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## Can There Be a Nonconsequentialist Rights-Based Moral Justification of Terrorism?

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## "Can There be a Nonconsequentialist Rights-Based Moral Justification of Terrorism?"

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"Where there is a lack of effective respect for the fundamental human rights of the members of one group, and *if* there is a reasonable likelihood that limited terrorism will significantly contribute to bringing about such effective respect, and no other effective means are available, can it be justifiable to violate the fundamental human rights of those who will suffer from such terrorism?" (Held 1991, p. 76).

### Introduction

According to some philosophers, acts of terrorism are necessarily morally wrong because such acts violate fundamental human rights. Virginia Held (1991) challenges this common view. She focuses on situations in which serious rights violations are already occurring, and considers the moral justifiability of the use of terrorism in pursuit of a more just society. Whether she succeeds in offering a nonconsequentialist rights-based justification of terrorism, however, is a vexed question. My contention is that Held is correct that a nonconsequentialist rights-based justification of some acts of terrorism is possible, but that her discussion of the conditions that must be satisfied for this to be the case is incomplete. I examine Held's argument along with some of the objections that have been leveled against it, respond to these objections, and then articulate the conditions under which acts of terrorism may be morally justified from a nonconsequentialist rights-based perspective. Whether any acts of terrorism do, or are likely to, satisfy these conditions is a distinct question not addressed here.

### A Rights-Based Argument Against Terrorism

That acts of terrorism are necessarily morally wrong because they violate human rights is probably the default position among philosophers and non-philosophers alike. Haig Khatchadourian provides an especially clear statement of this position. He supports the claim that "Terrorism, in all its types and forms, is always wrong" (Khatchadourian 1988, p. 131) by arguing that "all forms of terrorism ... seriously violate their immediate victims' and the sufferers' human rights" (p. 138), and that "an act cannot be morally right if it violates anyone's human rights..." (p. 139). It follows that "acts of terrorism that cause the immediate or delayed death of their victims ... are morally wrong" (p. 138). Expressed syllogistically:

**P1:** All acts of terrorism violate human rights.

**P2:** All acts that violate human rights are necessarily morally wrong.

**C:** Therefore, all acts of terrorism are necessarily morally wrong.

This argument is clearly valid. Is it also sound? In order to determine its soundness, three questions must be addressed: (1) Do all acts of terrorism violate human rights? (2) Are all acts that violate human rights necessarily morally wrong? (3) Under what conditions, if any, could acts of terrorism that violate human rights be morally justified? Let's consider these questions in order.

### **Do All Acts of Terrorism Violate Human Rights?**

“Terrorism” is a contested term, but virtually all definitions of “terrorism” include the idea that terrorist acts intentionally harm people as a means of advancing some political, ideological, social, or religious agenda. Such harm typically includes destruction of property, infliction of injuries, and/or death. Human rights have been described as “basic moral guarantees that people in all countries and cultures allegedly have simply because they are people” (Nickel 1987; quoted in Fagan 2006). Rights are understood to attach to particular individuals, to be of high priority, and to be such that compliance with them is mandatory rather than discretionary. It could be argued that all acts of terrorism violate human rights because by treating their victims’ feelings, desires, aspirations, projects, goals, and memories as things of little or no value, terrorists fail to respect other persons’ autonomy. When terrorists kill innocent persons in order to publicize their cause, to engage in moral extortion against those to whom they believe themselves to have a claim, or to rally their supporters, their victims’ rights to life, to security, and to well-being are violated.

It may be possible to conceive of acts of terrorism that do not violate human rights. However, for the sake of the argument, assume that there are human rights possessed by each person, and that the acts of terrorism whose moral justifiability we are considering violate at least one person's rights. In assessing the rights-based moral argument against terrorism (above), then, the key issue becomes the truth of **P2**.

### **Are Acts That Violate Human Rights Necessarily Morally Wrong?**

In practice, appeals to human rights typically presuppose that identifying something *as* a right entails that it would be morally wrong for anyone to violate that right. If rights are understood to be necessarily inviolable because they place exceptionless moral constraints on how persons may be treated, then obviously rights violations are never morally justifiable. The question at issue here, however, is whether rights *ought* to be considered morally inviolable, and whether there are circumstances in which violating someone's rights is morally justified or even obligatory.

From a consequentialist point of view, it is easy to imagine situations in which it is morally permissible or even obligatory to violate someone's rights, *viz.*, whenever doing so is likely to produce the best overall consequences. The more interesting and difficult question concerns whether it is ever morally permissible *from a nonconsequentialist rights-based perspective* to violate someone's rights. A nonconsequentialist rights-based moral justification for rights violations would not need to completely ignore consequences (any more than any nonconsequentialist moral perspective need ignore consequences), but it would need to appeal to moral considerations other than or in addition to consequences in justifying such an act, and such moral considerations would have to play a significant role in supporting the justification of the rights violation. What might such a justification look like?

### ***A Rights-Based Justification for Rights Violations***

One class of situations in which it might be morally permissible from a right-based perspective to violate human rights is when violating a person's rights is the only way to prevent even more rights violations. Consider Bernard Williams' much-discussed case of "Jim and the Indians." Jim becomes lost in the jungle while on a botanical expedition in South America. He happens upon a small town, where he sees twenty Indians lined up against a wall, as well as a number of men in uniform holding guns. A man in uniform who is clearly the leader informs him that the Indians engaged in acts of protest against the government, and are going to be killed to serve as a warning to the rest of their village. The leader tells Jim that because he is a guest, he has the privilege of killing one of the Indians, and that if Jim kills one of the Indians, the remaining nineteen will go free. Understanding the nature of the choice facing Jim, and convinced of the leader's seriousness, the twenty Indians beg Jim to kill one of them. Suppose that by killing one Indian, Jim violates that Indian's right not to be killed, but that only by doing so can he prevent the violation of the rights of all twenty Indians. Arguably, it might be morally permissible to violate the rights of one Indian in order to prevent the rights of the others from being violated. But if so, then there are situations in which it could be morally justifiable to violate one person's right for the sake of preventing the violation of the rights of others, from which it follows that sometimes rights violations can be morally justified *on the basis of respect for rights*.

In response, it could be maintained that because rights ought never to be violated, this is not an example of a morally justifiable rights violation. But even if it is conceded that in such situations it might be morally justifiable on the basis of respect for rights to violate an individual's rights, it could still be maintained that such cases are special (and quite unlike cases of terrorism) because if one does not violate a given person's right it will be violated anyway. What about situations in which someone's rights are violated, whose rights would *not* otherwise be violated? Can such rights violations ever be morally justifiable on the basis of respect for rights?

Virginia Held believes that they can. She describes a hypothetical scenario in which "achieving effective respect for the fundamental human rights of the members of one group, which rights ought to be respected, requires the violation of the fundamental human rights of the members of another group, which are also rights that seemingly ought to be respected" (Held 1991, p. 75). Consider two situations, S1 and S2, and two groups in each situation, group A and group B. In both situations both groups have a human right to *x*, but in S1 members of group A enjoy effective respect for this right whereas the members of group B do not. By contrast, in situation S2 the members of both groups enjoy effective respect for this right. Clearly, S2 is morally preferable to S1. Suppose that nonviolent means cannot effect a transition from S1 to S2, but that acts of terrorism would be effective in moving a society from S1 to S2. In this case, "Given that it will involve a violation of human rights, can it be better to violate rights through terrorism than to avoid this violation?" (Held 1991, p. 78).

Held concludes that it can: "[O]n grounds of justice, it is better to equalize rights violations in a transition to bring an end to rights violations than it is to subject a given group that has already suffered extensive rights violations to continued such violations" (Held 1991, p. 79). There are, however, certain conditions. For example, "there would be a *prima facie* judgment against serious violations, such as those of rights to life, to bring about respect for less serious rights, such as those to more equitable distributions of property above what is necessary for the satisfaction of basic needs" (Held 1991, p. 80). Nonetheless, even this restriction could be

overridden if a serious rights violation against one group would be effective in rectifying a large enough number of lesser rights violations against another group. In such situations, she argues, it would be morally justifiable to violate the rights of one group in order to achieve effective respect for the rights of another group, if engaging in such rights violations is the only way to effect a transition to a system in which rights violations are either eliminated or significantly reduced.

Robert Nozick (1974) calls situations in which the violation of one person's right(s) will prevent more numerous or more severe violations of the right(s) of others "rights violation minimization." If rights violation minimization is ever morally justified, then the violation of some rights, in some circumstances, can be morally justified on the basis of respect for rights. But if so, then **P2** in the rights-based argument against terrorism is false, and some rights violation minimizing terrorist acts may be among those that are morally justifiable from a rights-based perspective – a conclusion many would find both surprising and disturbing, and accordingly have argued against.

## Objections and Responses

### ***Objection: Rights violation minimization is self-contradictory.***

Frances Kamm articulates perhaps the most basic reason to reject rights violation minimization, *viz.*, that "it would be simply self-contradictory for it to be morally permissible to minimize violations of the [right] itself for the sake of showing concern for *it*" (Kamm 1992, p. 384). That is, permitting some rights violations in order to minimize rights violations overall embodies a contradiction, given the way that rights are typically understood. If rights specify the "basic moral guarantees that people in all countries and cultures allegedly have simply because they are people," then permitting the violation of such basic moral guarantees seems to invalidate the very notion of human rights. Indeed, Held herself notes one of the dangers of opening the door to recognizing morally justifiable rights violations: "If we permit violations, we risk undermining the moral worth of the very rights for which we are striving to achieve respect" (Held 1991, p. 73).

Kamm's argument depends on the assumption that, necessarily, to show respect for rights, rights must be considered inviolable. Why should rights be necessarily thought of as inviolable? One could simply *define* rights as inviolable, thereby stipulating that rights can never justifiably be violated. But such a move is in danger of simply begging the question. Kamm's answer, by contrast, attempts to ground the inviolability of rights in a certain conception of *persons*: "If we are inviolable in a certain way, we are more important creatures than violable ones.... The world is, in a sense, a better place, as it has more important creatures in it..." (Kamm 1992, p. 386). On the other hand, if we permit rights violations, we are in danger of making the world a worse rather than a better place:

"The world would become worse for us because we would have to live believing in a less sublime and elevated conception of ourselves. We might save more people, but they would, in a sense, be less worth saving in our eyes. This is because individuals whose rights stand as a barrier to action are more potent individuals than they would be otherwise" (Kamm 1989, p. 254).

## ***Response***

Kamm's argument risks treating a certain *conception* of persons enjoyed by those capable of alleviating great suffering as more important than the alleviation of the *actual suffering* of those enduring human rights violations. One could imagine those suffering from egregious human rights violations informing those who are capable of alleviating their suffering, but who refrain from doing so in order to preserve a "sublime and elevated" conception of personhood, that their moral priorities are exactly backwards. What good is a sublime and elevated conception of personhood if the cost of maintaining that conception is a refusal to do precisely what is required in order to alleviate the suffering of actual persons?

Kamm could respond that preserving a conception of persons such that rights are necessarily inviolable is necessary for achieving a world that is a "better place." But it is at least debatable that a world in which rights are thought of as necessarily inviolable would be a better world than one in which rights are thought of as inviolable *except in certain highly specified contexts* (e.g., contexts in which rights violation minimization is possible). If one's concern is to bring into existence the best possible world, then a world in which rights violations are nonexistent or few would presumably be a better world than one in which egregious rights violations exist. Yet as Held argues, achieving a transition from the latter sort of world to the former might in some circumstances require that human rights be violated.

In Kamm's view, the inviolability of human *rights* is entailed by the inviolability of *persons*: "[I]t should not be permissible to minimize the violation of rights by violating a comparable right, for persons are, at least to some degree, inviolable, and are ends-in-themselves" (Kamm 1992, p. 355). A more fundamental objection to Kamm's argument would be to question this assumption, as Applbaum does:

"Persons are ends in themselves, and so have a high degree of inviolability, expressed by rights to nonviolation, and these rights have moral force -- that is, some measure of inviolability. But it does not immediately follow from the recognition of a high degree of person inviolability that rights should have an equally high degree of inviolability.... The primary objects of our respect and concern are persons, not rights, so there is neither futility nor contradiction in violating the rights of persons if that is what circumstances demand to treat them as ends in themselves" (Applbaum 1998, p. 346).

Rights, in this view, might be considered as analogous to laws. Laws are highly inviolable, in the sense that in general there are very few good reasons for violating laws. Yet laws exist (among other things) to safeguard property, to provide security, and the like, and one can easily imagine situations in which safeguarding someone's property requires violating a law (e.g., it is against the law to break and enter someone's home, yet it might be necessary to do so in order to put out a fire that in spreading would destroy an entire neighborhood). Laws can be thought of as highly inviolable, yet with exceptions in cases in which violating a law is the only way to prevent some great harm. So, too, rights can be thought of as existing for the sake of persons, such that even if persons are necessarily inviolable, it would not follow that laws are similarly inviolable. But if the rights inviolability is not entailed by person inviolability, then rights violation minimization of the sort envisioned in Held's argument is not clearly self-contradictory. Despite Kamm's critique, therefore, Held's argument still stands as a serious challenge to **P2**.



***Objection: It is always morally wrong to intentionally harm the innocent.***

If intentionally harming innocent persons is always morally wrong, and rights violation minimization involves intentionally harming innocent persons, it follows that rights violation minimization is always morally wrong. As Igor Primoratz argues:

"Faced with the prospect of being killed or maimed on the grounds of this ... justification, might I not ... say that I am a person in my own right, that my life is the only life I have and all I have, and that nobody may take it away, nor ruin it by making me a cripple, for the sake of a more just distribution of, and subsequently more general respect for, the right to life and bodily security within a group of people? ... The value and significance of my life is not derived from my membership in a group. Nobody may sacrifice it to the group" (Primoratz 1997, p. 231).

Assume that in Primoratz's argument the first-person perspective is being used to characterize the legitimate response of any innocent person contemplating having effective respect for his rights sacrificed by others for the sake of achieving a more just distribution of respect for rights within a society. From the third-person perspective, it could be argued that it is never morally permissible to sacrifice effective respect for the rights of an innocent person for the sake of achieving a more just distribution of effective respect for rights in a society as a whole. But Held's argument apparently requires precisely this. Thus, it seems, Held's argument fails.

***Response***

In response, Held counters that:

"to fail to achieve a more just distribution of violations of rights (through the use of terrorism if that is the only means available) is to fail to recognize that the individual whose rights are already not fairly respected is a person in his or her own right, not merely a member of a group whose interests will be furthered by some goal, or whose rights can be ignored" (Held, in Primoratz 2004, p. 77).

That is, the issue is not violation of the rights of *individuals* for the sake of securing effective respect for the rights of a *group*, but rather that violating the rights of innocent people can be morally justified when doing so is necessary to secure effective respect for the rights of individuals who have not enjoyed effective respect for their rights.

Held maintains that, within the parameters she articulates, intentionally harming the innocent can be morally justifiable, a response that is (in principle, at least) unproblematic within a consequentialist perspective, but which is contrary to most nonconsequentialist moral perspectives. I will return to this issue in the section below on whether Held's argument is, in fact, a nonconsequentialist argument, and also in the final section in which I sketch the conditions that must be satisfied in order for acts of terrorism to be morally justified on the basis of a nonconsequentialist moral perspective that takes rights seriously.

***Objection: Respect for rights requires that one not violate any rights, not that one minimize rights violations.***

Taking rights seriously, it could be argued, does not justify rights violation minimization, because taking rights seriously requires that one not *violate* anyone's rights, not that one *prevent* rights violations. According to Thomas Nagel,

"[R]ights essentially set limits to what any individual may do to any other, even in the service of good ends -- and those good ends include even the prevention of transgressions of those same limits by others. If there is a general right not to be murdered, for example, then it is impermissible to murder one person even to prevent the murders of two others.... Rights tell us in the first instance what not to *do* to other people, rather than what to *prevent from happening to them*" (Nagel 1995, pp. 87-88).

Hence the "The Paradox of Deontology": the fact that "a right may sometimes forbid us to do something that would minimize its violation -- as when we are forbidden to kill one innocent person even to prevent two other innocents from being killed" (Nagel 1995, p. 90). The very nature of rights, in this view, prohibits violating some individuals' rights for the sake of minimizing rights violations overall. Some rights violations, it seems, cannot be remedied within the bounds of the morally permissible.

***Response***

Proponents of rights violation minimization could offer two responses to Nagel's argument. First, the assertion that taking rights seriously requires that one not violate anyone's rights simply begs the question of the moral permissibility of rights violation minimization. If rights violation minimization is morally permissible, then it would follow that it *is* sometimes morally permissible to intentionally violate some individuals' rights. Second, even if rights violation minimization is not morally *obligatory*, it might still be morally *justifiable* to violate rights if this is the only way of bringing about a morally preferable state of affairs. The fundamental question, again, is whether respect for rights requires that rights be thought of as necessarily inviolable, or as merely "strongly inviolable" but deserving of violation when such violation is necessary to bring about a morally preferable situation.

***Objection: Held's argument is consequentialist after all.***

Finally, one could criticize Held's argument, not because it treats as morally permissible acts that are in fact morally impermissible (as all the objections considered so far maintain), but rather because it does so from a consequentialist perspective. It is relatively easy on consequentialist grounds to show that acts of terrorism could be morally justified. One need only show that it is possible that the positive consequences (however these are defined) of acts of terrorism outweigh the negative consequences of such acts. Philosophers may disagree on whether the conditions for justifying terrorism on consequentialist grounds are ever satisfied, as well as on the sorts of consequences that ought to be considered, but there is little disagreement that such a justification is, in principle at least, possible.

Held's argument is philosophically interesting precisely because it purports to offer a *nonconsequentialist* moral justification of at least some acts of terrorism. Steinhoff, however, asserts that Held cannot justify rights violations "with an appeal to a better end result" because "this would be a utilitarian or consequentialist argument," rather than one based on "distributive justice" (Steinhoff 2004, p. 102). One judges that it is *better* that rights violations be distributed equitably than it is for them to be distributed inequitably, not because of the nature of rights *per se*, but because of an informal judgment about human flourishing and the sorts of actions necessary to achieve it. Such considerations introduce calculations of harms and benefits into moral deliberation. But if so, it could be argued, then Held's argument ultimately reduces to a consequentialist argument, rather than a *bona fide* rights-based argument, for the moral justifiability of terrorism in the sort of scenario she describes.

### ***Response***

Is Held's argument a consequentialist one? Some of Held's remarks suggest that she wishes to take both rights *and* consequences into consideration in judging the morality of terrorism: "[A]n adequate moral appraisal [of terrorism] will have to take violations of rights into account along with any calculation of benefits and harms produced" (Held 1991, p. 72). Yet her proposal, she says, is for a "nonutilitarian comparison of rights violations" (Held 1991, pp. 72-73), and she suggests "that we not yield to a merely consequentialist evaluation, but that we strive for reasonable comparative judgments" (Held 1991, p. 73). It is true that one must judge whether acts of terrorism would be effective in moving a society to one in which all persons' rights are respected. But Held maintains that "Such an evaluation is not a consequentialist calculation" (Held 1991, p. 74). Indeed, merely including a consideration of consequences in one's moral analysis is not sufficient to make one's argument a consequentialist one. Judging the moral status of an action solely on the basis of the consequences *actually resulting* from that action is sufficient to make one's perspective consequentialist, but Held proposes nothing of the sort. Considerations of *justice*, rather than of actual consequences, drives "the major argument" of her essay, *viz.*, that "on grounds of justice, it is better to equalize rights violations in a transition to bring an end to rights violations than it is to subject a given group that has already suffered extensive rights violations to continued such violations" (Held 1991, pp. 79-80). As she says, "That justice itself often requires a concern for how rights violations are distributed seems clear. We can recognize that some distributions are unfair, and seek to make them less so" (Held 1991, pp. 80-81). To act for *the sake of* justice is to act for a "consequence," in a sense, but it is not to judge the morality of the actions in question in terms of the consequences *actually produced*. But if so, then Held's argument is not a consequentialist argument.

### **A Nonconsequentialist Rights-Based Moral Justification of Terrorism**

If the objections to Held's argument fail to show that her argument is flawed, then the truth of **P2** in the rights-based argument against terrorism cannot be simply taken for granted. **P2** *may* be correct, but if Held's argument is sound, it is false that all terrorist acts that violate human rights are morally unjustifiable. It remains to spell out what conditions must be satisfied for such acts to be morally justifiable.

As Held notes, the most promising situation for offering a nonconsequentialist moral justification of terrorism is one in which human rights are being violated, the only way to rectify the situation is to violate others' rights through acts of terrorism, and the seriousness of the rights violations in question are comparable. This requires more elaboration and supplementation. I propose that in order for acts of terrorism to be morally justified from a nonconsequentialist view that takes rights seriously, all of the following conditions must be satisfied:

- (1) Members of an identifiable group in a society have for a considerable time been suffering egregious human rights violations at the hands of another group.
- (2) All nonviolent means of rectifying the situation have been exhausted.
- (3) There is convincing evidence that the use of terrorism would be effective, and more effective than any other means, in bringing about a situation in which rights violations are significantly reduced or eliminated.
- (4) The aim of the terrorism would be the transition to a society in which rights violations are significantly reduced or eliminated (not just distributed equally).
- (5) The acts of terrorism are intended to inflict only as much damage as is necessary in order to bring about a situation in which rights violations are rectified.
- (6) The acts of terrorism are directed against property rather than directly against persons, and every precaution is taken to insure that persons are not injured, maimed, or killed by such acts.
- (7) The acts of terrorism are directed only against the property of individuals known to be responsible for the human rights violations against the rights-violated group.
- (8) The magnitude of the rights violations resulting from the acts of terrorism for any individual person is not greater than the magnitude of any of the rights violations the rectification of which are the motivation for the acts of terrorism.

My claim is that these conditions are necessary but not necessarily sufficient for any act of terrorism to be morally justified from a nonconsequentialist rights-based perspective. That is, terrorist acts that satisfy these conditions are not necessarily morally justified, but if any acts of terrorism are morally justified from a nonconsequentialist rights-based perspective, they will have to satisfy all of these conditions. Whether any acts do satisfy these conditions is a distinct issue requiring detailed examination of acts of terrorism in their historical contexts, a task that is beyond the scope of this paper.

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