

Notes on Punishment and Terrorism

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This article focuses on the question of whether we should see terrorists as criminals, who are both bound and protected, as all citizens are, by the criminal law, or as enemy combatants with whom we are engaged in a war and who are entitled the protection of the rules of war, or as "unlawful combatants" who are entitled to no such protection. It argues that, however terrible their actions, they are minimally entitled to be treated as enemy combatants; and it discusses the dilemma that can be presented by the prospect of using torture to extract essential, life-saving information.

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Terrorism poses a significant challenge to a liberal account of punishment that emphasizes its communicative character and that seeks to reconcile punishment with a proper recognition of our fellow citizenship with those whom we punish. Can we really argue that in our responses to those who engage in terrorist attacks on us (and who, thus, deny any fellow citizenship with us) we must address them as fellow citizens to whom censure must be communicated? Can we really deny that however we should deal with other criminals, in our dealings with terrorists we must aim simply to deter and incapacitate?

Let us accept that *terrorists* can be defined, for present purposes, as those who engage in violent attacks, which are intended or expected to cause death not only on individuals or on groups but also on the state, and who use violence in pursuit of political or revolutionary aims. Assume that we are faced with terrorists whose actions are neither legally nor morally justified (an assumption that needs to be spelled out because it is, to put it very mildly, far from obvious that

Author's Note: *These notes were originally written as an addendum to my article "Karanie obywateli" (Punishing Citizens) in the journal Ius et Lex (in press). In that article, I argued that if we are to justify criminal punishment in a liberal democracy (in, that is, what purports to be a polity of free and equal citizens), we must show how it can treat those who are punished or threatened with punishment as citizens and that if punishment is to have this character, it must be a mode of moral communication with the offender that seeks the offender's recognition and repentance of the wrong he or she has done (see also my Punishment, Communication, and Community, 2001). Whatever plausibility such an account of punishment, and of the criminal law more generally, might have in relation to most kinds of crime and criminal, it faces obvious problems in relation to those who commit terrorist crimes. These notes sketch a first attempt to address those problems.*

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terrorism, as roughly defined here, is never justified); even if their ends are legitimate or at least worthy of respect, their means are quite illegitimate. How then should we picture them and treat them?

One possibility is that we should see and treat them as criminals—whether as criminals in terms simply of the municipal laws of the polity they attack or as criminals in terms of the laws of the international order. To see them thusly is to see them as being bound by those laws—as bound by the municipal laws, whether as citizens (in the case of domestic terrorists) or as visitors; or as bound by an international criminal law that concerns our mutual dealings not as fellow citizens of this or that polity but simply as fellow human beings. It is also to see them as being answerable to the national polity or the international community through its courts, which are to call them to account, to answer, for their wrongdoing. And it is to see them as moral agents with whom we must still seek to communicate, through both their trial and their punishment, in the moral terms in which we understand and condemn their deeds. From this perspective, we must also recognize the kinds of constraints on the processes of investigation, prevention, and interrogation that apply to our dealings with other kinds of criminals. Terrorists (and just as crucially, those suspected of terrorist crimes) are entitled to the same protections as any citizen. (There is clearly much more to be said about the role of an international criminal court and about the proper roles and remits of national and of international courts, but that is not an issue we can pursue here.)

Now the mere fact that terrorists might deny their citizenship of the polity and refuse to recognize the authority of its courts is not enough to undermine the possibility or legitimacy of treating them as criminals: Citizenship is not, or not to that degree, a voluntary matter, and it is open to us to insist that the terrorist is a citizen who is both bound and protected by the values of the polity. Nor will it do simply to say that terrorists have breached the most basic terms of the social contract and have, thus, excluded themselves from it. One danger of contractualist models of both political association and morality is that they can seem to invite this move of excluding from their protection those who flout their basic terms; but if we are to think contractually at all—something that some of us would doubt—we should not make it that easy to fall out of the contract's protection. However, we might plausibly feel that especially with the more serious kinds of international (as distinct from domestic) terrorism, we are faced by something that is more like war than crime: that some terrorist actions constitute not crimes that could be dealt with under our ordinary criminal laws and processes but, instead, attacks as part of a war that, although not formally declared between nation states, is nonetheless real.

To see ourselves as engaged in a war against a terrorist enemy is not to see ourselves as engaged in a battle in which the only moral imperative is to win—by whatever means might be necessary and effective. It is true that warfare does not aim—as punishment should aim—at moral communication with the enemy. Rather, it aims to defeat their unjust aggression in crucial part by killing or

otherwise incapacitating those engaged in that aggression as combatants. When combatants are captured and imprisoned as prisoners of war, the aim of their imprisonment is not moral communication but effective incapacitation. War is, however, subject to its own moral constraints—those that define the terms both of *ius ad bellum* and of *ius in bello* (of when a state can justly go to war and of what it can justly do in prosecuting the war). We can say that these constraints mark our recognition that those whom we are fighting are still our fellow human beings and are, therefore, still due a kind of respect that limits what we may do to them (a strictly contractualist model might again mislead us here, because the moral status of a human being is not conditional on the observance of the terms of a moral or social contract). In particular, if we are to justify our actions as part of a just war against terrorism, we must make sure that those actions are targeted only against those who are themselves engaged in a war of terrorism; and in our treatment of the terrorists themselves, we must respect those principles of international law that govern the treatment of enemy combatants—including the principles concerning the treatment of prisoners.

I will not try here to decide whether or when it is appropriate to see our dealings with and our responses to terrorism in terms of crime or of war save to say, first, that we probably can no longer maintain any simple and clear-cut distinction between *crime* and *war*; and second, that we should be slow and reluctant, especially in the case of domestic terrorism, to abandon the constraints and protections of the criminal law and the criminal process in favor of the much weaker constraints of war—to turn the terrorist from a citizen into an enemy. But my main concern here is to reject what some clearly favor as a third way of responding to terrorism—the view that we should treat terrorists neither as criminal wrongdoers subject to the demands and entitled to the protections of our criminal laws nor as enemy soldiers who are subject to the demands and entitled to the protections of the laws and conventions of war, but instead as “unlawful combatants” who have no such moral claims on our respect or concern and whom we may treat in any way that seems necessary to ensure our own safety and to “defeat terrorism.”

Such a view might reflect, first, a crude idea of national self-interest according to which “anything goes” in defense of the nation against attack, or second, the thought that terrorists have by their actions excluded themselves not just from citizenship (if they were citizens in the first place) but from humanity. The moral inadequacy of such a crude nationalism should be obvious as soon as it is made explicit: Whatever view we take of the relative importance of national self-interest (and leaving aside the problems involved in deciding what that means) and of other claims on a state, we cannot plausibly claim either that the demands of national self-interest or defense are the only demands on a state or that they must always trump any other demand. There are demands of humanity and justice that must transcend and override those of national interest if they conflict.

The suggestion that terrorists have excluded themselves from humanity is more insidious and tempting, especially if we take a contractualist perspective on ethics as well as politics or think that reciprocity is the key to moral respect: For why should we not say that the terrorists have by their own voluntary actions breached the most basic bonds of the human contract or failed utterly to perform their side of even the most minimal moral bargain? Now it might be true that the terrorists themselves are ill placed to complain about their treatment (depending on the character of their campaign), but this example just shows the serious limitations of a contractualist or reciprocity-based approach. To deny anyone's humanity, whatever they have done, is to reduce ourselves to or below their level. If we are to lay claim to even the most minimal level of moral decency, we must recognize the humanity of others, including those who have committed the most terrible wrongs or engaged in the most violent and unlawful attacks on us; but to recognize their humanity is to recognize moral constraints on how we may treat them—constraints of the kind reflected in the rules of war. (I leave aside here the further point that if we see terrorists as subhuman or nonhuman, we are also all too likely to see and to treat those suspected of terrorist acts in that way.)

My claim is, therefore, that the rules of war mark the minimal constraints that we must respect in our dealings with other human beings, whatever they have done. So even if we cannot or should not see some terrorist groups as criminals who should be subjected to (and so also protected by) the normal criminal process, we should minimally see them as enemies whom we should treat with the minimal respect and decency required by the rules of war.

This is not to deny that people might, in this as in other contexts, face terrible conflicts. The familiar, frightening example is that of the terrorist who knows, but refuses to divulge, the location of a bomb that is set to explode and to cause terrible loss of innocent life. Surely, it is said, the army or police officer interrogating the terrorist should use torture if that might get the terrorist to reveal the bomb's location.

That is certainly a terrible position to find oneself in, and we could not condemn a person who contemplated using torture if that contemplation flowed from an agonized concern to prevent such loss of life. The question is, however, whether we should see the use of torture as an understandable temptation that the interrogator must strive to resist or instead, as something that might be morally required or at least permitted: whether the conflict that the interrogator faces is a conflict between moral demands, neither of which clearly overrides the other, or between what morality demands and an absolute wrong that the interrogator is—albeit understandably—tempted to commit. Does the interrogator face a dilemma that it is agonizingly difficult to resolve or a temptation that it is agonizingly difficult to resist?

One thing should be clear: If we are to see this as a serious dilemma, we must suppose not only that the person under interrogation is a terrorist who has planted this bomb but also that this is known to be the case on the basis of evi-

dence that would warrant conviction in court. If the individual is not a terrorist, or is not guilty on this occasion of planting this bomb, what the interrogator is tempted to do is to torture an innocent person. If the individual cannot be proved to be a terrorist who is guilty of planting this bomb, what the interrogator is tempted to do is to torture someone who might well, for all the interrogator knows, be innocent. However strong that temptation might be, it is one that must be resisted by anyone who recognizes the victim's humanity, because the use of torture is the most outright denial of, and the most terrible attempt to destroy, the victim's humanity. Suppose, however, that the terrorist is in the relevant sense provably guilty: Should we not say that the terrorist's own actions (of planting the bomb and refusing to reveal its location) made it permissible for the interrogator to attach more weight to the humanity of the innocent potential victims, and to the moral demand that they be saved, than to the humanity of the terrorist and the demand that torture not be used?

This way of putting the claim is misleading, however, because it implies that the conflict is between two moral demands—not to use torture and to save the potential victims—of the same type. From a consequentialist perspective, of course, they are of the same type, because from that perspective, all genuine moral demands are ultimately of the same type; but from the nonconsequentialist perspective that informs these comments, they are of quite different types. The demand that we not torture anyone, even the terrorist in this example, is a demand that we refrain from a particular kind of wrongdoing. If we torture, it is we who commit the wrong, and those in whose name we act are complicit in that wrong. The demand that we save the innocent potential victims, by contrast, is a demand that we prevent the wrong that another—the terrorist—will do. If we do not find the bomb, the primary, terrible wrong is committed by the terrorist who planted it. Those who insist that such wrongs as torture are absolute wrongs that must never be considered as options would then argue that whereas the interrogator who uses torture is responsible for the commission of that wrong, one who does not use torture (but uses, in vain, every morally legitimate means to find the bomb) is not responsible for the killing of the innocents whom the bomb kills. For the interrogator's responsibility is to do what can be done, within the bounds of what is morally possible, to save those innocents. In this case, this interrogator has fully discharged that responsibility and could not prevent those deaths.

Such a denial of responsibility might seem like an evasion—even if it is accompanied, as it should be, by desperate efforts to do what morally can be done and by a terrible sense of horror and of failure. It is not an evasion: It rather expresses a particular, demanding moral perspective that takes very seriously the idea that there are moral limits, limits reflecting a conception of what it is to be human, on what we may even think of doing. But most of us will, and perhaps if we are to be human should, also feel the pull of the other perspective, which demands that we save the innocent even at the cost of torturing the guilty—and that is why someone facing this situation might reasonably think that they face a

tragic dilemma created by the irresolvable contradiction between these two perspectives.

We certainly should not condemn, as incontrovertibly mistaken or corrupt, someone who saw this as a dilemma rather than as a temptation, or someone who felt morally compelled to take on a larger responsibility to use torture on the guilty terrorist as an absolutely last resort while recognizing (for this is an essential feature of moral dilemmas) that to do this is to commit a terrible wrong. In the end, I believe, this is not an issue on which it is possible to speak either impersonally of what must be done or in the first person plural of what *we* would or should do. We, each of us, can speak only in the first person singular—if we do not actually face such a situation, of what *I* can hope that I would find myself able to do or to resist doing, or, if we are unlucky enough to face such a situation, of what I find that I can or must do. (It follows from this that the law should certainly not be so formulated as to allow a justification for torture in such a situation.)

However, I do believe there are some points on which we can and should collectively insist: that every human being, however terrible the wrongs they might have committed or might be committing, retains an unconditional moral claim to our recognition and respect; that this claim is violated if we subject people to treatment, such as torture, that denies or seeks to destroy their humanity; that nothing—no good to be achieved, no evil to be averted, no wrong that they have committed—can negate the wrong involved in such a violation; and, thus, that the belief that I “must” torture this terrorist as the only way to gain the information that will save the potential victims can claim our moral sympathy or respect only if it is accompanied and informed by a full recognition of the wrong that I would thereby do.

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