

An Infinite Regress of Impermissible Threats:

An Argument Against the Traditionalist View of Deterrent Threats

Russell L. Christopher

[Rough Draft for “The Logic of Deterrence and the Changing Face of Warfare” conference. Please do not quote, cite or distribute outside the conference without permission.]

INTRODUCTION

One of the fundamental issues in the logic of deterrence is whether it is permissible to threaten to do that which is impermissible to actually do. The issue has been widely debated among criminal law scholars, moral philosophers, and military strategists. For example, if it is impermissible to use deadly force to prevent the theft of property is it nonetheless permissible to threaten to use deadly force to deter the would-be thief. Since the middle of last century, the issue has perhaps attracted the most attention in the context of nuclear deterrence. For example, if it is morally impermissible for nation *A* to actually detonate a nuclear device against nation *B* is it nonetheless permissible for *A* to threaten to detonate a nuclear device against *B* to deter *B* from using nuclear force against *A*. And now in the twenty-first century, as new modes of warfare have arisen, the issue may also be relevant in formulating policies regarding defenses to cyberwarfare.

Some argue that is *never* permissible to threaten to do that which is impermissible to actually do. Under this so-called Traditionalist view,¹ the impermissibility of carrying out the threatened conduct dispositively establishes the threat itself as impermissible. If the threatened conduct is impermissible, then so also will be the threat itself. One possible caveat to this absolutist position is that it may only apply to sincere, intended threats but not to bluffing threats. As a result, this position is sometimes characterized in terms of intentions. Gregory Kavka terms it the “Wrongful Intentions Principle (WIP):

¹ GREGORY KAVKA, MORAL PARADOXES OF NUCLEAR DETERRENCE 34 (1987) (contrasting “Traditionalists” with “Retaliators”).

To form the intention to do what one knows is wrong is itself wrong.”² Kavka cites as proponents of the principle such notable philosophers as “Abelard, Aquinas, Butler, Bentham, Kant, and Sidgwick, as well as recent writers such as Anthony Kenny and Jan Narveson.”³

In contrast to the Traditionalists, others argue that it is *sometimes* permissible to threaten to do that which is impermissible to actually do (and even carry out the threatened act if the deterrent threat fails to induce compliance). Under this so-called Retaliationist view,⁴ the likelihood that such a threat is permissible is a function of the likelihood of its effectiveness. The more effective the threat, the lesser likelihood that (i) the impermissible threatened act will be carried out and, (ii) the recipient of the threat will engage in the conduct triggering the consequence for non-compliance. As a result, such a deterrent threat may be permissible on consequentialist grounds by minimizing the likelihood of impermissible conduct by both the utterer and the recipient of the threat. Uttering the prima facie impermissible threat is the best way to minimize impermissible conduct; uttering the prima facie impermissible threat leads to less impermissible conduct than not uttering the prima facie threat. In addition, Retaliationists argue that a threat, for example—to use force, is not equivalent to actually using force.⁵

This paper argues against the Traditionalist view. The Traditionalist principle—a threat to commit impermissible conduct is itself impermissible—proves too much. This paper attempts to demonstrate the overbreadth of the principle by repeatedly applying the

² *Id.* at 19.

³ *Id.*

⁴ *See supra* note 1.

⁵ Claire Finkelstein & Leo Katz, *Contrived Defenses and Deterrent Threats: Two Facets of One Problem*, 5 OHIO ST. J. CRIM. L. 479, 495 (“Threatening to use deadly force is not equivalent to using it.”).

principle to the very results of the principle. By doing so, the principle establishes that ever increasingly inchoate conduct is impermissible. Ultimately this method—repeatedly applying the principle to the results of the principle—generates an infinite regress of infinitely inchoate conduct that the principle finds to be impermissible. But this conduct that the principle declares as impermissible is either wholly permissible, too trivial or de minimis to be impermissible, or nonsensical. Either way, the Traditionalist principle proves too much.

I. REPEATEDLY APPLYING THE TRADITIONALIST PRINCIPLE TO ITS RESULTS

To see how the Traditionalist principle proves too much consider the following:

Utterer delivers to Recipient the following threat, threat *T*: “I will commit impermissible conduct *X* against you.”

According to the Traditionalist principle, threat *T* is impermissible because the threatened conduct *X* is impermissible. That is, the conduct of uttering *T* is itself impermissible. But if conduct *T* is impermissible, then, according to the Traditionalist principle, threatening to commit impermissible conduct *T* would also be impermissible. Let us term a threat to commit impermissible conduct *T* as threat *T2*. Because threat *T2* is threatening impermissible conduct *T*, *T2* is itself impermissible. But if *T2* is impermissible, then a threat to commit conduct *T2* is itself impermissible. Let us term a threat to commit impermissible conduct *T2* as threat *T3*. Because threat *T3* is threatening impermissible conduct *T2*, *T3* is itself impermissible. And so on, and so on. Repeatedly applying the Traditionalist principle to the very results of the principle generates an infinite regress of impermissible threats to threaten to threaten Not only is a threat

to commit impermissible conduct itself impermissible but also a threat to threaten to commit impermissible conduct is itself permissible. And not only is a threat to threaten to commit impermissible conduct itself impermissible conduct but so also is a threat to threaten to threaten to commit impermissible conduct itself impermissible. According to the Traditionalist principle, for any threat T (that is itself impermissible because it threatens impermissible conduct), an infinite regress of threats T_2 (threatening T), T_3 (threatening T_2), T_4 (threatening T_3) ... T_N (threatening T_{N-1}) may be generated that are themselves impermissible.

II. THREE POSSIBLE APPROACHES

While the Traditionalist views such a threat to threaten to threaten . . . as impermissible, it is more plausibly understood as permissible. There are three possible ways of finding such a threat to be permissible. First, a sufficiently multiple (but finite) series of a threat to threaten to threaten is sufficiently inchoate for it to be wholly permissible. Second, even if such a threat is properly impermissible, an infinite series of a threat to threaten to threaten . . . is so infinitesimally impermissible as to be de minimis and trivially impermissible, and thus, permissible. Third, such a threat to threaten to threaten . . . is nonsensical, and thus, permissible.

A. *A Sufficiently Multiple Series of A Threat to Threaten to Threaten . . . Is Permissible*

At some point conduct becomes too inchoate to plausibly view as impermissible. We recognize that a threat to commit a cognizable completed harm or wrong is impermissible. For example, a threat to kill, which we might view as “singly inchoate,”

is plausibly impermissible. Even a threat to solicit another to kill, which we might view as “doubly inchoate,” is plausibly impermissible. There might even be some “triply inchoate” offenses—attempted possession of drugs with the intent to distribute. Or maybe even “quadruply inchoate” offenses—attempted solicitation of possession of drugs with the intent to distribute. But at some point—conduct that is “quintuply” or “sextuply” inchoate and so on—ceases to be plausibly impermissible. We generally do not recognize as impermissible conduct that is sufficiently “multiply” inchoate. At some point, we draw the line, and conduct becomes too inchoate to declare as impermissible.

B. An Infinite Series of A Threat to Threaten to Threaten . . . Is Permissible

And even if any multiply inchoate conduct may be plausibly viewed as impermissible as long as it is only finitely inchoate, surely infinitely inchoate conduct cannot be plausibly declared as impermissible. Repeatedly applying the principle—a threat to commit impermissible conduct is itself impermissible—to the very results of the principle, generates an infinite regress of impermissible threats to threaten. The principle would declare an infinitely inchoate threat to threaten to threaten . . . as impermissible. But the impermissibility of such an infinitely inchoate threat is implausible.

Traditionalists might defend the principle by maintaining that even such an infinitely inchoate threat to threaten to threaten . . . properly remains impermissible. The Traditionalist might invoke the concept of degrees of impermissibility. While a threat to commit a cognizable wrong or harm is impermissible, a threat to threaten that cognizable wrong or harm is less impermissible by a degree but still impermissible. And a threat to threaten to threaten that cognizable wrong or harm is even less impermissible but

nonetheless still impermissible. And so on, and so on. As a result, an infinitely inchoate threat to threaten to threaten . . . may be considerably less impermissible but still, just barely, and ever so slightly, impermissible.

There are two responses to the above possible Traditionalist defense. First, it is not clear that impermissibility is susceptible to degrees. The concept of impermissibility may be such that conduct either is or is not impermissible—there are no degrees. Second, even if there are degrees of impermissibility, the infinitesimally small degree of impermissibility of an infinitely inchoate threat to threaten to threaten . . . is so trivial and de minimis as to not warrant a declaration of impermissibility. Such instances of de minimis or trivially impermissible conduct should best be understood as permissible conduct.

C. *A Sufficiently Multiple or Infinite Series of a Threat to Threaten to Threaten Is Nonsensical, and Thus, Permissible*

The third possible approach is that a sufficiently multiple or infinite series of a threat to threaten to threaten . . . is nonsensical. It might be considered nonsensical in two different ways. First, threatening to threaten might be nonsensical in the same way that attempting to attempt and conspiring to conspire might be nonsensical. Attempting to attempt might be considered nonsensical because the requisite mens rea for an attempt is generally the intent to commit the completed crime. If an actor is merely attempting to attempt, then the actor is intending to commit not the completed crime but only the inchoate attempt. Thus, in an attempt to attempt, the actor's intent negates the ability of the actor to form the requisite intent for an attempt. Rather than intending to succeed, the

actor intends to fail. By intending to fail, the actor's conduct is self-defeating and does not constitute the impermissible form of conduct termed an attempt. Similarly, conspiring to conspire might be considered nonsensical because a conspiracy requires an agreement between the conspirators to commit a crime. But if an actor conspires to conspire she is agreeing not to commit a crime but agreeing to form an agreement. By only agreeing to agree to commit a crime, the actor's conduct does not constitute the impermissible form of conduct termed a conspiracy.

However, not all threats to threaten might be nonsensical in the same way as attempts to attempt and conspiring to conspire. Because some threats are cognizable wrongs or harms, threatening such a threat might be properly impermissible. For example, making a terroristic threat is a cognizable harm or wrong. As a result, threatening to make a terroristic threat might well be properly impermissible.

Second, even if a threat to threaten is not nonsensical, a sufficiently multiple or infinite series of a threat to threaten to threaten . . . is nonsensical. Who would utter such a threat? Why would anyone utter such a threat? It does not seem to make any sense.

Traditionalists might be tempted to agree that it is nonsensical. The Traditionalist might argue that attempting to demonstrate the invalidity of the Traditionalist view through nonsensical means necessarily fails. If the critique is nonsensical, the critique fails.

But if a threat to threaten to threaten . . . is nonsensical, then the critique may still succeed. If the conduct is nonsensical, then there is no reason to declare it impermissible. There is no reason for nonsensical conduct to be impermissible. Other forms of arguably

nonsensical conduct—attempting to attempt and conspiring to conspire—are permissible. That the concept of a threat to threaten to threaten . . . is nonsensical does not supply the basis for a defense of the Traditionalist view, but rather, a criticism of it. That the Traditionalist principle finds the nonsensical conduct of a threat to threaten to threaten . . . as impermissible demonstrates that the Traditionalist principle proves too much.

CONCLUSION

In the debate over the morality of deterrent threats to commit impermissible acts and whether such threatened acts may be carried out, Traditionalists maintain that both the threat and committing the threatened act are impermissible. Traditionalists reason that if the act is impermissible, then so is the threat. Retaliationists argue, on largely consequentialist grounds, that both uttering the threat and committing the threatened act may sometimes be permissible. This paper attempts to demonstrate that the Traditionalist principle is invalid because it proves too much.

Repeatedly applying the Traditionalist principle to its results generates an infinite regress of impermissible threats to threaten to threaten . . . and so on and so on. But such conduct should be understood as permissible under one of three possible approaches. First, a sufficiently multiple series of a threat to threaten to threaten . . . is permissible because it is inchoate to such a degree that it is too far removed from threatening a cognizable wrong or harm. Second, an infinite series of a threat to threaten to threaten . . . is permissible because its degree of impermissibility, if any, is infinitesimal, trivial and de minimis. Third, conduct involving such a series of threats is nonsensical. Because there is no reason for nonsensical conduct to be impermissible, it is permissible. Either

way, the Traditionalist principle is invalid because it proves too much. It declares as impermissible conduct better understood as permissible.

As a result, one might be tempted to conclude that the Retaliationist view is preferable. Perhaps the better conclusion to draw is that the Retaliationist view should not be considered wrong *solely* because it violates the Traditionalist principle. Whether or not the Retaliationist view is preferable should be considered independently of the Traditionalist view. That is, a threat should not be considered impermissible simply as a function of it threatening impermissible conduct.