions of this sort of violence are not difficult to understand in light of our history in the regions involved

²³ Avishai Margalit, [On Compromise And Rotten Compromises](#) (Princeton: Princeton University Press, 2010).

Theories of justice are still being worked out. But we may be forgiven for not tarrying to hear the details. The fact is that in all cases terrorist violence could be ended by our trying improve the lives of the people whose discontents have moved them to violence. And this suggests that we should so dispose ourselves that our first impulse in response to terrorist violence is investigation of the grievance, accommodation to it, and so negotiation with it, rather than having as our first impulse the outraged use of defensive violence and the aim to repress the grievance.

By accommodation I do not mean appeasement. As many of the papers and background readings brought together for this conference attest, there is an enormous wisdom about how to bring people together to be found in the literature on diplomacy, reconciliation, mediation and negotiation, a wisdom that can find wins for everyone in the process of negotiation.

If we wish to avoid the problem altogether in the future, we should use the well-established offices and sophisticated powers of our ambassadorial and diplomatic cadre to undertake pre-emptive inventorying of the geopolitical regions likely to have these grievances, and pre-emptive overtures of negotiation with a view to listening to the needs of those likely aggrieved, offering apology and making amends, repair or improvement so that the potentially aggrieved will have reasonably good lives²⁴; for taking the initiative

²⁴ In this I'm proposing something in the spirit of, but at an even earlier stage in the evolution of conflict than, what is proposed by I. William Zartman, "[Preventing Deadly Conflict](#)", [Security Dialogue](#) 32 (2001), 137–154. He suggests negotiation before conflict

to do this now will be more just, cheaper effective and less costly in lives on all sides than first going through a period of militarily attempted repression.²⁵ In fact doing this may be necessary to saving the philosophy of conflict reduction through negotiation from the hazard that it will teach people to radicalize, to become the squeaky wheel that gets the grease.²⁶ If we can get to them before there is unmanageable anger, the discontented won't get to the point where we are having to be reactive.

In fact this may allow us to be responsible to another desideratum as well: there are more injustices in the world than just the ones that have attracted people into terrorism, injustices that no less deserve to be treated.²⁷ And preemptively managing the

that is already violent gets more intense and more extensive; I suggest negotiation with aggrieved and potentially aggrieved parties before violence breaks out at all.

²⁵ What of when there has already been militarized conflict? Obviously negotiation and diplomacy are part of attaining peace after conflict. For a fascinating discussion of the advisability of an expanded role for Joint Military Commissions in this process (commissions composed of military representatives of both sides in conflicts), see Kevin H. Govern, "Joint Military Commissions: A Model For Post-Conflict Negotiations In The Balkans And Beyond", paper presented to the Center for Ethics and the Rule of Law conference on The Ethics of Negotiation in Armed Conflict, held at the University of Philadelphia Law School, April 14-16, 2016.

²⁶ Thanks to Françoise Baylis for this concern.

²⁷ Thanks to Katie Stockdale for this point.

ones that might explode will mean resources will more likely be available to help the world towards a more inclusive justice wherever there is need.²⁸

²⁸ Here we will have to be careful not to create yet more similar problems. For attaining these results in other regions of the globe may require us to use resources that people presently contented would miss. Thanks to Stephanie Kapusta for this worry.