

## **Constitutions, Democracy, and the Rule of Law**

### **Terror and Civil Liberties**

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**Casting the First Stone: Who Can, and Who Can't, Blame the Terrorists?**

#### **Preliminaries**

**G. A. Cohen:** In April 1997, my son Gideon was dining out with his then wife-to-be [Carol] in the Blue Tops restaurant in the center of Addis Ababa. Suddenly, a hand grenade sailed into the room. The explosion killed one woman and severely injured several other people, but Gideon and Carol protected themselves by pushing their table over and crouching behind it. While Carol was physically unharmed, shrapnel hit and entered Gideon's right temple. It was removed three-and-a-half years later after it had caused bad headaches. Not only the identity, but even the inspiration of the Blue Tops terrorist remains, up to now, unknown.

One year later, and one country away, in the Sudan, in 1998, my daughter Sarah was less anonymously menaced. For she was one mile from the Khartoum factory, said by President Clinton to be producing chemical weapons and bombed by him in what was presented as an appropriate response to then recent anti-American terrorism in Africa.

Many thought that the American action, or at least its timing, was intended to distract attention from certain facts that had come to light about Clinton's sexual history. I could not judge whether that discrediting explanation of the action was correct, but even if the moot of explanation was false, and the calumny, the bombing of the pharmaceutical facility in Khartoum, a pharmaceutical facility which was merely maybe also a weapons factory, with Sarah nearby, enabled me to identify what the victims of superpower military force, more than a western person normally might. Hundreds of miles away, I could share Sarah's fear of further Khartoum bombing.

These experiences caused me to ruminate, more than I otherwise would have done, on the similarities and differences between the little bombs of the underdog, and the big bombs of the overdog. And I thank Columbia University for the opportunity to pursue some of that rumination in public today.

On May 1, 2003, Dr. Zvi Shtauber, who is Israel's ambassador to Britain, said what you've got on the [projection] screen, on British radio: "No matter what the grievance," he said, "and I'm sure that the Palestinians have some legitimate grievances, nothing can justify the deliberate targeting of innocent civilians. If they were attacking our soldiers, it would be a different matter."

Now Shtauber's statement made me angry. And I want to explain why it did so. I was not angry because I disagreed with what he said, and in fact, I shall not challenge the truth of what he said this morning. I shall neither deny it nor affirm it. That doesn't mean I have no opinion about the truth of his statement, but it means it's irrelevant to the considerations that I want to put before you this morning.

Rather, I shall raise some questions about the ambassador's right to say what he said, or at any rate, about his right to say it with the vehemence and indignation that he displayed. A lot of people who think it impossible to justify terrorism nevertheless find condemnations of terrorism by some westerners and by some Israelis repugnant. Yet if terrorism is impossible to justify, why can't just anybody at all say so? I offer an attempt to answer that question.

A lot of people have tried to define the word *terrorism*. But my topic is not the definition of the word. For my purposes, we can let terrorism be what Shtauber objected to, namely, the deliberate targeting of innocent civilians. If that is not what terrorism is, it is certainly what most people object to in what most people call terrorism. And most people think, as Shtauber manifestly does, and as I do, too, that deliberately targeting innocent civilians is, other things equal, morally worse than deliberately targeting soldiers. Notice, though, that sometimes other things are not equal; because, for example, the overdogs use what are truly weapons of mass destruction that the underdogs find it pretty hard to get. Or because justice isn't equally present on the two sides and so on.

A final preliminary point: I shall assume throughout that terrorism, or at any rate the terrorism that concerns us here, effectively serve the terrorists' aims. This is an artificial assumption, but it has an intellectual justification, because I want to focus on issues of principle. If terrorism, or a given case of terrorism, is anyhow counterproductive, with respect to the aims of the terrorists themselves, then for practical purposes, no questions of principle arise, because no sane person would say that some principle justifies counterproductive terrorism. But note, that anybody who condemns terrorism on the ground that it is counterproductive, and/or on the equally merely factual ground that it is never the sole possible resort of the aggrieved, anyone who condemns terrorism on those grounds, and who also thinks that such factual claims are essential to the case for condemning terrorism, has conceded a large point of principle to the terrorists.

The criticism that terror is counterproductive doesn't criticize it as terror. More approved forms of violence are also sometimes counterproductive. And Shtauber's complaint was that terrorism will not succeed, or that it will make it harder for Israel to agree to peace terms, though he would no doubt have added such claims, have the distinct question of the efficacy of Palestinian terrorism been raised. Shtauber's judgment was one of pure principle, and it is issues of principle, not difficult questions of fact, that will fall under my inspection here.

The rest of my discussion is inspired by reflection on the Israeli / Palestinian conflict. But although what I say relates to that conflict, I offer no conclusions about it. People who agree with my observations would apply them in different ways, according to their divergent further convictions. I model certain aspects of the conflict, more particularly some aspects of the discourse that surrounds it, for the same of philosophical discussion. But the practical significance of what I have to say will depend on the answers to controversial questions of fact and principle, about which I shall say nothing. I have in mind controversial factual questions about what happened in 1948 and in 1967 and earlier and later, and other factual questions about what the intentions of various parties to the conflict are now. I also have in mind difficult questions of principle, such as whether a people, or at any rate a massively abused people, has a right to a state. And if so, at whose expense, and at how much of their expense? All that will be set aside here.

As a Jewish person, I am exercised, indeed I am agonized, as so many Jewish people are, and as many people, both Jewish and non-Jewish, I would imagine in this audience, must be, by the Israeli/Palestinian conflict. But I seek to make some philosophical points that you should accept or reject quite independently of what you ultimately think about that conflict. The bearing of my points on the conflict, should my points be accepted, depends, as I said, on many other considerations, only some of which were mentioned a moment ago. This is not an investigation of the Israeli/Palestinian dispute per se, but a study of certain forms of argument and rhetoric that characterize the way the dispute is conducted.

Examination of those forms may help to illuminate at least the mindsets that clash in the dispute, but the properly intellectual content of what I shall offer is focused within the forms of argument themselves.

### **Who Can Criticize Whom?**

Much philosophy seeks to discover a consistent path between inconsistent propositions, both or all of which we have some inclination to infer. We are, for example, inclined to affirm both that we are responsible for our choices, and that sign shows that we are not. Both that we know a lot of undeniable truths and that we can be certain of almost nothing. Both that moral judgments are objective, since otherwise they would have no force. And that moral judgments are merely subjective, since there is no way of showing them to be true.

And to approach the territory of present concern, we are inclined to affirm, on the one hand, that certain conditions of extreme injustice should not be tolerated; that people should do everything within their power to remove them, or at any rate that the sufferers of that extreme injustice are themselves entitled to do anything that they can do to remove them. But we are also inclined to affirm that certain means of fighting injustice should never, under any circumstances be used. Yet, what should we say about circumstances that display the contemplated conditions of extreme injustice in which the forbidden means are the only means available? When we acknowledge that possibility, we are forced to revise some of our convictions about what morality says.

And in what turns out to be our preferred revision, morality might say to some victims, sorry, your cause is just, but you are so effectively deprived of all decent means of resistance by your oppressor, that the only means of resistance that remain open to you are morally forbidden means. Morality might say that, because that might happen to be the sad, moral truth of the matter. But can just anybody say that on morality's behalf? Can the oppressor herself say that? Can the oppressor, whoever that may be—and I'm making no assumptions about who is oppressing whom here—can the oppressor say, can the oppressor get away with saying, I am sorry, your cause is just, but you are so effectively deprived, as it happens, by me, of all decent means of resistance, that the only means open to you are morally forbidden?

As that example suggests, the force, the effect of a moral admonition varies according to who is speaking and who is listening. Admonition or blame may be sound and in place, but some may be poorly placed who offer it. When a person replies to a critic by saying, where do you get off criticizing me for that? She's not denying or of course affirming the inherent soundness of the critic's criticism. She's denying her critic's right to make that criticism. Her rejoinder achieves its effect without confronting the content of her critic's judgment. She challenges instead her critic's right to sit in judgment and to pass that judgment.

Let me step back a bit. We can distinguish three ways in which a person may seek to silence or to blunt the edge of a critic's condemnation. First, she may seek to show that she did not, in fact, perform the action under criticism, or that it has been misdescribed. Second, and without denying that she performed that action, she may claim that the action does not warrant moral condemnation, because there was an adequate justification for it, or at least a legitimate excuse for performing it.

But third, while not denying that the action was performed, and that it is to be condemned, which is not to say while agreeing that it's to be condemned, but setting aside the issue of the moral justification of the action, the perpetrator of the action can seek to discredit her critic's standing as a bona fide condemner of the relevant action. And that third form of defense is of great importance in the

political world, where it matters enormously who can say what to whom, credibly and sincerely. The political world is not populated by saints who can readily justify themselves by appeal to accepted standards, but by non-saints, who have a better hope of deflecting criticism, not by trying to justify what they did, but by implicating their criticizing their fellow non-saints in the same or similar charges. And this happens all the time.

### **“Look Who’s Talking”**

Two contrasting ways of discrediting a critic's standing will concern me here. They both occur widely in moral discourse and they occur saliently in exchanges of condemnation about terrorism and, in particular, in exchanges between Israelis and their supporters and Palestinians and their supporters. The first of these techniques for silencing a critic's voice, extremely common, was signaled in my childhood by the retort, look who's talking!? Harry might say, “Hey, Solly, how come you didn't come to the club last night? All the guys were expecting you.” And Solly might reply, “Look who's talking? Twice last week you didn't show up.” Now, unless Harry could now point to some relevant differences, his moral voice was silenced, whether or not the criticism he originally made of Solly was sound. And in places that are more genteel than the immigrant Jewish streets of postwar Montreal where I grew up, people don't say look who's talking, but that's the pot calling the kettle black. If I, the putative kettle, make that reply under criticism to the putative black pot, I'm not denying that I am tarnished, I am saying that since the pot is blacker still than I am, the pot must see to its own hue before it presumes to criticize mine. And a still more elevated epithet that occurs in the contemplated range of silencing replies is more elevated still because it's in Latin. I have in mind the sentence, also pronounced with a British accent, *tu quoque*, which means you too.

Now for this first subtype of discrediting response, I have three good labels. I think they're good labels. Look who's talking, pot calling the kettle black, and *tu quoque*. For my contrasting second subtype, I have no good vernacular or Latin tag that covers all and only the required cases. But I will point you in the right direction by reminding you of retorts to criticism like, well, you made me do it. Or you started it. Even those phrases don't ... even though those phrases don't cover all the variants of the second subtype.

In this second subtype, you are disabled from criticizing me not because you're responsible for something similar, or worse, yourself. That's the first type. But because you bear at least some responsibility for my having done the very thing that you're seeking to criticize. My Nazi superior cannot criticize me for doing what he ordered me on pain of death to do, even if someone else can say that I should have disobeyed that order and accepted death.

It is the first subtype that I want to reflect on first, the case where the criticism is rebutted by some sort of *tu quoque* that in some way undermines the moral

capacity of the critic to make the stated criticism, without prejudice to the aptness of the criticism when it is considered simply on its own. Tu quoque clearly plays a large role in Palestinian responses to Israeli criticism of Palestinian terrorism. And also some role in Israel responses to Palestinian criticism of Israelis.

Now was I angered by Ambassador Shtauber's statement because it's vulnerable to the look who's talking reply? No, because I have no definite view about who comes out worse, the Israeli government, or Palestinian terrorists when the discourse of tu quoque is applied. Many Israelis who are very critical of their own government believe that that government may nevertheless credibly criticize Palestinian terrorism because that terrorism is morally much worse than any violence that the Israeli government itself commits. In response to the claim that Israeli criticism of Palestinian terror is silenced by the fact that Israelis kill many more Palestinians and a lot more children, these Israelis argue that Israeli killing is not as bad as Palestinian killing.

Now some of these Israelis invoke the principle of double effect, which distinguishes between killing innocent people as a foreseeable side effect of otherwise targeted action, and killing innocent people who are your target. Our government can criticize them, these Israelis might say, because although that government kills more innocent people than they do, it does not aim at innocent people.

Now, I myself believe, I always have done, in the principle of double effect, or at any rate in the judgments about cases that are meant to illustrate that principle. But I also believe that the only same form of the principle of double effect is comparative rather than absolute. Let me explain: I believe, for example, that holding everything else equal, such as for instance, the amount of justice that there is in the cause, killing one hundred innocents through foreseeable side effect is actually worse than killing one innocent who is your target. It seems to me ludicrous for us to say that you committed an outrage, when you set your sights on and killed three civilians with your petrol bomb, but that we did not commit an outrage, when we merely foreseeably killed two hundred when our planes took out the ammunition dump next to where the two hundred lived.

And we also have to take into account how careful people are to avoid killing civilians. It's possible not to aim at killing them, but to be utterly reckless of their safety. And the observer from afar can be excused his impression that Israeli soldiers become more reckless, in some cases willfully reckless, as the antagonism between the peoples deepens. So it's not at all clear that Israel criticism of Palestinian terrorism can shelter under doctrine of double effect.

But Palestinian terrorists and their apologists also face a powerful tu quoque challenge. Palestinians complain that they lack a state. They complain that their rights are denied. But how can they then justify a terror that denies the right to life of innocent others? They might protest that they aim not at innocents, but only at

Israelis who are complicit in causing their grievance. But no defensible doctrine of complicity will cover everybody in Tel Aviv cafes, including the children and non-citizens of Israel who may happen to be there. In face of that fact, can Palestinian terrorists invoke the principle of double effect, and claim that they are aiming only at the complicit citizens in the Tel Aviv bars and the other deaths are side effects? I, for one, do not find that posture credible.

But again, how does it differ from the posture of Israeli assassination squads who blow up homes because Hamas supporters live there, even when they know that innocent people who also live there may well lose their homes and their livelihoods and even their lives. In sum, I'm not sure what tu quoque tells us in the present case. I don't think it delivers judgments that are straightforward enough to serve as an immediate provocation to the anger that I felt when I heard Shtaubers's statement.

### **"You Made Me Do It"**

I now want to consider Ambassador Shtaubers's statement within what, for convenience, I'm calling the "you made me do it" framework. I focus first on the concession at the opening of his statement, a concession that is often heard in Israeli/Palestinian debate, and in discourse about terrorism more generally. The concession says well, look, your grievance may be just, I'm not denying that. I'm setting that aside. But I believe that there is a problem about proceeding to condemn the terrorist's means after you've expressed a willingness, in principle, to concede the grievance, when you, the critic, are the source of the grievance, if there is one.

I shall argue that whether or not the Palestinians have a legitimate grievance, and whether or not those Palestinians who use terrorism in pursuit of a supposed grievance are justified in doing so, Shtaubers's statement is indefensible on his lips because they are the lips of the spokesperson for Israel. An Israel spokesperson is not morally qualified to make, though no matter what the grievance concession, when it's followed by the nothing-can-justify admonition. Because the character of the grievance that the Palestinians allege has a special bearing on the moral capacity of Israelis in particular to criticize the means some Palestinians use to pursue that grievance.

I must again emphasize, and I realize it's a refined point which people unused to philosophy are unused to taking on board. But I do it to protect myself. I must emphasize my present claim is mutual, with respect to whether the Palestinians actually have a grievance, or a grievance on a scale that might justify terrorism. I'm simply saying you cannot set that issue aside if you are the putative causer of the grievance. A third party may do so.

If the Palestinians have normal democratic sovereignty and normal civil liberty, they would have a normal army, which is not equipped merely to police its own

people. Their grievance is centrally that they lack a state. And therefore, among other things, the approved means of violence that a normal army possesses. So it's a very lack of what they claim to have a right to, it's the grievance itself that if anything does, justifies their mode of pursuing it. It is after all only by unconventional means that you can pursue the grievance that you lack conventional means of pursuing grievances.

And it seems to me to follow that the question of the justice of the Palestinian grievance cannot be put aside by those who deprive them of conventional means of redress in a discussion of the particular unconventional means that they use to pursue their grievance. Consider a Wild West parallel. If a certain varmint is not allowed to own a gun, when everybody else has one, then whoever took away his gun must justify his removal of it, if he wants to criticize the varmint's recourse to whatever it is that is worse than a gun that he uses instead. If you've got someone up against the wall, don't complain if he kicks you in the balls, unless you can justify your action of putting him up against the wall.

If it is you who have disarmed the people, if it is you that deprived them of weaponry that is effective against your soldiers, or at least ensure that they cannot get such weaponry—I mean, Shtaubert isn't saying if they were attacking our soldiers, it would be a different matter—therefore when the ships come in the Mediterranean towards Gaza, with weaponry that's suitable against soldiers in particular, we'll let them come because we want them to be able to fight us decently. Of course, he's not saying that. That is an extreme hypocrisy of the last form of the last element in that statement.

You cannot complain if your opponent uses unconventional weaponry against non-soldiers unless you can deny that they have a grievance against you. So you can't say what Shtaubert said, namely, whatever the rights and wrongs of the cause may be, only conventional or more conventional procedures are permissible in its pursuit.

In sum, even if it is the moral truth, that one should never attack civilians in terrorist fashion, the Israelis in particular can't condemn Palestinians for attacking civilians, regardless of the justice of their grievance. You can't ignore the character of the grievance if it is you who disarmed or who ensures the armlessness of the opponent. You must then claim that you had a right to do that, and thereby, you perforce take a stand, a negative one, as to whether they have a just grievance. You can complain, when a homicidal criminal that you have disarmed tries to strangle you, but that's because disarming him was justified. After all, he made you do it.

Now I said that among the broad variance of this reply to criticism are, "You started it!" And, "You made me do it!" But they won't cover all the cases and I've not found a phrase that does so, except perhaps, "You're in it, too," which is pretty insipid.



The riposte I'm considering has many subvariants, with, "It's your fault that I did it," at one end of an extreme, and, "You helped me to do it," at another. And note that if it's your fault in whole or in part that I did it, then it can be your fault for structurally different reasons. Here is part of the relevant wide array: "You ordered me to do it;" "You asked me to do it;" "You forced me to do it;" "You left me with no reasonable alternative;" "You gave me the means to do it, perhaps by selling me the arms that I needed."

When such responses from a criticized agent are in place, they silence criticism that comes from the now-impugned critic, while leaving third parties entirely free to criticize that agent. When, as a child, I tried to excuse an action on the grounds that somebody else had told me to perform it, my mother would say, so if they told you to jump off the Empire State Building, you would do that too? The inferior functionary who followed Nazi orders can't be criticized by his superiors for following those orders, but he can nevertheless be criticized by us.

Notice now how this second subtype differs from the first. Look who's talking. In the second subtype, you made me do it, the responding criticized person need make no judgment about whether her critic has herself committed a similar or worse crime. Look who's talking says, how can you condemn me when you yourself are responsible for something similar or worse? You made me do it, it says, how can you criticize me for doing this when you are yourself responsible or at least co-responsible for this very thing that I did? The responsibility can run from physically forcing at one end to merely abetting at the other. If you thought it was wrong for me to rob the bank, why did you gladly give me the safe-lock number?

So the general form of this response is, "Well, you the critic are implicated in the commission of this act as its co-responsible stimulus, commander, guard, assistant, or whatever." An important subcase of "You made me do it," is "You left me with no responsible or acceptable alternative."

Notice that your having left me with no reasonable alternative to doing some ghastly thing does not in itself entail that I was forced to do that ghastly thing if only because I might nevertheless have not done it. I might have accepted my death rather than do this horrible thing. So I had no reasonable alternative, because accepting my death isn't reasonable, to doing some awful thing, but nevertheless I wasn't forced to do it. I didn't. Nor does your having left me with no reasonable alternative entail that I was justified in doing the thing. Suppose that I did do it? Having no acceptable alternative to using terrorist means may be a necessary condition of being justified in using terror but it doesn't follow that it is a sufficient condition of being justified in using terror.

I might be in the powerless condition that I have no acceptable choice at all, but terror might nevertheless be more unacceptable than one or more of my other

unacceptable courses. I might have to choose between disaster for me and a course so morally horrible that the only decent thing I can do is to choose disaster for me. But how can you, in particular, complain if I refuse to choose disaster for me if it was you who deprived me of all acceptable alternatives unless you can justify your having done so?

If someone has no acceptable alternative, then there is a case to answer against whoever made that true. If the sad moral truth is that although the alternatives to terrorism are unacceptable, my terrorism is nevertheless unjustified, then how, even so, can the person who deprived me of acceptable alternatives and so drove me to admittedly unjustifiable terrorism, condemn that resort, without justifying the action that disabled me? That person must respond to my grievance that she left me with no acceptable alternative to a morally heinous and forbidden action. The terrorists say, "Your occupation makes us use these methods." The Israelis say, "Your terrorism necessitates the continuation of our occupation."

These claims can't be adjudicated in the absence of some view about who has what sort of justified grievance. So whatever else is true is this highly contested case, Shtauber should not have said what he did, and I think that's what made me angry when I heard his statement.

### **Alternatives to Terrorism**

Finally, I've assumed—and I noted the peculiarity and artificiality of the assumption, and I'm grateful for the patience you've shown, at least you haven't fidgeted a lot, you know—in, well, appearing to accept it for the purposes of argument. I assume, in order to expose some lines of moral principle, that Palestinian terrorism is an effective strategy. But it's not hard to think of more effective nonterror strategies that they might adopt. Suicide protests, which killed only the protestors—suicide without homicide—might be far more effective because of the reaction of world opinion. But Shtauber couldn't decently recommend pure suicide as an alternative, even if third parties could do so. Third parties could decently say to prospective Palestinian suicide bombers, "Why do you have to take other people with you when you do it?" Or suppose that the Palestinians retire their anti-Israeli armed struggle and demonstrate wholly peacefully against the apartheid colonial status that they may not have now, but that they will come to have under Israeli rule if Israeli rule continues? Can anyone doubt that this would in time produce a potent international and Israeli outcry against Israeli rule?

Perhaps Ambassador Shtauber should recommend that Ghandian course. I'm very grateful to you for listening to my perhaps unconventional views on these matters. Thank you very much.