

מוסר, מלחמה וטוהר הנשק

פרופסור נעם זהר

סמסטר א' תשע"ד

הקליד וערך: דביר חדד

סוכם ע"י: לוריאל משיח ודביר חדד

המחלקה לפילוסופיה

אוניברסיטת בר אילן

החוברת מכילה את החומרים הבאים:

**סיכום לקורס ע"פ פרקי הספר של מיכאל וולצר:
מלחמות צודקות ולא צודקות.**

**מאמרים שקראנו בשיעור שנבחרו ע"י פרופסור
זהר. (נספחים)**

ושחזור של מועד א' שהיה.

בהצלחה לכולם!

חשוב מאוד לציין!

אסור ללמוד רק מהחוברת הזאת, היא ממש לא מכסה את כל הנושאים בספר!
היא בקושי מכסה את מה שדיברנו עליו בכיתה, וגם זה לא באופן מלא.
מומלץ מאוד לקרוא את הספר במלואו (פרט לפרקים שלא קשורים לבחינה) לפני
המבחן.

חלק ראשון:

המציאות המוסרית של המלחמה

פתיחת הסמסטר:

מוסר, מלחמה וטוהר הנשק הוא נושא הקורס – אנו נדון בקשר שבין מוסר למלחמה ולחימה, וכשטוהר הנשק הוא כמובן ערך המוכל בנושא העצום הזה.

המבחן יהיה רב ברירתי עם עשר מטלות- צריך לבחור תשובה אחת (4 נקודות) מתוך 5, ולספק נימוק קצר (6 נקודות). ובסה"כ $10 \cdot (4+6) = 100$.

בד"כ אנשים אומרים שמוסר ומלחמה הם מושגים רחוקים זה מזה, אולי אפילו אוקסימורון. יש אמרה שאומרת "כשרועמים התותחים, שותקות המוזות". כשיורים (במלחמה) המוסר שותק. ישנה עמדה נוספת, שטוענת כי יש קשר מסוים, זיקה מסוימת, בין שני המושגים. למה, אם כן, אפשר לטעון כי אין ביניהם קשר?

1. "המטרה מקדשת את האמצעים". אדם עלול לטעון כי עבור מטרת העליון של המלחמה – להכניע את האויב – הכל מותר.
2. המלחמה במהותה היא הרג בני אדם, ולכן מראש היא כבר יצאה מתחום כללי המוסר, על כן אין מה לנסות ולהפוך אותה למוסרית. היא כששל עצמה כבר מחוץ לגבולות האלה.
3. כשדוחקים אדם אל הפינה, מונעים ממנו את האופציה להישאר מוסרי.

תומס הובס הוא אחד מהתיאורטיקנים של האמנה החברתית, והוא מדובר על מצב טבעי טרום-מוסרי. המצב הטבעי של האדם הוא מלחמת הכל בכל. "Life is short, brutish and cruel". לכן עלינו לכוון חברה יותר מתוקנת עם חוקים, כדי לאפשר לאדם לצאת מהמצב הזה. אצל הובס, הכינון של המוסר הוא באמנה החברתית, וממש לא במצב הטבעי.

איפה הובס יכול להראות לנו את המצב הטבעי הזה? הרי כל חברה שאנחנו מכירים עם בני אדם הוא עם חוקים כאלה ואחרים. הדוגמה שהוא מביא היא המצב הבינלאומי בין מדינות, ומאחר ואין משטרה בינלאומית כל אחד עושה מה שברצונו. מכאן נוכל לטעון שאין קשר בין מוסר למלחמה, כי אנחנו חוזרים למצב הטבעי של האדם שבו האדם חסר מוסר.

העמדה המרכזית שתוצע בקורס שלנו היא ההפוכה (והיא שנהייתה מיינסטרים היום) ושטוענת כי ישנו מקום לגשר בין המוסר למלחמה, כי במצבו הטבעי של האדם עדיין יש לו חוקים מוסריים כאלה ואחרים.

גישה פילוסופית שמאפשרת את ה"מטרה מקדשת" היא התועלתנות, שגורסת כי הכל נועד לשרת את רצונותיי ולייעל את העולם למטרותיי.

שאלה: האם כך אפשר להצדיק את החלטת טרומן ב-45 של פצצת האטום?

תשובה: ראשית, היסטורית, כן. מנענו בעזרת הפצצה את ההרג של מיליוני יפנים ואמריקאים. אני מקווה שבהמשך הקורס נדון באיום של פצצת האטום, שנהייה רלוונטי פתאום. כשפרופסור זהר התחיל ללמד את הנושא, בראשית שנות ה-90, הוא רצה להאמין שהנושא לעולם לא יהיה רלוונטי עוד..... ☹

נציין משהו על הנקודה הפסיכולוגית, שלדעת המרצה היא הכי מעניינת. הטענה שגורסת כי כשאדם נדחק אל הפינה הוא מתנהג בצורה חסרת מחשבה ולא ניתן לדרוש ממנו להתנהג בצורה מוסרית. אמפירית, יש לנו ראיות שאנשים נשארם מוסריים גם במקומות רחוקים ודחוקים עד מאוד; מחנות ריכוז, אנטרקטיקה, מלחמות, וכו'. כמובן שישנם אנשים שמתנהגים בצורה לא מוסרית, אך מכאן ללמוד שהאדם הוא חיה לא מוסרית במצבים הדחוקים זה פשוט לא נכון.

בספר הנשמה בגדר התיל הסופר דן במה שקורה לנשמתו של האדם כשהוא עומד מאחורי גדר תיל. סולז'ניצין מדבר על כך שיש פער בין מה שהאדם צריך כדי לחיות ומה שמציעים להם, כאן הם גם יודעים שהם במחנה הזה (של סטלין) נמצאים שם באי צדק. לכן המטרה המתקבלת היא לשרוד את זה, לעבור את זה בכל מחיר. ואז מתחילים לחשוב, מה זה בכל מחיר? ולפעמים השיקול הוא לדרוך על גופות של אחרים. חלק אמרו שכן, אני אחיה בכל מחיר. ויש שאומרים שלא, יש לי קו אדום. לדעת המחבר, אותו מיעוט גדול שבחר לחיות שלא בכל מחיר הם נשארם האנושיים, והאחרים מדרדרים ונהיים לתת-אנושיים.

הערה: אסור לנו להתעלם מההיסטוריה והביוגרפיה של האדם עד שהוא הגיע לנקודה הזו של ההכרעה בין הבחירה של המוסר על ההישרדות. אין ספק שזה משפיע על ההחלטות של כל אדם באשר הוא, וזו נקודה אחרת שאפשר להאריך בה מאוד.

אצלנו בקורס נצטרך לטעון כי יהיו לנו קווים אדומים שלא נעבור אותם כדי לנצח את המלחמה.

הספר שבו נשתמש הוא *Just and Unjust Wars*: Michael Walzer. התרגום לעברית הוא: מלחמות צודקות ולא צודקות, מיכאל וולצר.

כמה מילים על Realism: יש בכללי מושג שנקרא ריאליזם שהוא עומד ממול לנומינליזם, אבל כאן מדובר על ריאליזם בפילוסופיה פוליטית וביחסים בינלאומיים. ז"א יש היבט שאמור לדווח לנו מה קורה, ואלמנט של מה צריך לקרות. כטענה תיאורית, כל מה שקורה במישור הפוליטי נובע אך ורק מאינטרסים. עוד ניתן לטעון כי כך זה צריך להיות! ומי שיתמוך בכך הוא הובס. אנחנו, כמוכן, טוענים שזה לא מה שאמור להיות.

באופן טבעי, אנחנו מדברים על מלחמה במושגים של טוב, רע, פשע, טבח, ועל כן בטבעיות ניתן לייחס שיפוטיות מוסרית להתנהלות במלחמות.

כדי שהספר יוכל לדון בצדקת ובחוסר צדקתם של מלחמות, הוא טוען שהראליזם בכלל לא ריאלי – ורק כך הדיון יכול להיות קיים.

הקדמה ומבוא לקורא הישראלי:

בשיעור הקודם התווכחנו על האם בכלל יש לדבר על מוסר ומלחמה, או שמא הם הפוכים. בכך אנו תומכים בוולצר, שנלחם ברעיון הראליזם. צריך לציין, וולצר הוא ציוני וחבר באוניברסיטה העברית. נתחיל את הקריאה בהקדמה, ולא במבוא לישראלי. זהו הסדר הכרונולוגי הנכון.

הוא מתחיל ואומר שהוא אינו תיאורטיקן של מלחמות, אלא רק כתומך פעיל של תנועה פוליטית נגד המלחמה בווייטנאם. מיד אחר כך התחילו מחשבותיו. אם כך אבל, איך נדע כיצד לפעול בשעת ההכרעה? הוא מסביר שעלינו לחשוב ולהחליט לפני איך להתנהג, ובהתאם לכך לדעת כיצד לפעול במצבי לחץ.

אפיזודה פילוסופית: language יוצרת Methodological Individualism שיוצרת collective שיוצרת language. דרך השימוש בשפה אנו יוצרים מושגים ומדייקים אותם, וכך נוצר הקולקטיב, אוסף המושגים הזה, ובכך אנו שוב יוצרים שפה עשירה יותר, וממשיך כך לעד.

לענייננו חשוב הקשר שבין שפה לבן אדם חושב ומעריך. תורת מוסר לשיטתו של וולצר היא מערכת של שמות ומושגים הקשורים זה בזה. הוא כותב את הספר כי לאחר שהוא מחה והפגין וכו', הוא הרגיש שעליו לנסח את הדברים בצורה רפלקטיבית ונינוחה. בעיני וולצר, כך נובע מהמבוא, החשיבה הפילוסופית נובעת מהטראומה שלאחר המלחמה בווייטנאם ונוצרת ומשתנה מדו שיח מתמיד עם המציאות.

חשוב גם לציין מבחינתנו, שאנחנו לא מנסים להגדיר מהו צדק. אנחנו מניחים כאן כמה הנחות יסוד קריטיות שצדק קיים, ושיש לנו חוש מסוים מה טוב ומה לא, מה ראוי ומה איננו, ועליו אנו נסמכים. אם נכנס לפרוייקט הגדול של הגדרת הצדק ממש, אנחנו עלולים לכתוב על זה ספרים עבי קרס. ראו ערך: קנט, שפינוזה, יום, והרשימה עוד ארוכה.

במקור כתובה תת כותרת: "A moral argument with historical illustrations" – התדיינות מוסרית עם איוורים היסטוריים. חשוב לו לשים בכותרת שהנושא הוא טיעון מוסרי שנעשה בעזרת דוגמאות מההיסטוריה. במהלך הספר הוא מדגים את הטיעונים שלו בעזרת קודם סיפור או דוגמה, ומתחיל את המסקנות

שלו. וולצר איננו היסטוריון, אך הוא בהחלט נעזר בעבודותיהם של ההיסטוריונים השונים כדי להסביר את עמדתו ולהדגים את טענותיו. ראשית יבוא הסיפור, המעשה, המקרה – ולאחריו יתחיל הדיון של וולצר עליו. מה היה צריך להיעשות, למה מה שנעשה לא היה ראוי, וכך הלאה.

הוא מזכיר את Just War Tradition – מסורת המלחמה הצודקת, שהיא מסורת של תנאים שהופעים מלחמה כלשהי לצודקת או מוצדקת. הוא מנסה להחזיר את השיח על צדקת המלחמה ולהעלות אותו לשולחן הדיונים, במבט לאחור אפשר להגיד שהוא צלח מאוד.

נקודה נוספת שהוא מרגיש צורך לציין ולהבדיל בין הציבור הישראלי והאמריקאי היא שהישראלים כולם לחמו או לוחמים בהווה. זה חלק מההווה הישראלית. להבדיל, כמובן, מהציבור האמריקאי – שחלק נכבד ממנו מעולם לא התקרב או יתקרב לשדה הקרב. הוא מציין את ההבדל הזה כי השיח על מלחמות צודקות ולא צודקות בעיקר רלוונטי כלפי אנשים שהיו ולקחו חלק במלחמות. אנשים מהסוג הזה רוצים להצדיק את מעשיהם, או לפחות להרגיש בסדר אם מה שהם עשו. השיח הזה מאפשר זאת.

פרק 2 : פשע המלחמה

ניזכר רגע במבנה של וולצר על המלחמה, שעל פיו אנחנו דיירים כעת בבניין, ואת היסודות בנו כבר מזמן. אנחנו לא הולכים להתעסק ביסודות, אלא רק לדבר על באיזה מסלול עדיף להסתובב בבניין, ובאיזה חדרים יהיה יותר ראוי לעבוד או לגור.

בכותרת של הספר יש רמיזה לעניין הזה. הכותרת (מלחמות צודקות ולא צודקות) יכולה להתפרש בשני מובנים. הראשון הוא כמובן שכל המלחמות מתמיינות לשתי הקטגוריות הללו, או שמלחמה כלשהי היא צודקת או שהיא לא צודקת. לא רק זה, אלא שאין גם מלחמה ניטרלית. תמיד יש מלחמה צודקת או לא. האפשרות השנייה להבנת הכותרת היא שמלחמות הן צודקות ולא צודקות. במובן הזה, שבכל מלחמה יש דברים מוצדקים ויש שאינם. מכאן נובע שהדיון במוסר במלחמות לא רק שלא יהיה דיון דאונטולוגי עם איסורים מוחלטים, אלא שעל כל דבר ניתן יהיה להצדיקו לכאן ולכאן. כעת נתחיל בפרק השני:

וולצר מתחיל בהבחנה בין Jus in bellum וJus ad bellum. זה בעצם ההבדל שבין מוסר בלחימה לצדקת המלחמה. צדקת הלחימה היא שאלה חיצונית למלחמה- האם היה ראוי להתחיל במלחמה זו, האם היא התחילה מסיבות מוצדקות, ועוד שאלות מהסוג הזה. מוסר בלחימה, לעומת זאת, הוא מושג טוהר הנשק אצלנו בעברית. הכוונה היא לשאלות בתוך הלחימה ממש: האם הפעולה הזו והזו היתה מוצדקת? האם תקיפה מסדר גודל כזה ראויה? האם אנחנו מוכנים להקריב אזרחים בשביל לפגוע במושע? ועוד שאלות כאלו לגבי התנהלות בשדה הקרב ממש.

דוגמה למלחמה מוצדקת היא כמובן הגנה עצמית. בכל מלחמה יש לכל היותר צד אחד צודק. בכל מקרה, קל לדמיין מלחמה שבה שתי הצדדים לא צודקים. אבל אם מדינה אחת תוקפת אחרת, אז האחרת מגנה על עצמה בצדק, ועל כן המלחמה שהיא מקיימת תהיה מוצדקת. אבל לגבי Jus in bellum, יהיה עלינו לדון. איך מותר לה לנהוג? האם אין גבולות?

תאוריית המלחמה הצודקת נמצאת כאמצע בין הריאליזם לפציפיזם. על הריאליזם דיברנו שיעור קודם, והפציפיזם הוא בדיוק ההפך. הפציפיזם מבוסס בנצרות, במתי פרק ה' כדלהלן: " 38 שמעתם כי נאמר עין תחת עין שן תחת שן 39: ואני אמר לכם אל-תתקוממו לרשע והמכה אותך על-הלחי הימנית הט-לו גם את-האחרת: ". אם מישוהו מכה אותך, אסור לך להחזיר לו, אלא עליך לתת לו את הלחי השנייה. מכאן למדו שאסור להרוג אדם אחר לעולם. איסור דאונטולוגי שאי אפשר לבטל.

הפשע הראשון במלחמה הוא פשע התוקפנות. עצם הפתיחה במלחמה.

טיעונו של קרל פון קלאוזביץ' בספרו "על המלחמה" הוא כדלהלן: War is an act of force which theoretically can have no limits. מלחמה היא מעשה של אלימות שלא יחויבו לה גבולות – מבחינה/רק תיאורטית. קלאוזביץ מגדיר מושג של מלחמת הכל בכל, והיא total war, שבה כולם נלחמים בכולם בלי שום מגבלה, עד שבסופו של דבר מישוהו שולט בשני.

וולצר כמובן לא מסכים עם קלאוזביץ, ובמציאות מרבית המלחמות כן מתנהלות תחת הגבלות כלשהן. בשביל קלאוזביץ המלחמה הטהורה היא ללא גבולות, ונדיר מאוד למצוא מלחמה כזו. בעצם, וולצר לא מסכים להגדרת המלחמה אצל קלאוזביץ, אבל כן מקבל את העובדה שמלחמה היא אקט של אלימות. וולצר לכאורה מנסח כאן כללים של "כללים מוסריים איך להרוג אנשים".

מתבקש לשאול, האם מלחמה אינה תופת? (בהתאם לאמרה! War is hell)

וולצר שוב מדגים זאת ע"י דוגמה היסטורית, והוא מביא את האבירים שנלחמו אחד בשני בתשלום ובשביל הכיף האישי שלהם. זו היתה מלחמה לכל דבר, אך האם היא נראית כתופת? לא עושה רושם כזה. הם בחרו במלחמה הזו.

הבעיה המרכזית היום היא שחלק גדול מהמלחמות הוא גיוס חובה. כלומר שהחיילים אינם שם מרצון, ואם לא יתגייס הוא יישב בכלא. כאן, לפי וולצר, יש לטעון שבכל מקום שיש גיוס חובה זו היא מלחמת תופת. מלחמת שכפו על אנשים חפים מפשע, כי גייסו אותם נגד רצונם.

פרק 3 : כללי מלחמה

השאלה שהיום נרצה לדון בה היא Jus in bellum. בעברית: איך מתנהלים במלחמה?

בעמוד 58 ישנה כותרת משנה, "מוסכם המלחמה", ובמקור "War Convention". נשים לב, שלא מדובר בחוק אלא בקונבנציה, הסכם כלשהו. מקור תוקפו הוא בעצם ההסכמה ההדדית של האנשים שבחרו בו. לדוגמה, ישנם סוגי נשק שנחשבים לגיטימיים מול אחרים שלא נחשבים ככאלה. הדוגמה הכי ברורה לזה היא הנשק הכימי מול האקדחים שלנו, כמו שהיינו עדים למשא ומתן של ארה"ב וסוריה במהלך ההפיכה.

יש גם עניין תעמולתי שלוחמה ביולוגית ואטומית איננה דבר חיובי, ובכל זאת מדינות מחזיקות בנשק הזה. לנורמה אין שום צידוק פרט להסכמות. אין סיבה מהותית אך צריך הסדר בשביל זה דרך קונבנציה.

האם לדעת וולצר הכל קונבנציה אחת גדולה? התשובה היא חד משמעית לא. וולצר טוען כי במי מותר לפגוע איננה רק קונבנציה, אלא עניין של הצדקה מהותית. צדק ממש. מוסריות במלוא מובן המילה. הדוגמה שוולצר מביא לעסק היא הכניעה. האם אנחנו רשאים לפגוע במי שנכנע? זה ברור לנו שאסור לפגוע באלה שנכנעו. לעומת זאת, וולצר עלול להשיג צידוקים בשביל פגיעה באזרחים. זה שאסור לתקוף לא מעוגן רק בהסכמה, אלא הוא בעל תוקף מוסרי ממש. האם ישנה התקדמות היסטורית בעניין? לגבי אי פגיעה בשבויים, וולצר רואה בזה ערך עתיק שאפשר להביט אחורה היסטורית ולשים לב לזה.

כעת נחدد את המושג השני, את הצד השני של המטבע: non combatant immunity – חסינותם של לא לוחמים. בעצם, ניתן לפגוע בלוחמים – תוצאה ישירה מהמשפט הקודם. וולצר נותן כותרת קצת אחרת להיתר הזה לפגיעה בלוחמים: השוויון המוסרי של החיילים.

מהכותרת ניתן להסיק כי משמעות הביטוי שוויון מוסרי היא שכמו שכל חייל מצבא אי מועד להרוג חייל מצבא ב' ולא להיחשב לרוצח, כנ"ל נכון לגבי הצד השני. לכן, יוצא, שהפגיעה של חייל בחייל מהצבא הנגדי נהיית לגיטימית. כל חייל רואה עצמו צודק מבחינתו, והחיילים משני הצדדים נמצאים במצב שיווני מבחינה מוסרית. בעמוד 50 וולצר מציין שהחיילים שווים כי הם מצייתים לכללים. לכאורה, וולצר אמר בהתחלה כי יש אמצעים שאנו בוחלים באמצעים, וביקר את הריאליזם בצורה חריפה מאוד. עכשיו הוא מתיר הרג של חיילים בצורה כמעט לא מוגבלת, האין זו סתירה?

את חסינותם של לא לוחמים קל לנו לקבל, אך את השוויון המוסרי של החיילים לא ברור לנו למה לקבל. חיילים מרצון או שכירי רכב אינם בגדר פשע כי זה המקצוע שלהם, והם הסכימו להיכנס למלחמה. ההסכמה ההדדית מותרת את השוויון, אבל בגיוס חובה? החיילים מרגישים שהמלחמה נכפתה עליהם, ועל כן גם פשעה אינם שלהם. כמובן, בנקודה הזו, הרבה פילוסופים כיום חולקים על וולצר.

ראשית, קשה מאוד להגדיר לוחם.

שנית, קשה מאוד להגדיר לא לוחם.

האם שר הבטחון הוא לוחם? אפילו מתוך האנשים שבשדה הקרב, כמה מהם באמת יורים בנשק ומכוונים על האויב? והאם חייל נחשב לוחם כשהוא לא במדים? ראו ערך: הלינץ' ברמאללה. יש מצבים עמומים שבהם לא ידוע לנו איך לקרוא להם, האם לקרוא לאנשים חיילים והאם לקרוא למצב מלחמה. לעומת זאת, אל לנו לפגוע בעקרון בגלל קושי להגדיר חלק מהמצבים.

החידוש הגדול של וולצר הוא לא רק אנטיפציפיסם, אלא גם שמותר להילחם! לא רק מותר, אלא אולי גם ראוי. אבל לא נגד כולם. יש אנשים בכל מדינה (החיילים..) שנגדם מותר להילחם. אלה המבקרים את עמדת וולצר לא דוחים את העקרון באופן שלם, אלא מחילים אותו חלקית. מיישמים אותו לא באופן מלא. לפעמים, רק למותקף ולא לתוקפן – אלא שאז זה לא באמת שוויון...

הבעיה היא עוד יותר גדולה: איך חייל יודע אם הצד שלו צודק או לא? הפתרון האפשרי האולטימטיבי הוא הקמת בית דין גבוה למוסר. הבעיה שתיווצר היא נקודה שהעלנו קודם – קשה מאוד למיין מלחמות לצודקות ולא צודקות. רובן, נמצאות בשתי הקטגוריות.

הגנרלים של היטלר היא סוגיה שדנה בהתנהלות הגנרלים של היטלר. האם העובדה שהם ידעו שהמלחמה שלהם לא צודקת, מיד הופכת אותם לפושעים בגלל שהשתתפו בה?

בסה"כ נקבל שתי קבוצות של כללים (כסיכום לפרק):

1. מתי מותר להרוג.
2. את מי מותר להרוג.

חלק שני:

התיאוריה של התוקפנות

פרק 4: חוק וסדר בחברה הבינלאומית

תוקפנות היא השם שאנו נותנים לפשע הקרוי מלחמה. זהו הפשע היחיד שמדינה אחת יכולה לבצע כלפי מדינה אחרת. בעיה גדולה היא העובדה שתחת הכותרת, תוקפנות, יש כל כך הרבה סוגים. בין אם זה רק הפרת שקט ע"י קטיושות, ובין אם זה פצצת אטום. בין אם המדינה המותקפת התנגדה, ובין אם לאו. קלאוזביץ בספרו "על המלחמה" כותב כי הכובש הוא אוסף שלום מובהק (כפי שבונפרט הגדיר את עצמו): הוא היה רוצח שכניסתו למדינה לא תעורר התנגדות כללית. זהו פשע מיוחד כי בכל מצב שלא יהיה, הוא קורא תיגר על זכויות של ייהרג ובל יעבור.

זכויותיהן של קהילות פוליטיות הוא המושג המתייחס לריבונות ששולטת בכל מדינה. העקרון הזה מבוסס על ההסכמיות שבין האזרחים של אותה קהילה פוליטית או של אותה מדינה במקרה שלנו. התביעה לקיום פוליטי כמעט זהה לתביעתו של אדם לרכוש פרטי. כדי שקיום לאומי או קהילה כלשהי תוכל להתקיים, עליהם להיות באזור משותף, אדמה כלשהי. ועבור כך, עליהם להחזיק בטריטוריה.

פרשת אלזס לורייך ממחישה את המשמעות של אדמה וקהילה עליה. לאחר שגרמניה וצרפת נחלקו על מי יהיה הבעלים (הריבון) על השטח הזה, התשובה הוכרעה ע"י התושבים בכבודם ובעצמם. התושבים ראו עצמם מחויבים לצרפת, ובכך היה די כדי להבין למי השטח שייך. ברגע שהקהילה הפוליטית בו הגדירה את עצמה, או בחרה להשתייך לקהילה כלשהי אחרת, הם מחויבים לריבון הזה. בפועל מה שקרה הוא שהשטח היה תחת שלטון גרמני, והבעיה המרכזית היתה האם זה מוסרי שהצרפתים יפתחו במלחמה על גרמניה כדי לספח אליהם חזרה את השטח שבו תושביהם יושבים. לכאורה, לא היה להם מה להילחם. האזרחים נאמנים לצרפת, ולא לגרמניה.

שאלה אחרת היא ההתנהגות בהגעה לשטח פנוי. האם מותר להתיישב עליו? תיאורטית, אם אין עליו אף אחד, אין זו תוקפנות פשוט לחדור ולשבת שם. ומה אם הוא חלקית מיושב? כל עוד אין איום על חייהם של התושבים הקודמים, אין בכך שום בעיה.

הפרדיגמה הלגליסטית היא הצורה הראשונית של תאוריית התוקפנות תחת האנלוגיה הפנים מדינתית. באנלוגיה זו, תוקפנות מושוות לרצח, בית למדינה, וכו'. אם השקט בשכונה הופר, זה כנראה נעשה ע"י מישהו. אין אינטרס לאנשים סתם ככה להפריע אחד לשני, וכך גם בין מדינות. כמו שאמרנו כבר, לכל מלחמה יש לכל היותר צד אחד צודק, כאשר יכול בוודאות להיות ששתי הצדדים לא צודקים.

הפרדיגמה הלגליסטית היא כדלהלן:

1. קיומה של חברה בינלאומית של מדינות עצמאיות
2. לחברה הבינלאומית חוק הקובע את זכויותיהן של חברותה ומעל הכל, זכויות של שלמות טריטוריאלית ושל ריבונות פוליטית.
3. כל שימוש בכח או איום ממשי בשימוש בכח מצד מדינה אחת נגד הריבונות הפוליטית או השלמות הטריטוריאלית של מדינה אחרת מהווה תוקפנות, והוא מעשה פשע.
4. תוקפנות מצדיקה שני סוגים של תגובה אלימה: מלחמת הגנה עצמית מצד הקורבן ומלחמה של אכיפת חוק הן מצד הקורבן והן מצד כל חבר אחר בחברה הבינלאומית. ז"א, אפשר לבצע כל דבר שהוא בבחינת שווה ערך בינלאומי למעצר של אזרח.
5. אין הצדקה למלחמה מלבד התוקפנות. שום סיבה אחרת לעולם לא תצדיק יציאה למלחמה.
6. לאחר שהמדינה התוקפנית הוכתה מבחינה צבאית, מותר גם להענישה.

שתי שאלות שנכתבו על הלוח בכיתה וניסחנו יחד תשובות:

1. מהו עקרון מנכן, ומה נימוקיו של וולצר להתנגד לעקרון זה ולשבח לעומתו את פינלנד?
2. במה קשור הדיון הנ"ל להשקפה בדברי "זכויותיהן של קהילות פוליטיות"?

תשובות:

1. עקרון מינכן משמעותו רדיפת שלום – ניסיון להגיע לידי פשרה וכך לשלום כדי למנוע מלחמה או תוקפנות. "...הפייסנות היא פשוט מאוד השלמה עם הרוע (עמוד 86)". בנוסף "עקרון מינכן" מעדיף את שרידותם של אנשים כפרטים על חשבון אובדנה של עצמאות מדינית, או ערעורה. " (89) אם מדינה כלשהי מותקפת ע"י אחרת, ומדינה המותקפת יש בת ברית כלשהי- חובתה של בת הברית היא לנסות ולשכנע את המדינה הקורבן להגיע לשלום. להתפייס (לא בכל מחיר) כי המלחמה היא רע שאין שני לו.
2. כדי להגן על זכויותיהן של קהילות פוליטיות אסור להיכנע מיד. לפעמים העצמאות של המדינה היא יותר חשובה מחיי האדם. זוהי דעה מנוגדת לעקרון מינכן, שאומרת שלא תמיד צריך שלום, אלא הכי חשובה היא זכות הקיום של קהילות פוליטיות.

בסוף הפרק, וולצר כותב: " ברצוני לשוב ולהדגיש, הדגש היטב, שהגנה על זכויות היא הסיבה הנאותה האחת והיחידה למלחמה" (90). הסיבה המוצדקת היחידה למלחמה היא הגנה על זכויות- בעצם על זכויותיהם של קהילות פוליטיות אם במדינות עסקינן.

פרק 5: צעדי מנע

ראשית, נשים לב למושג פעולות מנע (=Anticipations) כאשר בתרגום הוא השתמש במילה מנע לכל אחד ואחד מהמושגים השונים, אנחנו נבחין ביו שני המושגים בהם וולצר משתמש במקור:

Preventive War – מבחינת וולצר, זה אסור.

Pre-emptive Strikes – אך זה כן. זה ניסוח מודרני ומוסרי של "הקם להורגך השכם להורגו".

התרגום הקלוקל פוגע בהבחנה שוולצר עושה ועלול לחבל בהבנה שלנו. אלא שמצדיקים גם Preventive Wars הם למעשה ריאליסטים, עליהם דיברנו בשיעור הראשון. כאלה אנחנו לא רוצים להיות.

יש לנו בעיה, כי אפשר תמיד למצוא הצדקה לPre-emptive strike, וזה מה שהיטלר השתמש בו. הוא טען שההתחזקות של השכנים שלו מהווה לו איום, ולכן היה חייב לתקוף. בעצם, מדובר בהפיכת התקפה מוקדמת להגנה עצמית. אם כן, אילו פעולות מוצדקות ואילו לא?

ראשית, ברור שצריך פגיעה ממשית כלשהי בנתקף. פטפוטי יוהרה של מנהיגים לא יכולים לשמש תקיפה של ממש, זה ברור. כמו כן, צריך להבדיל בין התגרות לבין איום.

לגבי מלחמת ששת הימים, מדובר במהלומת מנע, כדי למנוע איום ממשי ממצריים. וולצר מביא דוגמה זאת להצדקת מהלומת מנע כלשהי, שהייתה חייבת להיות כהגנה עצמית. בעצם, שאם לא היינו עושים אותה היינו נפגעים אנחנו – אזרחי המדינה הלא לוחמים. מצריים לא רואה בישראל כמדינה בעלת זכות קיום, על כן אין לה גם זכות להגן על עצמה ומותר לתקוף אותה בכל רגע נתון. אלא שאמרנו לפני כמה פרקים, שלכל קהילה פוליטית מגיעה הזכות הבסיסית של הגדרה עצמית!

הישראלים הלמו לאחר שעל הרעיונות של נאצר חתמו סוריה, ירדן וגם עיראק. למרות שאין לנו ספק שנאצר לא היה תוקף את ישראל, האיומים שלו (ולא סתם התגרות) היו סיבה מספיק טובה בשביל ישראל תצטרך להגן על עצמה. האנשים לפני מלחמת ששת הימים היו מבוהלים, מאוימים, מפוחדים, והמנהיגים היו על סף התמוטטות עצבים. הפחד הזה היה מוצדק, בעיקר בגלל שהם היו באמת בסכנה- וכמובן בגלל שזו היתה מטרתו המפורשת של נאצר. פעולותיו הצבאיות נועדו בשביל מטרה זו.

אם נחזור רגע לאנלוגיה הפנים מדינתית, זה יהיה רוצח (אדם א') שמודיע לאדם ב' על רצונו לרצוח אותו. זכותו הוודאית של אדם ב' למנוע ולסכל את התוכניות של אדם א' אם הוא מסוגל לעשות זאת. אין אנו מצפים ממנו לשבת בחיבוק ידיים ולחכות למותו. ובעזרת האנלוגיה הזו, נצדיק את פעולתה של ישראל.

הנוסחה הזו נראית קצת מתירנית, אבל יש בה כמה מוגבלות בגופה. למשל, ברור שאם יש דרך שלא כוללת בה לחימה אז היא הדרך הנכונה והעדיפה והמוסרית.

פרק 6 – התערבויות:

מהפרדיגמה הלגליסטית נובע כי אל למדינה להתערב בענייני פנים של שום מדינה אחרת.

מיל מסביר שמדינה היא קהילה המגדירה את עצמה, ועל כן עלינו להתייחס אליה ככזו. הגדרה עצמאית היא זכותו של עם להיעשות לבן חורין בכוחות עצמו. הוא מחרף ואומר שאל לנו להתערב במקרה של שלטון עריץ, כי החרות לא יכולה להגיע לעם כלשהו מגורם חיצוני, אלא רק מתוך העם עצמו, מתוך רצון להשתחרר מאותה מגבלה, או דיקטטורה, או עריצות. עוד, אין לעם זכות להיות מוגן מפני תוצאות של כשלון פנימי, או אפילו מפני דיכוי רצחני. מדובר בסוג של דארוויניזם חברתי, כאשר החברה מתפתחת אט אט מתוך עצמה כאשר החזק והיעיל שורד.

המהפכה ההונגרית משמשת את וולצר לדוגמה להתערבות שהיתה צריכה לקרות מצד בריטניה. הוא מדבר גם על מלחמת אזרחים, ועל הקושי שיש בה. בעצם, למצוא ריבון למדינה הוא הקושי. לדעת מי מוביל את המדינה, מי הממשלה, וע"י כך מי בעצם חברה בחברה הבינלאומית. כדוגמה אחרונה הוא מביא את המלחמה של האמריקאים בוויטנאם כהתערבות נגד, ודן בהשלכותיה וכשלוניה של ארה"ב.

התערבות הומניטרית היא התערבות לשם תמיכה בצד שנפגעו לו זכויות האנוש הבסיסיות בעקבות המלחמה. למרות שבהיסטוריה האנושית אנחנו מכירים יותר פגיעה בזכויות מאשר התערבות הומניטרית כדי לתקן את הפגיעה, נדון בשני מקרים בהם היתה התערבות הומניטרית. הבטנו בקובה ובבנגלדש, ובשתיים המכנה המשותף הוא זעזוע שנגרם לעם כלשהו. "התערבות הומניטרית מוצדקת כאשר יש בה משום תגובה המלווה בציפיות סבירות להצלחה על פעולות המזעזעות את הרגש המוסרי של האנושות". בעקבות מניעה של הפרדיגמה הלגליסטית להתערב במקרים של טבח של השלטון כלפי עמו, נצטרך לנסח מחדש כמה כללים. נוסף כי מותר יהיה לפלוש למדינות ומותר לפתוח במלחמה כדי לסייע לתנועות פרישה (הגדרה עצמאית מחוץ למדינה כלשהי). גם כאן נוצרות בעיות בקצוות, אבל לא נזניח את הכלל בגלל זה.

פרק 7 – מטרות המלחמה וחשיבות הנצחון:

לאחר מלחמה, יש צורך לומר על החללים שהם לא מתו לשווא. מה המשעות הדבר? הרי ברור שמדובר בכך שיש משמעות כלשהי למלחמה, ולמוות של החיילים אשר מסרו נפשתיים בלחימה. יש תוצאות שמחיר השגתן – חייהם של חיילים – אינו גבוה מדי. רעיון המלחמה הצודקת מחייב את קיומה של אותה הנחנה.

מלחמה צודקת נחשבת כזו אם חשוב מבחינה מוסרית לנצח בה. אבל לא תמיד ברור, מהו ניצחון. על פי קלאוזביץ' מדובר על השמדת כוחות האויב, והנחלת תבוסה. אבל נציין כי בד"כ ניתן להשיג את מטרות המלחמה גם ללא השמדה, או הנחלת תבוסה.

לא דיברנו על הפרק הזה מספיק בכיתה, אך ציינו שיש משהו ששווה יותר מאשר חיי אדם במלחמה, וזה הקיום של קהילה פוליטית. אנחנו מוכנים להקריב את חייהם של חיילנו כדי להגן על הקיום של הקהילה הפוליטית אליה אנחנו משתייכים, ועליה חיילנו מגנים.

חלק שלישי:

מוסכם המלחמה

פרק 8 – אמצעי הלחימה וחשיבותה של לחימה נאותה:

תכליתו של מוסכם המלחמה הוא לקבוע מהם חובותיהן של המדינות הלוחמות, של מפקדי הצבא ושל החיילים כפרטים בכל הנוגע לניהול פעולות האיבה. ראשית, נציין שוב כי המעמד המוסרי של החיילים כפרטים דומה מאוד אצל שני הצדדים: הם מגיעים לכלל לחימה מתוך נאמנות למדינה שלהם ומתוך צייתנות לחוק.

כאן האנלוגיה הפנים מדינתית לא ככ תעזור לנו, ובכל זאת ברור לנו שצריך כללים. לא הכל יהיה מצודק בשביל להגיע למטרה כלשהי. נביט בניסיון כלשהו להגדרת עקרונות ראויים למעשה:

טיעונו של הנרי סדג'וויק: ראשית, הוא מציע מגבלה כזו: כל מעשה זדון שאינו מכוון לתכלית (הנצחון), או כל מעשה זדון אשר תועלתו בהשגת התכלית מועטה בהשוואה למידת הנזק שבו. בעצם, לדבריו, לא כל פעולה היא לגיטימית. היא צריכה לעבור את הקריטריון הזה. ושנית, עקרון היחסיות. לבדוק את כמו הנזק ביחס למה שהרווחנו. לא מדובר במשהו כמותי מספרי, אלא בתחושה מוסרית איכותית.

אונס הנשים האיטלקיות, כאשר הצרפתים שכרו חיילים מרוקניים ונתנו להם אישור לאנוס ולבזוז את כל אשר בערים האיטלקיות בהן הם נלחמים. לכאורה לפי סדג'וויק, היינו יכולים לקבל את המקרה הזה ואולי אפילו להצדיק אותו! (למרות שהמקרה מופיע בפרק 9, התעסקנו בו גם כאן. לשיעור הזה קראנו את פרקים 8 ו9)

אבל, אונס הוא פשע. בעת מלחמה כבעת שלום. זו הפרה של של זכויותיה של האישה המותקפת.

פרופסור זוהר הביא את הנוסח הקודם של רוח צה"ל, שעליו הוא הזדעזע והעיר, ואחריו ראינו את הנוסח הנוכחי, שבו הנוסח של טוהר הנשק הוא המתוקן:

נוסח א' (פרופסור אסא כשר): טוהר הנשק – החייל ישתמש בנשקו ובכוחו לשם הכרעת האויב במידה הנדרשת לשם כך ויתרסן, כדי למנוע פגיעה שלא לצורך בחיי אדם, בגופו בכבודו וברכוש. טוהר הנשק של חיילים צה"ל הוא השימוש המרוסן שהם עושים בנשקם ובכוחם, בביצוע המשימות רק במידה הנדרשת להשגתן, ללא פגיעה מיותרת בחיי אדם, בגופו, בכבודו וברכוש, הן בחיילים, הן באזרחים במיוחד בחסרי ישע, בעת מלחמה ובפעולות בטחון שוטף, בעת רגיעה ובעת שלום.

כשקוראים את הנוסח הזה, אפשר לשמוע את סדג'וויק מהדהד קצת באומרו "לשם הכרעת האויב". כמעט חסר גבולות לחלוטין, ועל כן אנחנו נכנסים לזירה של חוסר מוסריות, או לפחות חוסר מוסריות על פי וולצר.

נוסח ב' (פרופסור נעם זהר): טוהר הנשק – החייל ישתמש בנשקו ובכוחו לביצוע המשימה בלבד, אך ורק במידה הנדרשת לכך, וישמור על צלם אנוש אף בלחימה. החייל לא ישתמש בנשקו ובכוחו כדי לפגוע בבני אדם שאינם לוחמים ובשבויים, ויעשה כל שביכולתו למנוע פגיעה בחייהם, בגופם, בכבודם וברכושם.

ע"י תיקון הנוסח, והוספת הביטוי "וישמור על צלם אנוש" פרופסור זהר ניסה להכיל כאן את מגבלות המוסר, ולא שניתן לעשות כל דבר כדי להכריע את האויב. חשוב לציין, כי פרופסור כשר אמר שכמובן שבדין הבינלאומי דנים בסוגיות האלה, והצבא הישראלי כפוף גם לדין הבינלאומי.

לסיכום: פעולת לחימה לגיטימית היא פעולה שאינה מפרה את זכויות העם שהיא מכוונת נגדו.

פרק 9 – חסינותם של הלא לוחמים והכורח הצבאי:

עקרון כפל התוצאות – Doctrine of Double Effect (DDE). בכל תקיפה של חיילים בשטח שאינו מדברי או ימי, החייל התוקף יודע שהוא יפגע גם בחפים מפשע. לכן אנו צריכים את הדוקטרינה הזו, כדלהלן:

מותר לעשות מעשה שסביר שתוצאותיו יהיו רעות בתנאי שמתקיימים ארבעת התנאים הבאים:

1. המעשה כשלעצמו טוב, או מכל מקום אינו רע, כלומר הוא משרת את צרכינו, כמעשה מלחמה לגיטימי
2. התוצאה הישירה קבילה מבחינה מוסרית – השחתת אספה צבאית לדוגמה, או הריגת חיילי אויב.
3. כוונתו של מבצע המעשה היא טובה. כלומר, הוא חותר אך ורק לתוצאה הקבילה. התוצאה הרעה אינה אחת ממטרותיו, גם אין היא אמצעי למטרותיו.
4. התוצאה הטובה היא טובה דיה לפצות על גרימת התוצאה הרעה; היא חייבת להיות מוצדקת לפי כלל היחסיות של סדג'ויק.

אחר כך וולצר מוסיף את עקרון כפל הכוונות. שמצד אחד אנחנו רוצים שיושג ה"טוב", ומצד שני רוצים שהרע הצפוי יצומצם כמה שרק אפשר. עד כדי כך שהצד התוקף או מבצע הפעולה מוכן יהיה לשלם מחיר כלשהו. זהו תיקוף לסעיף 3 בעצם.

לפני שאנו ופונים לשימוש בדוקטרינה, עלינו לברר מאיפה הגיעו האזרחים הללו. אם הם חלק מהלחימה, אין לנו מה לחשוב פעמיים. אם הם אזרחים לא לוחמים וחפים מפשע, עלינו כמובן להשתמש בדוקטרינה ולעשות את המקסימום כדי לא לפגוע בהם. בין אם זה אומר לטוס נמוך, ובין אם זה אומר לשלוח מכתבים ולהתקשר בית בית לפני כל התקפה.

פרק 10 – מלחמה נגד אזרחים; מצורים והסגרים:

הטיעון המוכלל למצורים והסגרים הוא כדלהלן:

1. המגינים כופים עליהם הר כגיגית, ולכן הם מוכרחים להיות שותפים למותם של האנשים.
2. האזרחים מסכימים שיגנו עליהם.
3. המתקיפים כופים עליהם הר כגיגית, והורגים אותם לפעמים במישרין ולפעמים בעקיפין.
4. שהאזרחים מותקפים אך אין כופים עליהם שום דבר. כאן אמור להיות מופעל כפל התוצאות, אבל הרעבה של אנשים חפים מפשע לא מצדיקה כלום.
5. מוצאת לאזרחים יציאה חופשית, ולאחר מכן יהיה צידוק להריגת הנשארם.

הבעיה גדלה במצור על מדינה שלמה כמובן. בספר דברים אוסרים על כריתת עצי מאכל, ומתירים אך ורק כריתת עצי נוי וסרק. למרות שבעבר הרעבת עמים היו דבר לגיטימי שנעשה, בתורת המלחמה הצודקת שלנו מעשים כאלה יכולים להיות מופנים אך ורק כלפי הצבא של המדינה האויבת.

וולצר מציין בפרק גם את הזכות לצאת, והלכה ממשנה התורה של הרמב"ם ממחישה זאת ע"י כך שכשמתקיפים עיר, אסור לעשות זאת מארבעת צדדיה – וחובה להשאיר פתח אחד לאלה שירצו לברוח. בעצם, חובה להשאיר יציאה לאלה שנכנעו. מדובר ברעיון שהוא יפה ומוסרי מאוד, אבל טקטית-אסטרטגית לא יעבוד.

בשורה האחרונה בפרק, וולצר מציין כי זה חלק מתפקידו של הצבא המתקיף להגן על אזרחי הצבא המותקף אם חלק מפעולותיו מסכנות את חייהם.

פרק 11 – מלחמת גרילה:

לוחמי גרילה הם אזרחים שהחליטו להתארגן ולמרוד בצבא שתקף את מדינתם. הם עושים זאת כארגון או כיחידים אך לא כצבאה של המדינה הנתקפת. ברור לנו, שלוחמי הגרילה התנגדותם ראויה, ועל כן מותר להם לתקוף את החיילים. אך אם אנו מאפשרים להם להתנגד, עלינו להתיר גם לחיילים שלנו להענישם.

הבעיה המרכזית עם לוחמי הגרילה היא שהם קוראים תיגר על מוסכם המלחמה עצמו. הם לא מזהים את עצמם כלוחמים, וכמו כן הם גם אינם אזרחים. כאשר אצלנו, בבסיסה של תיאוריית המלחמה הצודקת, צריך הבחנה ברורה בין חייל לאזרח כדי לדעת איך לנהוג.

מחובתו של הצבא הלוחם לבודד את לוחמי הגרילה מהאזרחים, בו בעת עם עשיית המקסימום כדי למנוע פגיעה באזרחים שלא משתתפים בלחימה. לחימה בה יש תמיכה מצד האזרחים כלפי הלוחמי גרילה היא

בחברה הישראלית יש לנו מילה אחת ללוחמי גרילה ולטרוריסטים : מחבל. חשוב להבדיל, ולדעת שלוחם גרילה נלחם בחיילים, ואלו טרוריסט מכריז על כוונתו לפגוע באזרחים. לפעמים ניתן להציק את מעשהו של הלוחם גרילה, אך אין אנו מתיימרים אפילו לנסות להצדיק את כוונותיו של הטרוריסט.

אולי המשפט הכי חשוב בפרק הזה , הוא שלפעמים מגבלות המוסר בלחימה לא מאפשרות ניצחון, ולמרות זאת לא נעבור את המגבלה הזו. לא נוותר על המוסריות בשביל פעולה כזו, ולא נפגע בקווים האדומים = חפים מפשע.

פרקים 12 ו13 הם על טרוריסט ועל פעולות תגמול, שלא קראנו בקורס. דיברנו על המושג טרוריסט מול מלחמות גרילה, וציינו כמה דוגמאות של פעולות תגמול גם כן כבדרך אגב.

חלק רביעי:

דילמות המלחמה

פרק 14 – ניצחון ולחימה נאותה:

הפרק מתחיל ביושב הראש מאו והקרב על נהר הונג, כשהדוכס סרב לתקוף צבט אינו מוכן. מאוחר יותר כינו את השיטה שלו כ"אתיקה של שוטים", משום שהיא פוגעת בנצחון במחיר של כבוד אריסטוקרטי. מבחינת מאו (שמבקר את הדוכס של סונג) הנצחון יותר חשוב מאשר הכבוד.

מיד אחר כך דנים בסוגיית חשיבות הנצחון מול המחיר של לחימה נאותה. מה קורה במצב בו הלחימה הנאותה והמוסרית פוגעת בנצחון? האם מותר לנצח בכל מחיר? או שמא יש גבולות אדומים שאותם אסור לנו לעבור לעולם?

וולצר מציע ארבע דרכים להתמודדות עם מתח אפשרי בין כללי המלחמה ובין תורת התוקפנות:

- מוסכם המלחמה נדחה מפני לחצו של הטיעון התועלתני (דוגמת הסיפור של ה'אתיקה של שוטים')
- המוסכם נכנע בהדרגתיות לדחיפות המוסרית של המטרה
- המוסכם עומד בתוקפו והזכויות נשמרות בקפידה, ויהיו התוצאות מה שיהיו.
- רומסים את המוסכם אך רק לנוכח פני אסון ברור המאיים להתחולל. (דוגמת הירושימה)

לדעת וולצר, ב' וד' הן המעניינות ביותר, אבל הוא רואה בד' את הטיעון הנכון. לדידו, עד הרגע האחרון, כולנו הננו הדוכס מסונג.

פרק 15 – תוקפנות וניטרליות:

האם מותר למדינה להיות נייטרלית כאשר מדינה לידה מתבצעים מעשים בלתי נסבלים? האם היה מותר לשוויץ להיות נייטרלית בזמן מלחמת העולם השנייה שהתרחשה בה שואת יהודי אירופה, לדוגמה?

הזכות לנייטרליות נתונה לכל מדינה באשר היא, אבל היא זכות מפחידה בגלל האנלוגיה הפנים מדינתית שהיא יוצרת. וולצר מדגים את הנושא ע"י אינוסה של בלגיה, וגם ע"י צ'רצ'יל והנייטרליות הנורבגית. כמנהגו, הוא מציע את המקרה ומבקר על אחד לגופו. לא אעשה זאת כאן, מוזמנים לעיין בספר © עמודים 281-293.

פרק 16 – שעת חירום עליונה:

מהי שעת חירום עליונה? הרי אם נגיד שזהו זמן משבר, נרמוס את מוסכם המלחמה תמיד. כל מלחמה היא משבר, ועל כן איך נוכל להצדיק את ההגדרה? כהרגלו, וולצר מדגים ממלחמת העולם השנייה והפצצת הערים הגרמניות – אחת הסיבות שצ'רצ'יל אפשר להפציץ ערים של אזרחים חפים מפשע היה כדי לרומם את המורל של הבריטים שהגיע לרצפה. הבריטים היו צריכים לשמוע שהגרמנים טעמו ממה שהם הנחיתו על האנושות.

בנוסף, צ'רצ'יל הסביר שנצחון גרמני – נאצי במלחמה הזו לא מהווה איום רק למדינות, אלא לאנושות כולה באירופה ואולי בעולם. זו תהיה תוצאה בלתי נסבלת ולא ראויה, וזהו מצב של שעת חירום עליונה. זהו מצב בו מותר לרמוס את כללי המלחמה, אולי גם לפגוע בחפים מפשע.

דוגמה שניה שוולצר מביא היא הירושימה. כשטרומן החליט להטיל את הפצצה על היפנים, הוא הצדיק זאת ע"י שיקול תועלתני, ונימק כי ליפנים אין זכות להתלונן על כך משום היחס שהם נתנו לשבויי מלחמה אמריקאים שהיו בגבולם, ושיטת ההוצאה להורג הנוראית שהם השתמשו בה. וולצר משמיע הד או לחשוש של ביקורת על כך שלא נבדקה באופן מלא האופציה של פתרון אחר, עם פחות הרוגים, ופחות פגיעה בחפים מפשע.

את עצם פיתוח הפצצה, את התחלת הפרויקט הזה של יצירת הפצצה, גיבשו בשעת חרום עליונה. גיבשו אותה ברגע שהבינו את תוצאות העניין אם גרמניה היתה מצליחה ליצור פצצה אטומית, מה יהיה המחיר. ועל כן היה עליהם להשיג את גרמניה וכדי להכניע אותה – גם לאיים עליה. גם פה ברור לנו שמדובר בשעת חירום עליונה.

אולי כדאי לציין, שעצם זה שוולצר נצמד דווקא לדוגמה הזו, הוא אומר לנו שבעצם יש מעט מאוד מקרים שבהם מדובר באמת בשעה חירום עליונה. בגלל שיש לנו רק מקרה אחד כזה, יש להשליך זאת הלאה ולהבין שכנראה שלא היו עוד הרבה כאלה, וכולנו תקווה שגם לא יהיו.

פרק 17 – הרתעה גרעינית:

בשיעור על הנושא הנ"ל נדון במתי ניתן להצדיק הרתעה גרעינית?

פרופסור זהר תמיד מספר שכשהתחיל להתעסק בתחום, ולהרצות קורסים בנושא, הוא חשב שעל הפרק הזה אפשר לוותר. שהנושא הזה לא יעלה שוב. אבל היום, כאזרחים במדינת ישראל, תחת איומה של איראן הגרעינית – אולי יש לחשוב פעמיים על אמירות מהסוג הזה.

מלחמה גרעינית מוגבלת: "אם אפשר שיהיה טעם רציונלי כלשהו לאיים בה, לא ייתכן שיהיה טעם כלשהו בהוצאת האיום לפועל" (עמוד 323). כאן וולצר מציג את דעתו, כי אין זה ראוי לעולם לתקוף בנשק אטומי.

הבעיה היא, שהאיום יהיה בר תוקף והצד השני אכן ירגיש מאוים רק אם הוא ידע שהאיום עלול להתממש. שמי שאיים באמת עלול להשתמש בפצצה כדי להכריע את אויבו. ואז מה שיקרה יהיה מלחמה הרת אסון שך השמדות בלי סוף. פצצה ועוד אחת ועוד אחת, בלי חשבון וממש מסוג עין תחת עין.

גם אי אפשר יהיה לכוון את הפצצה רק על בסיס של חיילים, ועל כן האיום יצטרך תמיד להישאר בגדר איום. אך אם זה איום שהוא בר מימוש, הרי שמדובר באיום לא מוסרי, שימוש בפצצה בצורה כה קיצונית ופגיעה בחפים מפשע.

טיעונו של פול רמזי: הוא היה תיאולוג פרוטסטנטי. הוא פסל את שתי הקיצונים שאחד אמר שמותר לאיים על ערים עם נשק אטומי, והשני דרש פירוק נשק טוטלי. רמזי מתעסק בעיקר בהרתעה ולא במימוש האיום, ולכן חושב שזה לגיטימי.

הבעייתיות האמיתית היא העובדה ששום איש לא יול להיות בטוח שאי פעם נוציא את האיום לפועל. הבעיה עם רמזי היא שהוא לא מתאר גבולות בעלי משמעות מוסרית, כמו האסטרטגים בעלי תורת "התגובה הגמישה" אשר טיעוניהם תלויים ברוע המוחלט של הפגיעות בערים.

וולצר מסכם את הפרק כך:

"מבחינה מוסרית אין מלחמה גרעינית קבילה, וכך יהיה גם בעתיד, ואין דרך לשנות מצב זה. כיוון שאין היא קבילה, אלינו לחפש דרכים למנעה, וכיון שהרתעה היא דרך פסולה, עלינו לחפש דרכים אחרות. מטרתנו כאן אינה להציע דרכים חלופיות כאלה. דעתי היתה נתונה יותר להכרה בכך שמדיניות ההרתעה, על הנפשע שבה, אפשר שבשעה זו היא בבחינת הכרח. אך דין האיום בהפצצת ערים מטילת אימה כדין ההפצה עצמה: **שעת חירום עליונה לעולם אינה מצב יציב**. תחום הכורח נתון לשליטתה של תמורה היסטורית. ומה שיותר חשוב, אנו מחויבים לנצל כל הזדמנות להיחלץ ממנו, ואפילו להסתכן למען אפשרות מסוג זה. הנה כי כן, הנכונות לרצוח מתאזנת, או צריכה להיות מאוזנת, על ידי הנכונות שלא לרצוח, שלא לאיים ברצח, כאשר אך תמצאנה דרכים חלופיות להשגת שלום." (עמוד 333)

**חלק חמישי:
שאלת האחריות**

לפרקים 18,19 לא הגענו.

תם הסמסטר.

**בהצלחה
בבחינות!**

נספח א'

War and Innocence

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המאמר דן בסוגיית השוויון המוסרי של החיילים שהיה קשה לחלקנו לקבל בכיתה. ההרחבה נשלחה במייל ע"י נעם למעוניינים.

I

In a war, is it morally permissible intentionally to kill noncombatants? Elizabeth Anscombe and Paul Ramsey argue that noncombatants may not be intentionally killed.¹ We are obligated to refrain from such killing because it is murder; and it is murder because noncombatants are innocent.

George Mavrodes questions the grounds for asserting that in war noncombatants are “innocent” and combatants are “guilty.” If immunity of noncombatants from killing is to be established this way, he says, then we must find a “sense of ‘innocence’ such that all non-combatants are innocent and all combatants are guilty,” and “this sense must be morally relevant.” Mavrodes fears, however, that immunity theorists such as Anscombe and Ramsey are actually using “innocent” and “noncombatant” synonymously. He believes that the sense of “innocence” used in their arguments has no moral content.²

Mavrodes’ main argument is this. There are noncombatants who may enthusiastically endorse and support the war their nation is waging, while there are combatants who may be under arms unhappily and unwillingly, who may not support the war but are unable to

1. Elizabeth Anscombe, “War and Murder,” in *War and Morality*, ed. Richard Wasserstrom (Belmont, Ca., 1970); Paul Ramsey, *The Last War* (New York, 1968). See also John C. Ford, “The Morality of Obliteration Bombing,” in *War and Morality*.

2. George I. Mavrodes, “Conventions and the Morality of War,” *Philosophy & Public Affairs* 4, no. 2 (Winter 1975): 121, 123.

resist conscription. It is odd to claim that the enthusiastically supportive noncombatant is innocent and the reluctant conscript guilty. "Is it not clear," Mavrodes asks, "that 'innocence,' as used here, leaves out entirely all morally relevant considerations . . . ?"³

Anscombe and Ramsey both invite this sort of counterargument by the way they defend their immunity thesis. Anscombe implies that the thesis is rooted in the Principle of Punishment: no man is to be punished except for his own crime.⁴ Ramsey, too, employs the model of the criminal in defending the thesis.⁵ But, from the point of view of punishment, it is odd, if not perverse, to view the enthusiastically supportive noncombatant as innocent and the reluctant combatant as guilty. Mavrodes, in my judgment, is right in believing this defense fails to establish the immunity of noncombatants from intentional killing.

Mavrodes believes that the obligation not to kill noncombatants intentionally can rest only on a convention among nations. Such an obligation, if it exists, is at best contingent, conditioned as it is on the existence of such a convention in force. Anscombe and Ramsey believe the obligation to refrain from intentionally killing noncombatants is noncontingent. It is not convention-dependent.⁶

In this paper I shall briefly sketch an argument for the immunity of noncombatants which avoids Mavrodes' criticisms. It will establish that in warfare there is a morally relevant distinction between noncombatants and combatants which prohibits the intentional killing of the former at the same time as it justifies the intentional killing of the latter. My argument will appeal to a nonconventional principle, and thus the obligation deriving from the principle will not be convention-dependent (or anyway not wholly so). I will then go on to show that even if certain considerations undercut drawing the line of immunity between combatants and noncombatants, a weaker version of the immunity thesis is still viable.

3. Mavrodes, pp. 122–123.

4. Anscombe, p. 49; Mavrodes, pp. 120, 123.

5. Ramsey, p. 144; Mavrodes, p. 123.

6. For Mavrodes' definition of convention-dependent obligation, see p. 126 of his article.

II

To set the scene, first consider an example. Jones is walking down a street. Smith steps from behind the corner of a nearby building and begins to fire a gun at Jones, with the appearance of deliberate intent to kill Jones. Surrounded by buildings, Jones is afforded no means of escape. Jones, who is carrying a gun himself, shoots at Smith and kills him.

Jones is morally justified in killing Smith by the Principle of Self-Defense. Smith's actions put Jones' life directly and immediately in mortal jeopardy, and Jones' killing Smith was necessary to end that threat. From the point of view of self-defense, these facts about Smith's actions are the *only* relevant ones. The moral justification of the killing rests on them alone given the legitimacy of self-defense.

But let me now sketch in some possible background circumstances to Smith's assault on Jones. Suppose Smith's wife, spurned by Jones when she made advances toward him, tells Smith she has been raped by Jones. Furious, and egged on by his wife, Smith seeks out Jones and begins firing. Or, suppose Smith, through heavy gambling losses, is in debt to the mob for \$100,000. The mobsters propose to Smith that if he will kill Jones (a crusading district attorney, say), they will forgive his debt. Unable to pay the debt, and knowing what will happen to him if he fails to pay it, Smith seeks out Jones and begins firing. Or, suppose the mobsters kidnap Smith's children and threaten to kill them unless he kills Jones. Driven by the threat, Smith seeks out Jones and begins firing.

None of this background information alters the situation from the point of view of self-defense. Whatever prompted Smith to fire at Jones, the justification for Jones' killing Smith lies solely in the fact that Smith was the direct and immediate agent of a threat against Jones' life. From the point of view of self-defense, this fact justifies Jones in killing Smith—and *only* Smith.

Again, suppose that Smith's wife was standing across the street egging Smith on as he fired at Jones. Jones, though he justifiably shot Smith in self-defense, could not justifiably turn his gun on the wife in self-defense. Or suppose the mobsters were parked across the street to observe Smith. After killing Smith, Jones could not turn his gun

on them (assuming they were unarmed). No matter how causally implicated the wife or the mobsters were in Smith's assault on Jones, in the situation it was only Smith who was the agent of immediate threat to Jones; the wife and the mobsters were not posing a direct and immediate danger. From the point of view of justifiably killing in self-defense, they are not justifiably liable to be killed by Jones; they are immune.

There is a point of view from which these background features I have drawn in become morally relevant, namely the point of view of retribution or punishment. Smith's wife and the mobsters would be viewed as morally culpable for their contribution to Smith's assault on Jones' life. They ought to be punished. Perhaps Jones might be justified in taking his own retribution, and killing the wife or mobsters in revenge; but even if he is justified in killing them in retribution, he still cannot justify killing them on the grounds of self-defense.

In these cases of killing and attempted killing there are two points of view: the point of view of self-defense and the point of view of punishment. Some considerations that become morally relevant from the second point of view in justifying killing are not relevant from the first point of view. We use the notions of guilt and innocence almost always in connection with the second point of view, the perspective of punishment. From that point of view, Smith's wife and the mobsters are as guilty as Smith. In the instance where the mobsters cause Smith to act under duress, perhaps they are more guilty.

If we were to speak of innocence and guilt as categories applying in cases of self-defense, then for the purpose of justifiably killing in self-defense and from that point of view we would say that Smith alone was guilty (justifiably liable to killing) and his wife and the mobsters were innocent (not justifiably liable to killing), though all are guilty from the point of view of punishment.

It should be obvious now how my argument for the immunity thesis is going to run. The moral relevance of the distinction in war between combatants and noncombatants will be derived from the Principle of Self-Defense. Because we most commonly speak of innocence in connection with crime and punishment and because we also speak of innocent victims of war, Anscombe and Ramsey have been led to defend the innocents in war by appeal to the wrong model. For these same

reasons, Mavrodes has failed to see an alternative to his conventionalism.

III

I shall now sketch an argument for the moral immunity of noncombatants from intentional killing.

The question at hand is the killing in war and its justifiability. Why is any killing at all justified? I claim that a nation may justifiably kill in self-defense. From the point of view of self-defense, only those are justifiably liable to be killed who pose the immediate and direct jeopardy. In the case of war, it is nations' armed forces which are the agents of the jeopardy. In a war, the armed forces of nation *A* stand to opponent nation *B* as Smith stood to Jones.⁷ It is against them that *B* may defend itself by the use of force. The active combatants, their arms, ammunition, war machines and facilities, are the legitimate targets of intentional destruction.

Though *A*'s civilian population may support its war against *B* and contribute to it in various ways, they stand to *B* as Smith's wife or the mobsters stood to Jones. For the purpose of justifiably killing in self-defense and from that point of view, the civilian population is morally immune—it is "innocent." To intentionally kill noncombatants is to kill beyond the scope of self-defense. It is to kill unjustifiably from the point of view of self-defense.

This, in brief, is my argument. It provides for drawing a line between combatants and noncombatants, and prohibits intentionally killing the latter. This is just where the immunity theorists want to draw the line of prohibition. Furthermore, they see the prohibition as "natural," not convention-dependent. My argument supports them in this. The distinction between combatants and noncombatants derives from the operation of the Principle of Self-Defense. Our obligation not to kill noncombatants stems from our obligation not to kill without justification; and the Principle of Self-Defense justifies killing only combatants. Since both the obligation not to kill without justifica-

7. In a war each side is likely to view the other as the aggressor and itself as the defender; thus each side will claim to be acting in self-defense. I ignore the question of how we determine who is correct in making such a claim. My argument has to do with how *much* one may claim if one claims to act in self-defense.

tion and the Principle of Self-Defense are “natural” rather than conventional, the moral immunity of noncombatants does not rest (solely) upon the existence of appropriate conventions among nations.⁸

IV

From the point of view of killing in self-defense in war, Mavrodes’ reluctant conscript is “guilty” (justifiably liable to killing), and his non-combatant partisan is “innocent” (not justifiably liable to killing). To say that the reluctant conscript is guilty and the noncombatant partisan is innocent is to stand the matter on its head, claims Mavrodes. So it is—from the point of view of punishment. This, I have urged, is not the fundamentally governing point of view when it comes to justifying killing in war. The innocence of the noncombatant seems inexplicable to Mavrodes because he takes up the wrong point of view for evaluating killing in war. He is, of course, encouraged to take up this view by Anscombe’s and Ramsey’s own arguments in defense of the innocence of noncombatants. Viewing killing in war from this evaluative standpoint, and finding it incapable of explaining the prohibition against killing combatants, Mavrodes turns to conventionalism.

Might it not be contended against my defense of the immunity thesis that the point of view of self-defense is not the sole governing point of view when it comes to killing in war? Nations, it might be argued, exist in a state of nature, and thus possess the right to exact their own punishments on transgressors. Thus, in war, justifying deliberate killing may be done by appeal to both the Principle of Self-Defense *and* the Principle of Punishment. Finally, to the extent that retribution justifies some of the killing in war, it will justify killing some noncombatants.⁹

I have two answers to this challenge. The first answer preserves

8. In his argument against Anscombe and Ramsey, Mavrodes does not claim that conventionalism is true because the Principle of Punishment, to which they appeal, is itself conventional. Mavrodes does not dispute their assumption that the Principle of Punishment is a nonconventional source of obligation. Nor does Mavrodes support his conventionalism by arguing that *all* moral obligation is convention-dependent. Thus, I take it that the Principle of Self-Defense and the obligation not to kill without justification are nonconventional sources of obligation, since they are at least as nonconventional as the Principle of Punishment.

9. Some Allied air raids against German cities in World War II seem to have been clearly punitive in intent.

the strong immunity thesis, but it requires an assumption of fact which may, theoretically, not obtain. The second answer, dropping the assumption, requires me to weaken the immunity thesis.

For purposes of argument, I will concede that nations have the right to exact their own punishment in war. Even so, the Principle of Punishment justifies punishing *only* the *morally guilty* (culpable from the point of view of punishment), not the *morally innocent* (innocent from the point of view of punishment). Techniques of warfare—combat, bombing, shelling, burning—are too indiscriminate in their destruction to serve as legitimate instruments of punishment. They cannot be used discriminately between the morally guilty and the morally innocent. It is not justified by the Principle of Punishment intentionally to kill the morally innocent. If a nation claims punitive rights in war, it must adopt mechanisms of punishment which will discriminate between those who deserve punishment and those who do not. Bombing, shelling, and other such techniques kill guilty and innocent alike. Consequently, if we wish to justify killing during war by the means of war, the only applicable perspective is self-defense.¹⁰

If, however, contrary to the facts, there were some perfectly discriminating techniques of warfare, then, since I have conceded the right of nations to exact their own punishment, I see no argument against a nation legitimately taking up both points of view in its prosecution of a war. Some of the justified killing will be justified by self-defense, some by merited punishment. This would require a weakening of the immunity thesis, since the Principle of Punishment would justify some intentional killing of noncombatants, namely those that were morally guilty. Nevertheless, a version of the immunity thesis can be preserved: some line prohibiting intentional killing would still be mandated. The Principle of Self-Defense will

10. The Principle of Self-Defense also requires discrimination—between combatants and noncombatants. Since usually combatants are in uniform, with weapons, on battlefields, instruments of war can be used in a way which (roughly) avoids the death of noncombatants. However, instruments which cannot be used in a discriminating way, and whose use entails extensive non-combatant casualties (e.g. hydrogen bombs), are ruled out for use even in self-defense. See Richard Wasserstrom, "On the Morality of War: A Preliminary Inquiry," in *War and Morality*, pp. 100–101. (See also pp. 89 ff. where Wasserstrom discusses the justification of self-defense; and pp. 94–96, where he discusses the meaning of innocence in war.)

justify intentionally killing combatants, even the morally innocent among them. The Principle of Punishment will justify killing (if this is proportional to the crime) the morally guilty noncombatant. But neither principle will sanction or permit the intentional killing of the morally innocent noncombatant, many of whom will be found in any nation at war.¹¹ There will thus be a line of immunity required to be drawn around a certain class in war, the class of morally innocent noncombatants. We shall be morally obliged to refrain from intentionally killing members of this class, and this moral obligation will not disappear in the absence of any particular convention among nations.

Because of the indiscriminate nature of modern techniques of destruction, I see two reasons why the line of immunity is to be maintained between combatants and noncombatants. First, if nations recognize the Principle of Punishment, they may nevertheless be required to refrain from attempting to use it as a justification for killing because they shall not be able to meet the discrimination requirement. Second, nations may find it collectively beneficial to agree to forgo the exercise of their punishment rights during war (the exercise of which is morally ruled out anyway). They might thus, as Mavrodes suggests, adopt conventions confirming the line of immunity during warfare between combatant and noncombatant. To this extent, Mavrodes' conventionalism has support. The obligation not to kill noncombatants may be partly conventional; but if my arguments have been correct, it is not wholly so.¹²

11. Consider merely what percentage of a nation's population is made up of children under the age of ten.

12. In order to present a clean line of argument I have omitted discussion of various questions and qualifications that must be dealt with in any thorough defense of killing in war. Sometimes self-defense will not sufficiently justify killing. The Principle of Punishment may not justify any killing—I only assume that it does in order to consider a strong objection to the immunity thesis. I omit important questions such as whether persons have a moral right to a hearing before they may be punished, and so on. I believe that none of these issues, when resolved, will justify *more* killing.

נספח ב'

Self-Defense

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כאן תומסון מבקרת את השיטה של עקרון כפל התוצאות, ומבטלת את העניין של כוונתו. מביטה בעיקר על מבחן התוצאה – מה שקרה.

I

Before we take a close look at it, we may think of self-defense as morally transparent. What could be clearer than that morality permits a person to save his or her life against threats to it?

But what if in order to save one's life one has to kill another person? In some cases that is obviously permissible. In a case I will call *Villainous Aggressor*, you are standing in a meadow, innocently minding your own business, and a truck suddenly heads toward you. You try to sidestep the truck, but it turns as you turn. Now you can see the driver: he is a man you know has long hated you. What to do? You cannot outrun the truck. Fortunately, this is not pure nightmare: you just happen to have an antitank gun with you, and can blow up the truck. Of course, if you do this you will kill the driver, but that does not matter: it is morally permissible for you to blow up the truck, driver and all, in defense of your life.

It is probably not necessary to stress *here*—though the point is important for our purposes—that you do not merely have an excuse for blowing up the truck, you are morally permitted to do so. Suppose Peter killed Paul. For it to be the case that Peter merely has an excuse for killing Paul is for it to be the case that though he ought not have done so, and acted wrongly in doing so, still he is not as much at fault for doing so as he would have been had he not had the excuse, and, if his excuse is not merely mitigating but completely exculpating, then he is not at fault at all for doing so. But blowing up the truck in *Villainous Aggressor* is not something you ought not do. We cannot plausibly say that you ought not

An early version of this article was presented at the University of Arizona Philosophy Colloquium; I am grateful to those present for their comments. A number of people made helpful comments on a later draft: I am particularly grateful to Jonathan Bennett, Bruce Ackerman, and the Editors of *Philosophy & Public Affairs*.

blow up the truck, but will only be in a measure at fault, or in no measure at fault, for doing so: you simply *may* blow up the truck. Morality permits it.

But why may you blow up the truck? The following answer suggests itself: the driver is villainously aggressing against you, and will thereby kill you unless you stop him—and, moreover, you can stop him only by blowing up the truck. That second clause is important. Suppose you had two ways by which you could stop him. One, blow up the truck with your antitank gun, or two, wave your antitank gun and shout, “Stop, or I’ll blow up the truck!” If you do not actually need to blow up the truck, if you really could stop him by merely threatening to blow up the truck, then that is what you ought to do. It would be wrong to kill even a villainous aggressor when you do not need to do so.

So the driver is villainously aggressing against you, and will thereby kill you unless you stop him, and you can stop him only by blowing up the truck. Why not say that *that* premise explains why you may proceed? I suggest that it is in at least one way stronger than it need have been.

II

For let us look at a second hypothetical case, which is like the first except in this respect: the driver is entirely without fault for what he is doing. How can that be, given that he is chasing you around the meadow in a truck, trying to run you down? Well, let’s suppose some villain had just injected him with a drug that made him go temporarily crazy. It is not his fault that he is going to kill you if you do not blow up the truck, he is not villainously aggressing against you; but he is aggressing against you, and he will in fact kill you if you do not blow up the truck. Does morality permit you to blow up the truck? *I* think it does: I think self-defense permissible in this case—which I will call Innocent Aggressor—just as in the case I called Villainous Aggressor.¹

1. Innocent Aggressor is modeled on George P. Fletcher’s splendid hypothetical case in “Proportionality and the Psychotic Aggressor,” *Israel Law Review* 8 (1973): 367–90: “Imagine that your companion in an elevator goes berserk and attacks you with a knife. . . .”

I will everywhere be using “innocent” to mean free of fault. But it might pay to take note here of another use of “innocent”—sometimes “technically innocent”—under which it means “not harming”: see G.E.M. Anscombe, “Mr. Truman’s Degree,” reprinted in her

But I suspect that some people would say that while self-defense is permissible in Villainous Aggressor it is merely excusable in Innocent Aggressor. Should we agree with them? By hypothesis, the driver in Villainous Aggressor is villainously aggressing against you and the driver in Innocent Aggressor is not; but how exactly could that difference be thought to show that while it is permissible for you to proceed in Villainous Aggressor, it is merely excusable for you to proceed in Innocent Aggressor?

Perhaps it will be thought that the point is this: the villainous driver is less worthy (less good) than the fault-free driver. But the fault-free driver too might be a not particularly worthy person. His being fault-free in Innocent Aggressor consists only in his being free of fault for the particular aggression that he is currently committing.

Alternatively, perhaps it will be thought that the point is this: the villainous driver deserves punishment for his aggression, whereas the fault-free driver does not. But who are you, private person that you are, to be dishing out punishment to the villainous for the things that they do? And anyway, what makes it permissible for you to blow up the truck in Villainous Aggressor is not the fact that the driver in that case deserves punishment for what he is doing, or else it would be permissible for you to blow up the truck even if you do not need to do so to save your life.

Moreover, to say that self-defense is merely excusable in Innocent Aggressor is to say that although you would not be at fault for blowing up the truck in that case, you ought not blow it up, you act wrongly if you do. I think that cannot be right. (I think it an excessively high-minded conception of the requirements of morality.)

It might help also if I stress that I am not saying here that the fault of an aggressor is nowhere relevant to the question what you may do to defend yourself. I say here only that it is not relevant when what is in question is his life for yours. What if we lower the cost to you? I should think that fault is also irrelevant when the aggressor would otherwise blind you, or cut off your legs: the aggressor's fault or lack of fault has no bearing on whether you may kill the aggressor to defend your eyes or legs. (Death is worse than blindness or being without legs, but other

Collected Philosophical Papers (Oxford: Basil Blackwell, 1981), 3:7. The driver in Innocent Aggressor is not innocent in that sense of the term.

things being equal, morality does not require submission to such an aggressor, even if he is without fault.) I should think, more generally, that the same holds whenever the aggressor would otherwise cause you very grave bodily harm. Similarly if we go to the other extreme and imagine the prospective cost to you is minimal. If the aggressor would otherwise take your wallet or hat, then you may not kill the aggressor to defend yourself, whether or not the aggressor is at fault for his aggression. (That it is a villain who will otherwise take your wallet or hat is not sufficient reason to kill him to protect it.) There is room for argument, however, at places between these extremes of very grave bodily harm on the one hand, and loss of wallet or hat on the other hand. Suppose an aggressor will take, not both your legs, but only your left foot unless you kill him. Here the aggressor's fault or lack of fault may well be thought to make a difference: thus it may be thought that you may kill him to defend your left foot against his aggression if he is at fault but not if he is without fault. I leave this open. (I also leave open what should be said in cases in which it is not certain that the aggressor will cause you a harm if you do not kill him but only more or less probable that he will.) What I think is clear in any event is that if the aggressor will (certainly) take your life unless you kill him, then his being or not being at fault for his aggression is irrelevant to the question whether you may kill him.

But as I said, I suspect that some people would say that self-defense is merely excusable in Innocent Aggressor—or at least would feel uncomfortable about saying that it is permissible. I have a hypothesis as to what is at work in anyone of whom this is true, and will come back to it later.

Suppose, however, that we are in agreement that morality permits blowing up the truck in Innocent Aggressor as in Villainous Aggressor, so that you do not in either case merely have an excuse for proceeding. Then we are in agreement that the fault of the driver in Villainous Aggressor does no moral work in making it permissible for you to proceed in that case. But then the premise we looked at, by appeal to which it might be thought possible to explain why you may proceed in Villainous Aggressor, was stronger than it need have been. (I fancy we overrate the role of fault in many areas of moral theory; further examples will turn up shortly.)²

2. I think we also misinterpret the role played by fault. See, e.g., my "Morality and Bad Luck," *Metaphilosophy* 20 (1989): 203–21.

Then why may you blow up the truck in the two cases? Why not just say this: the drivers are aggressing against you—in the one case villainously, in the other case without fault—and will thereby kill you unless you stop them, and you can stop them only by blowing up the trucks, and *that* premise explains why you may proceed.

But isn't this premise, too, stronger than it need have been?

III

In a third hypothetical case—which I will call Innocent Threat—you are lying in the sun on your deck.³ Up in the cliff-top park above your house, a fat man is sitting on a bench, eating a picnic lunch. A villain now pushes the fat man off the cliff down toward you. If you do nothing, the fat man will fall on you, and be safe. But he is *very* fat, so if he falls on you, he will squash you flat and thereby kill you. What alternative do you have? Well, you only have time to shift the position of your awning; if you do this, the fat man will be deflected away from you. But deflecting him away from you will be deflecting him past the edge of the deck down onto the road below. Does morality permit you to shift the awning? *I* think it does.

As I said in the preceding section, I suspect that some people would say that while self-defense is permissible in Villainous Aggressor it is merely excusable in Innocent Aggressor; I suspect that even more people would say that self-defense is merely excusable in Innocent Threat. Why so? The innocent aggressor, though without fault, is at least aggressing against you; the fat man is not only without fault, he is not doing anything at all—he is merely *falling* toward you.

I think that difference makes no moral difference, and thus that it is permissible for you to proceed in Innocent Threat just as in Villainous Aggressor and Innocent Aggressor. I have a hypothesis as to what is at work in those who think otherwise, and will come back to it later.

Suppose we are in agreement that morality permits proceeding in Innocent Threat just as in Villainous Aggressor and Innocent Aggressor, so that you do not in any of these cases merely have an excuse for proceeding. Then we are in agreement that the aggression of the drivers in

3. Similar cases have been discussed by others, but unless I am mistaken, the first to draw moral philosophers' attention to them was Robert Nozick, in *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 34–35.

Villainous Aggressor and Innocent Aggressor does no moral work in making it permissible for you to proceed in those cases. But then the premise we looked at, by appeal to which it might be thought possible to explain why you may proceed in those cases, was stronger than it need have been.

How to weaken it? The premise says: the drivers in Villainous Aggressor and Innocent Aggressor are aggressing against you and will thereby kill you unless you stop them, and you can stop them only by blowing up the trucks. It follows that the drivers in those two cases will kill you unless you kill them. Can we say of the fat man in Innocent Threat that he too will kill you if you do not kill him? If so, then it is plausible to think that what is at work in this third case is the same as what is at work in the first two: that is, it is plausible to think we can explain the permissibility of proceeding in all three cases by appeal to the fact that in all three, the man you kill if you proceed *will otherwise kill you*.

It might be replied, however, that this is not true of the fat man in Innocent Threat. I said earlier that if he falls on you, he will squash you flat and thereby kill you, but is it really right to say that if he falls on you he will *kill* you? It might be said that while an event consisting in his fall on you will kill you, *he* will not have killed you. After all, he will not have aggressed against you, he will merely have fallen on you.

If we are moved by that idea, then we will think that the premise should not be weakened in the way I just pointed to. Perhaps, then, we will have the following thought: even if it is not true of all three—the two drivers and the fat man—that they will otherwise kill you, they are anyway all threats to your life, threats to your life that you can defend against only by killing them. And perhaps we will think *that* is what the premise should be weakened to.

I think that we should not be moved by that idea. Is it really to be thought that Y kills X only if Y aggresses against X? Suppose a piano and a safe fell off a roof, and we know that one fell on Alfred, and that the event that consisted in its fall on him killed him. We might ask, "Which killed Alfred, the piano or the safe?" The correct answer might be, "The piano," despite the fact that pianos commit no acts of aggression. ("Which of these bullets killed Kennedy?" asks the museum curator of the bullets just donated to the museum by the police. "That one," say the police, pointing to one in particular. And they might be right.) Indeed, I

should think that if an event that consists in the fall of Y on X kills X, then it follows that Y killed X, whatever Y may be.

Moreover, the suggested alternative weakening of the premise is not self-explanatory. What exactly is it for one thing to be a threat to the life of another? The two drivers will kill you if you do not kill them, and perhaps that clearly enough marks them as in some appropriate sense threats to your life. If we say it is not true of the fat man that he will kill you if you do not kill him, then what exactly does he have in common with the two drivers that is supposed to mark him too as in that same sense a threat to your life?

So I suggest we reject both the idea and the suggested alternative weakening of the premise; I suggest we say that, like the drivers in *Villainous Aggressor* and *Innocent Aggressor*, the fat man in *Innocent Threat* will kill you if you do not kill him. There is no need to be confused: we need merely remember about the fat man that, though he will kill you if you do not kill him, he will not have killed you by an act of aggression. If we agree to this, and I will assume we do, then we can say that in all three cases, the person you kill if you proceed *will otherwise kill you*.

And then if we are in agreement that morality permits proceeding in all three cases, why not say it is that premise that explains why?

Well, it will not do. I think we are helped to get at what is missing if we attend first to some cases in which the premise is false.

IV

The three cases we have been looking at are cases in which I think it permissible for you to kill a person in defense of your life; I will therefore call them Yes cases. It is perfectly plain, on any view, that there are No cases, cases in which it is impermissible for you to kill a person in defense of your life. Three classes are of particular interest.

In the first place there are *Substitution-of-a-Bystander* cases. In a case I will call *Trolley*, a villain has started a trolley down a track toward you. You cannot stop the trolley, but you can deflect it. Unfortunately, the only path onto which you can deflect it will take it onto a bystander who cannot get off the path in time. (I intend this allusion to the *Trolley Problem*, and will return to it briefly later.) I take it to be plain that you may

not proceed. If you proceed, you will be making a bystander be a substitute victim; hence the name of the class.

A second class of cases might be called Use-of-a-Bystander cases. A villain has started a trolley down a track toward you, and the only way you have of defending yourself is to shoot a bystander who stands on a footpath over the track: he is sufficiently heavy to crush the trolley's rooftop mechanism when he falls onto it, which will thereby stop the trolley. In this case too it is plain that you may not proceed. To proceed would be to use a bystander as a piece of equipment; hence the name of the class.

The mark of a Use-of-a-Bystander case is that you need the bystander you would have to kill if you are to defend your life. In a Use-of-a-Bystander case, if the bystander goes miraculously out of existence just before you act, then there is no way at all in which you can defend yourself. That is not true in Substitution-of-a-Bystander cases such as Trolley. But there are cases that fall into both classes, as, for example, where you defend yourself against a villain's gunfire by grabbing a bystander and using him as a shield so that he is shot instead of you. That case is both a Substitution-of-a-Bystander case and a Use-of-a-Bystander case.

A third class of cases I will call (for want of a better name) Riding-Roughshod-over-a-Bystander cases. A villain is shooting at you, and your only defense is to run. But your only path to safety lies across a bridge that will hold only one person, and there is already a man on it; if you rush onto the bridge, he will be toppled off it into the valley below. In this case too it is plain that you may not proceed. If you proceed, you do not make a bystander be a substitute victim, so it is not a Substitution-of-a-Bystander case. If you proceed, you do not use a bystander as a piece of equipment, so it is not a Use-of-a-Bystander case. What you do if you proceed is to "ride roughshod" over a bystander; hence the name of the class.

Proceeding in some of these cases is worse than proceeding in others. Here is another Use-of-a-Bystander case, which I will call Starvation. Some villains throw you in a dungeon, and leave you there, without food, for several weeks. Not surprisingly, you are by now very hungry. To tempt you, and thereby increase your misery, the villains now introduce a plump baby into the dungeon. They remove the baby for feeding periodically, so that *it* is at no risk of starvation. But you are. May you eat the baby? Of course not. It would presumably be far worse to eat the baby in

Starvation, which is a Use-of-a-Bystander case, than it would be to turn the trolley in Trolley, which is a Substitution-of-a-Bystander case. If, in the press of fear, you turned the trolley in Trolley, then we might think this, though wrongful, nevertheless more or less excusable. If, in the press of pain and fear, you ate the baby in Starvation, that would be both wrongful and in no measure excusable.⁴ But proceeding in Use-of-a-Bystander cases is not everywhere worse than proceeding in Substitution-of-a-Bystander cases and Riding-Roughshod-over-a-Bystander cases. Suppose you are a subway track workman. A subway is headed toward you. (1) There is a small alcove in the wall near you, but there is another workman already in it. You can pull him out into the path of the subway and get into the alcove yourself. This is a Substitution-of-a-Bystander case. (2) There is a small alcove in the wall near you, but there is another workman already in it. You can force your way into the alcove, thereby crushing him to death. This is a Riding-Roughshod-over-a-Bystander case. (3) There is no alcove, but there is another workman with you on the track. You can shove him into the path of the subway, which will stop it. This is a Use-of-a-Bystander case. I do not think that there is any difference in the degree of moral badness of your proceeding according as we supply ending (1), (2), or (3) to the story that begins with a subway headed toward you.

Why, after all, should it have been thought that the fact that you *need* the person you would have to kill in order to defend yourself makes it worse for you to proceed than it would have been had you not needed the person? If I am right in thinking that is the mark of a Use-of-a-Bystander case, then *using* a person does not in general have the special moral taint that has been ascribed to it. Appeals to the notion “respect for persons” will certainly not suffice to make out this special moral taint. After all, if one proceeds in a Substitution-of-a-Bystander case (a Substitution-of-a-Bystander case that is not also a Use-of-a-Bystander case) or in a Riding-Roughshod-over-a-Bystander case, one behaves as if the person one kills were not there at all—surely no less a display of lack of respect for persons.⁵

4. Or so I think. Some people think it was in a measure excusable (though of course wrongful) for the sailors to eat the cabin boy in *Regina v. Dudley & Stephens* 14 Q.B. 273 (1884). Perhaps what is at work in those people is the thought that it was likely that all, including the cabin boy, would otherwise die. Even so. . . .

5. I am indebted to Jonathan Bennett here.

Let us go back. Cases of these three kinds are No cases. And in all of them our premise is false: it is not true in any of them that the person you have to kill to save your life *will otherwise kill you*. Indeed, that person is, as I have everywhere put it, a bystander.

V

Is it everywhere impermissible to kill a bystander in defense of one's life? Consider a case that is often discussed in the literature on the Doctrine of Double Effect. In Strategic Bomber, the villainous Bads have invaded noble country Good, and a Good pilot has been ordered to bomb a munitions factory in Bad. Unfortunately, the factory is so situated that if the pilot bombs the factory, some nearby Bad civilians will be killed—let us imagine them to be children, in a nearby children's hospital. Doesn't morality permit the pilot to proceed all the same? But the children are mere bystanders.

In the literature on the Doctrine of Double Effect, Strategic Bomber is often contrasted with Terror Bomber, in which the Good pilot is ordered to bomb, not a Bad munitions factory, but a Bad children's hospital—the point of having him do this is to terrorize the Bad population and thereby get them to sue for peace with the Goods. Friends of the doctrine say it is clear that while the pilot may proceed in Strategic Bomber, he may not proceed in Terror Bomber, and they claim that the Doctrine of Double Effect explains this moral difference between the cases.

Very roughly, the Doctrine of Double Effect says that we may do what will cause a bad outcome in order to cause a good outcome if and only if (1) the good is in appropriate proportion to the bad *and* (2) we do not intend the bad outcome as our means to the good outcome. Thus, for example, the doctrine yields that the Good pilot in Strategic Bomber may bomb the Bad munitions factory in order to cause the Goods to win the war (good outcome), despite the fact that he will thereby cause the deaths of some children (bad outcome), if while he foresees that he will cause the deaths of the children, their deaths are not intended by him as a means to causing the Goods to win the war. By contrast, the doctrine yields that the Good pilot in Terror Bomber may not bomb Bad children in order to cause the Goods to win the war (good outcome) if *he* would be causing the children's deaths (bad outcome) as a means to causing terror and thereby causing the Goods to win the war. Many people take

it to be an attractive feature of this doctrine that it supplies an explanation of the moral difference between the cases.

Much of the literature on the Doctrine of Double Effect consists, on the one hand, in efforts to make it precise in a way that does not make it yield morally implausible results in other pairs of cases to which it is applied, and on the other hand, in efforts to explain why the distinction to which it draws our attention—that between foreseen and intended effects—is morally relevant.⁶

It is a very odd idea, however, that a person's intentions play a role in fixing what he may or may not do. What I have in mind comes out as follows. Suppose a pilot comes to us with a request for advice: "See, we're at war with a villainous country called Bad, and my superiors have ordered me to drop some bombs at Placetown in Bad. Now there's a munitions factory at Placetown, but there's a children's hospital there too. Is it permissible for me to drop the bombs?" And suppose we make the following reply: "Well, it all depends on what your intentions would be in dropping the bombs. If you would be intending to destroy the munitions factory and thereby win the war, merely foreseeing, though not intending, the deaths of the children, then yes, you may drop the bombs. On the other hand, if you would be intending to destroy the children and thereby terrorize the Bads and thereby win the war, merely foreseeing, though not intending, the destruction of the munitions factory, then no, you may not drop the bombs." What a queer performance this would be! Can anyone really think that the pilot should decide whether he may drop the bombs by looking inward for the intention with which he would be dropping them if he dropped them?⁷

Here is Alfred, whose wife is dying, and whose death he wishes to hasten. He buys a certain stuff, thinking it a poison and intending to give it to his wife to hasten her death. Unbeknownst to him, that stuff is the only existing cure for what ails his wife. Is it permissible for Alfred to give it to her? Surely yes. We cannot plausibly think that the fact that if he gives it to her he will give it to her to kill her means that he may not

6. A recent example is Warren S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect," *Philosophy & Public Affairs* 18, no. 4 (Fall 1989): 334-51.

7. Jonathan Bennett's criticism of the Doctrine of Double Effect in *Morality and Consequences*, The Tanner Lectures on Human Values III (Salt Lake City: University of Utah Press, 1981) focuses on its friends' use of the notion 'intention', but he also points on pp. 96-98 to the oddity I point to here, as well as to the ideas that issue in two theses I will shortly propose for adoption.

give it to her. (How could *his* having a bad intention make it impermissible for him to do what *she* needs for life?)

The badness of Alfred's intention may incline some people to want to say that while it is permissible for Alfred to give-his-wife-the-stuff, it is impermissible for Alfred to give-his-wife-the-stuff-to-kill-her. (And compare: while it is permissible for the pilot to drop-the-bombs, it is impermissible for the pilot to drop-the-bombs-to-cause-terror.) It would of course be odd to say to Alfred, "You may give your wife the stuff, but you may not give it to her to kill her"; but that it would be odd to say a thing is compatible with the thing's being true. A puzzle lurks here, however. Some people believe that the conjunction of "If X were to do alpha then X would in fact do beta" and "X may not do beta" entails "X may not do alpha." Now by hypothesis, if Alfred were to give-his-wife-the-stuff, he would in fact give-his-wife-the-stuff-to-kill-her. So on that view, if we say that Alfred may not give-his-wife-the-stuff-to-kill-her, we are committed to saying that Alfred may not give-his-wife-the-stuff. I think that view is mistaken, but I take no stand on it here.⁸ I here suggest only that *if* we accept it, then we must also accept that Alfred may give-his-wife-the-stuff-to-kill-her. For whatever else we say, we must accept that Alfred may give-his-wife-the-stuff. After all, she needs it for life.

I suggest, quite generally, that we should accept

The Irrelevance-of-Intention-to-Permissibility Thesis: It is irrelevant to the question whether X may do alpha what intention X would do alpha with if he or she did it.

Thus in particular, it is irrelevant to the question whether Alfred may give-his-wife-the-stuff what intention he will do it with if he does it. (Indeed, it is also irrelevant to the question whether Alfred may give-his-wife-the-stuff-to-kill-her what intention he will do *that* with if he does it—thus, for example, whether he will give-his-wife-the-stuff-to-kill-her to inherit her estate or to get her early entry into heaven or what you will.)

There is a more general thesis in the offing here that I think we should also accept—indeed, it is the truth of this more general thesis that explains the truth of the less general thesis. If Alfred gives the stuff to his

8. A recent discussion of a cousin of this issue is Michael J. Zimmerman's "Where Did I Go Wrong?" *Philosophical Studies* 59 (1990): 55–77.

wife he will give it to her to kill her. His giving her the stuff to kill her would be his giving it to her with a bad intention, and he will therefore be gravely at fault if he gives it to her with this intention. But that he will be at fault if he gives it to her with this intention does not mean that he may not give it to her.

The point I make here is simply the other side of a coin we took note of earlier. I drew attention to the fact that a man may be without fault though he does something wrongful; what we take note of here is that a man may be at fault though he does something that is not wrongful. (Supposing that the fact that a man would be at fault in doing a thing fixes that it is impermissible for him to do it is yet another example of our overrating of the role of fault in morality.) In short, I think we should accept a thesis that incorporates both sides of this coin, namely,

The Irrelevance-of-Fault-to-Permissibility Thesis: It is irrelevant to the question whether X may do alpha whether X would be at fault in doing it.

And the truth of this more general thesis explains the truth of the less general thesis, for if fault is irrelevant to permissibility, then so also is intention. If it is irrelevant to the question whether Alfred may give the stuff to his wife whether Alfred would be at fault if he did it, then it must also be irrelevant to this question what intention he would give her the stuff with if he gave it to her. Alfred's intention is of moral interest only via its being the case that he will be at fault if he acts on it, and therefore his intention has no bearing on the permissibility of his acting if his being at fault itself has no such bearing.

But what matters for our purposes is only the Irrelevance-of-Intention-to-Permissibility Thesis, for if that thesis is true, then an agent's intending or merely foreseeing an effect of his or her action is irrelevant to the question whether he or she may proceed with it, and the Doctrine of Double Effect collapses.⁹ (Not because the doctrine is in need of a yet

9. I should add, however, that this is so only if the doctrine is interpreted in the way I indicated. There are other ways of interpreting it. One possibility is to construe the doctrine as concerned, not with intendings, but with sheer causal order; I ignored this possibility in the text above, since I think it pretty obvious that the doctrine so construed has no future at all. A second possibility is to construe the doctrine as concerned with intendings all right, but not with permissibility, rather with fault. I think it possible to interpret G.E.M. Anscombe's remarks on the distinction between foreseen and intended consequences in her article "Modern Moral Philosophy" in this way: she there speaks of the distinction as bear-

more subtle characterization of the relevant intendings, but because it is a product of a misassessment of the role of intendings in morality.)¹⁰ A fortiori, the doctrine cannot be appealed to to explain the moral difference between Strategic Bomber and Terror Bomber.

VI

What should we think of Strategic Bomber? I think it a murkier case than has usually been thought. I said that the children whom the pilot would kill are mere bystanders. But then why isn't this a No case, a No case falling into the class of Riding-Roughshod-over-a-Bystander cases?

In Trolley, a villain has started a trolley toward you. You can save yourself only if you deflect the trolley, but there is a bystander on the only path you can deflect it onto, and you therefore may not proceed. Consider a variant on Trolley, which I will call Trolley-Preemption. In this case you cannot deflect the trolley at all, you can only fire your antitank gun at it. But there is a bystander standing next to the trolley track, and if you fire your antitank gun, you will blow up the bystander along with the trolley. Can anyone plausibly think it impermissible to deflect the trolley in Trolley but permissible to blow it up in Trolley-Preemption? Hardly. Trolley is a No case falling into the class of Substitution-of-a-Bystander cases; surely Trolley-Preemption is also a No case, but one that falls instead into the class of Riding-Roughshod-over-a-Bystander cases.

But Trolley-Preemption is Strategic Bomber without the war between

ing on "responsibility" and "credit." ("Modern Moral Philosophy" is reprinted in her *Collected Philosophical Papers*, vol. 3.) But so construed, the doctrine does not—by hypothesis it does not—have anything to say about permissibility, which is our topic here.

10. I suspect that this misassessment is made only by those who misassess the role of fault in morality, for I suspect that you would think intendings relevant to permissibility only if you thought fault is. But why do people think fault is? There must be something deep behind this idea, since it is so common, and not merely among friends of the Doctrine of Double Effect. Perhaps what is at work in at least some people who harbor this idea is an inward-looking, stoic conception of the limits of morality. If you think morality is wholly a matter of what makes a person be good or bad—if you suppose it is wholly a set of instructions for being virtuous and not being vicious—then it would be no surprise if you thought that one is in breach of morality only if one does a thing the doing of which marks one as so far a bad person, i.e., a thing one is at fault or to blame for doing. (I think this conception of morality could be described as a kind of moral solipsism.) It is a good question what could make morality true if it goes beyond these limits; but perhaps no better than the question what could make it true even if it does not.

the Goods and the Bads: Strategic Bomber differs from Trolley-Preemption only in that the pilot's proceeding in Strategic Bomber is part of a larger process in which the noble Goods are defending themselves in a war being waged against them by the villainous Bads. If we think it permissible for the pilot to proceed in Strategic Bomber, but impermissible for you to proceed in Trolley-Preemption, then we must grant that that is because there is a war on in Strategic Bomber.

How does the fact that there is a war on in Strategic Bomber do the moral work of making it permissible for the pilot to proceed? At least partly, I am sure, by virtue of making it the case that the (long-range) stakes are higher than we have been told about in being told about those children in the hospital next door to the munitions factory.

Not just anything goes in wartime, of course. The fact that it is villains who, in the course of fighting an unjust war against your side, have so arranged things that you can save your life only by killing a person does not by itself make it permissible to kill the person. For example, it would not be permissible for you to eat the baby in Starvation even in mid-war. Moreover, most people think it impermissible for the pilot to proceed in Terror Bomber. (But why, exactly? Suppose a Good pilot bombed a place in Bad that contained both a munitions factory and a children's hospital, and that the Bads therefore sued for peace—not because of the loss of the munitions factory, but because of the loss of the children: the bombing terrorized the Bads, bringing home to them what war was going to have in store for them. It can hardly be thought that the fact that the causal route to the Goods' winning the war passed through Bad terror, rather than through Bad lack of munitions, shows that it was impermissible for the pilot to drop his bombs. It is of course large-scale terror bombing of enemy cities that people have in mind when they think of Terror Bomber; but why exactly is that wrongful? Well, is it always wrongful? Must it be? Perhaps the point is that it mostly is wrongful, or even that it in fact always is wrongful, in that it mostly is, or even in fact always is, unnecessary for the accomplishing of any morally acceptable wartime purpose—which leaves open that it is, or anyway might be, permissible when it is necessary for the accomplishing of a morally acceptable wartime purpose.¹¹ If that is correct, however, then terror bombing

11. This is the view taken by Michael Walzer in *Just and Unjust Wars* (New York: Basic Books, 1977), chap. 16. It seems to me very attractive.

is not in moral principle different from strategic or tactical bombing, for they too are wrongful when unnecessary for the accomplishing of a morally acceptable wartime purpose.)

I will have to bypass as too hard the question how the fact of war affects questions about self-defense. Let us take ourselves to have before us only the question what it is and is not permissible to do by way of self-defense in private life, when the episode is not part of a continuing process whose stakes are higher. That means we here bypass the question what makes it permissible for the pilot to drop his bombs in Strategic Bomber, and impermissible (if it is) for him to do so in Terror Bomber.

VII

I had asked at the beginning of Section V whether it is everywhere impermissible to kill a bystander in defense of one's life. We looked in Sections V and VI at a putative counterexample to the idea that it is, namely, Strategic Bomber, and I have suggested that the permissibility of proceeding in that case is due to the fact of the war between the Goods and the Bads. Is it everywhere in private life impermissible to kill a bystander in defense of one's life? In the cases we looked at in Sections I through IV, what is in question is one life for one: yours and that of a person Y whom you have to kill if you are to save your life. We will look briefly in Section X at cases in which several lives would be saved by the killing of Y; let us consider here only cases in which what is in question is one life for one. I suggest that in all such cases, it is impermissible for X to kill Y if Y is a bystander.

But what exactly are bystanders, and why should it be thought that they are morally protected in this way?

A person is a bystander relative to a particular situation. Suppose Y is in no way causally involved in X's being at risk of death. That seems intuitively to be a sufficient condition for Y's being a bystander to the situation that consists in X's being at risk of death.

Is this condition necessary as well as sufficient? Ordinary use of the word "bystander" gives no precise directive. Perhaps we would regard Y as a bystander to the situation that consists in X's being at risk of death even if Y is in *some* way causally involved in it, so long as Y's causal involvement in it is in one or another respect minimal. No matter for our purposes. Two things are enough for us. First, if Y is in no way causally

involved in the situation that consists in X's being at risk of death, then Y is clearly a bystander to it. And second, if Y is causally involved in it, and not minimally so—as, for example, when it is Y himself or herself who is about to kill X—then Y is clearly not a bystander to it.

Then it suggests itself that we can explain as follows why bystanders are morally protected in cases in which what is in question is one life for one. Other things being equal, every person Y has a right against X that X not kill Y. That is vague, for what are those other things that may or may not be equal? But we do know about some of those other things. Suppose that X is at risk of death. Suppose also that Y is clearly a bystander to X's being at risk of death. Then the fact that X can save himself only by killing Y does *not* make other things be unequal, and thus does *not* make Y lack the right.

Might something else make Y lack the right? By hypothesis, we are considering only cases in which what is in question is one life for one, so that there are no other people whose life or limb is relevant.

Might something override Y's right? The fact that X can save himself only by killing Y no more overrides Y's right than it makes Y lack the right. I will in fact ignore the possibility of overridings since in all of the cases we are considering there is no better reason to think Y's right is overridden than there is to think Y lacks the right.

It seems to me very plausible then to think that, given that Y is clearly a bystander to the situation that consists in X's being at risk of death, Y has a right that X not kill Y, and that *that* is why X may not kill Y.

Consider, for example, the No cases we looked at in Section IV. You are at risk of death in all of those cases, and can save your life only by killing a bystander. Given that they are bystanders, the fact that you can save your life only by killing them does not make other things be unequal: it does not make them lack rights against you that you not kill them. Nor does anything else make them lack these rights. Then we can surely say that

(1) In the circumstances, he has a right that you not kill him

is true of each of them. If so, then a fortiori you may not kill them. Indeed, if these ideas are correct, we have an explanation of why you may not.

It is certainly arguable that others besides bystanders are morally protected in this way. I leave that open.

Let us now look at the two drivers in Villainous Aggressor and Innocent Aggressor, and the fat man in Innocent Threat. *They* are clearly not bystanders, so there is not that reason to think (1) true of each of them.

I have left open that others besides bystanders are morally protected in the way we are looking at, so perhaps there is some other reason to think (1) true of each of them?

Quite to the contrary, there is reason to think (1) false of them. As I said, other things being equal, every person Y has a right against X that X not kill Y. So in particular, other things being equal, *you* have rights against each of them that they not kill you. Suppose, in fact, that

(2) In the circumstances, you have a right that he not kill you
is true of each of them. If so, then surely

(3) If he kills you, he will violate your right that he not kill you
is also true of each of them. But given that

(4) If you do not kill him, he will kill you

is also true of each of them, it surely follows that (1) is *not* true of any of them. That is, it follows that they lack rights that you not kill them. A fortiori, you may kill them. Indeed, if these ideas are correct, then we have an explanation of why you may.

I spelled all this out in detail in order that it be clear exactly where the shoe pinches.

The shoe fits well in Villainous Aggressor: we have no trouble regarding (2) and therefore (3) as true of the villainous driver, and we have no trouble regarding him as therefore lacking a right that you not kill him—he has, as we say, forfeited that right. But what of the driver of Innocent Aggressor? *He* is without fault, and we are accustomed to thinking of violation of rights as requiring fault in the violator.

But I suggest that the shoe stretches a bit with further wear, for there are good reasons to think we should not take fault to be required for a violation of a right. To begin with, the villainous driver in Villainous Aggressor has no right to kill you, and surely it is also true of the fault-free driver in Innocent Aggressor that *he* has no right to kill you. In Hohfeldian terms, neither of the two drivers has a privilege of killing you. For them to lack the privilege of killing you, however, is for you to have rights (Hohfeldian claims) that they not do so, rights they will infringe if they

succeed in killing you. So it really does seem right to think that (2) is true of the fault-free driver as well as of the villainous driver.

What of (3)? Well, given that (2) is true of the fault-free driver, you have a right that he not kill you. Can it be thought that morality all the same permits him to kill you? Can it be thought morally permissible for him to do so? No doubt the fault-free driver—unlike the villainous driver—will have an excuse, a very good excuse, a completely exculpatory excuse, if he runs you down; but these considerations suggest that he has no more than an excuse. If so, then he really does, however faultlessly, violate a right of yours if he kills you.

Can we conclude that (1) is therefore not true of the fault-free driver? Perhaps we will feel reluctant to say that the fault-free driver *forfeits* his right by virtue of being about to violate your right. Some people, I think, take it that forfeiting a right by definition requires fault. No matter. What is in question is not whether the innocent aggressor forfeits his right but whether he lacks it. And once we agree that he is about to violate your right—and that you can prevent this only by killing him—it seems right to conclude that he no longer has a right that you not kill him.

Still, there are bound to be some people who would resist these ideas: “No violation of a right without fault,” they would say. In particular, since the driver in *Innocent Aggressor* is free of fault, he will not violate a right of yours if you do not stop him, and he therefore does not cease to possess a right by virtue of doing what he does. But do these people then think it all the same permissible for you to kill the fault-free driver? How *could* they think this? I said in Section II that some people would insist that self-defense is merely excusable in *Innocent Aggressor*, and that I have a hypothesis as to what is at work in anyone of whom this is true. The hypothesis is precisely that they think the fault-free driver will violate no right of yours if you do not stop him, and therefore does not cease to possess a right by virtue of doing what he does. It would certainly be no wonder if a person who thought this also thought it merely excusable in you to blow up the truck in *Innocent Aggressor*. Moved by the considerations that suggest that fault is not required for violation of a right, I think it permissible for you to proceed. Others, as I say, may insist that fault is required. It constitutes confirmation of the account of self-defense I offered if they conclude that self-defense is not permissible, and is merely excusable, in *Innocent Aggressor*.

Does the shoe stretch far enough to accommodate *Innocent Threat* as

well? The fat man in that case is not only not at fault, he *does* nothing at all—he merely falls toward you. How can anyone say that (3) is true of him? I think there are good reasons in general to say that agency is no more required for violating a right than fault is, and good reasons therefore to say that (3) is true of the fat man, and therefore that (1) is not true of him.¹² No matter, if those who say “No violation of rights without agency” *also* say it is not permissible, but merely excusable, for you to proceed in Innocent Threat. I said in Section III that some people would insist that self-defense is merely excusable in Innocent Threat, and that I have a hypothesis as to what is at work in anyone of whom this is true. The hypothesis is precisely that they think the fat man will violate no right of yours if you do not stop him, and therefore does not cease to possess a right by virtue of falling toward you. It would certainly be no wonder if a person who thought this also thought it merely excusable in you to shift your awning. Moved by the considerations that suggest that agency is not required for violation of a right, I think it permissible for you to proceed. It constitutes confirmation of the account of self-defense I offered if those who think agency is required for violation of rights draw the conclusion that self-defense is not permissible, and is merely excusable, in Innocent Threat.

In short, I suggest that what makes it permissible for you to kill the two drivers and the fat man is the fact that they will otherwise violate your rights that they not kill you, and therefore lack rights that you not kill them.¹³ Some people may say there is no such fact in the case of

12. Frances Kamm draws attention to the fact that if the falling fat man could alter his own direction of fall, then morality would call for his doing so, even at some considerable cost to himself—he is required to absorb a larger cost to prevent his landing on you than would be required of a third-party bystander who could prevent the fat man’s landing on you. (But she expresses doubt as to how large a cost: minor injury is one thing, death arguably quite another.) See her “The Insanity Defense and Innocent Threats,” *Criminal Justice Ethics* 6 (1987): 61–76, esp. pp. 63–67. The moral phenomenon she draws attention to is easily explained if we suppose that the fat man will violate a right of yours if he lands on you. (Kamm herself uses the terminology of “duty,” and may well have in mind the correlative of a Hohfeldian claim.)

13. I stress that what makes it permissible for you to kill them is the fact that they will otherwise violate your rights *that they not kill you*. That is a very stringent right. So is the right violated in rape, for example. But it would not be permissible for you to kill a man just on the ground that he will otherwise violate your right that he not take your wallet or your hat. Some of the lawyers whose views are analyzed by Fletcher (in “Proportionality and the Psychotic Aggressor”) think an appeal to rights violation is required to justify self-defense, and then seem to have had trouble understanding how there can be a ‘proportion-

either the fault-free driver or the fat man; some (probably more) people may say there is no such fact at least in the case of the fat man. All is well for the account of self-defense I offered if the first group are also content to say that it is impermissible (though excusable) for you to proceed in Innocent Aggressor and Innocent Threat, and the second group to say this at least of your proceeding in Innocent Threat.

VIII

I hope it will have been noticed that the account I just offered of why you may proceed in Villainous Aggressor, Innocent Aggressor, and Innocent Threat is not the same as the account we had reached at the end of Section III. We were there considering the possibility of explaining why you may proceed in those cases by appeal to the premise "They will otherwise kill you." The account I just offered includes that premise, but adds something, namely, that if they kill you they will violate your right that they not do so. That is a significant addition.

And it—or something that does a comparable job—is necessary, for it just is not sufficient to justify your killing a person that that person will otherwise kill you.¹⁴

ality' requirement on self-defense; but it is curious that they should have had this trouble, since a proportionality requirement flows very naturally out of the fact that some rights are more stringent than others, a fact that any plausible theory of rights must accommodate. (Perhaps their having this trouble issues from their assuming that all rights are 'absolute', an assumption that would thereby be shown to have had bad effects in law as well as in philosophy.)

14. G.E.M. Anscombe believes that one may not directly kill the innocent, even in self-defense, but that the non-innocent are another matter. In *Mr. Truman's Degree*, she defines "innocent" as "non-harming"; see note 1. That might incline us to think she believes "They will otherwise kill you" to be sufficient to justify your killing them. But in a later paper she defines "innocent" as follows: "What is required, for the people attacked to be non-innocent in the relevant sense, is that they should themselves be engaged in an objectively unjust proceeding which the attacker has the right to make his concern; or—the commonest case—should be unjustly attacking him. Then he can attack them with a view to stopping them. . . ." See G.E.M. Anscombe, "War and Murder," reprinted in her *Collected Philosophical Papers* 3:51–61. If it is this latter that she all along had in mind as the non-innocence required in Y if X is to kill Y in defense of X's life, then she at no time believed "They will otherwise kill you" sufficient to justify your killing them: she all along believed that justifying that conclusion requires something more, here expressed as the requirement that they be "engaged in an objectively unjust proceeding." One way of interpreting that phrase is as requiring what I have offered, namely, that they be about to violate your rights; but however it is construed, the shoe will pinch in the same places—if it is to justify

Perhaps this will come out most vividly if we consider fighting back, a topic that any account of self-defense must in any case address itself to. Consider Villainous Aggressor, for example. You have an antitank gun, and it is permissible for you to blow up the truck. What if the villainous driver has his own antitank gun, and can use it on you so that you cannot use your antitank gun on him? Is it permissible for him to do this? I should think it obviously impermissible for him to do this, even if it is the case (since he will in fact continue to drive toward you in his truck) that you will shoot him unless he shoots you.

Why may the villainous driver not fight back in self-defense? We have an answer if we accept the account of self-defense that I offered in the preceding section. Suppose you are Alice, and that he shoots, and later says, "It was a matter of self-defense, your honor; after all, Alice was going to kill me unless I killed her." Self-defense? How so? Suppose he says, "Look, your honor, it might have been thought that

(1') In the circumstances, Alice had a right that I not kill her
is true. But it is not true. For

(2') In the circumstances, I had a right that Alice not kill me,
and therefore

(3') If Alice killed me she would violate my right that she not kill me
are true. But

(4') If I did not kill her, she was going to kill me

is also true. It follows that (1') is not true. It follows that it was permissible for me to kill her." This is a bad joke. (2') is false, for he had ceased to have the right by virtue of driving toward you in the truck.

Is fighting back permissible in Innocent Aggressor and Innocent Threat? I think not, but that is because I think the same holds of the fault-free driver and the fat man as holds of the villainous driver, namely, that they too lack rights that you not kill them. Others may disagree. It would be a further confirmation of the account of self-defense I offered if those who think the fault-free driver and the fat man do have rights that you not kill them also think it permissible for them to fight back.

your proceeding in Innocent Aggressor and Innocent Threat as well as in Villainous Aggressor. (I suspect that the role of that "objectively" is precisely to stretch the shoe.)

In short, I suggest that the permissibility of X's killing Y in self-defense goes hand in hand with the impermissibility of Y's fighting back, and that both phenomena have a common source.

I am of course assuming it to be obvious that the villainous driver may not fight back. I suspect that some would take a Hobbesian line here: on their view, all bets are off when a person will otherwise kill you. Thus they would say that the premise "Y will otherwise kill X" really is sufficient for the conclusion that X may kill Y, so that even the villainous driver may fight back. But why stop there? Why not go on to say more generally that all bets are off when you will otherwise *die*, and thus that the premise "X will otherwise die" is sufficient for the conclusion that X may kill Y? That, alas, yields that you may eat the baby in Starvation. It is hard to see what rationale could be offered for stopping this slide into moral absurdity, and that should make us suspicious of what inclined us to want to start it. In any case, I am assuming that we do not want to start it.

IX

All of the cases we have been looking at are cases in which the situation you find yourself in was ultimately caused by a villain. All of them (except, I suppose, Villainous Aggressor) have variants in which no villain is involved at all. Thus, for example, we might imagine a case in which the fat man in Innocent Threat was caused to fall toward you, not by a villain, but instead by a sudden strong gust of wind. Does the presence or absence of a villain make a difference? I should think not. That it is a villain as opposed to nature (or as opposed to someone without fault) who made it be the case that you have to kill a person to save your life does not by itself work in support of its being the case that you may proceed—or in support of its being the case that you may not.

But there are two other kinds of variants on those cases that are worth stopping over.

In the first place there are what might be called Third-Party cases, in which what is in question is not self-defense, but other-defense: cases in which you cannot save yourself but some third party can. So, for example, let us imagine that you have no antitank gun in Villainous Aggressor, but a third party does; then what we have is a Third-Party case, and our question is whether the third party may use *his* antitank gun to save

your life, and if so, why. Similar variants are available for all of the cases we have been looking at.

Self- and other-defense are not exactly two sides of one coin, but they are nevertheless close to it. I say they are not exactly two sides of one coin in light of considerations of autonomy. Suppose that X can defend himself or herself against an attack by Y and that a third party Z can also defend X against the attack by Y. In some such cases, Z ought to refrain from proceeding in that defending X would constitute "barging in," meddling, interfering. Indeed, Z's defending X might constitute "barging in" even when X cannot defend himself against the attack by Y—we do think that people should be left to fight their own battles, even at the cost of losing some. (Some, but decidedly not all. We draw a line well before a potential victim's life is at stake.)

Considerations of autonomy apart, however, I think it very plausible to suppose that the permissibility of X's killing Y in self-defense goes hand in hand with the permissibility of Z's killing Y in defense of X, and that both phenomena have a common source. So all three phenomena—the permissibility of X's killing Y in self-defense, the impermissibility of Y's fighting back, and the permissibility of Z's killing Y in defense of X—go hand in hand and have a common source.

And I take it to be a further confirmation of the account of self-defense I offered if anyone who thinks the fault-free driver and the fat man have rights that you not kill them also thinks they have rights that a third party not kill them, and thus that it is impermissible for the third party to intervene in your defense.

Some people may say, "But the driver in *Innocent Aggressor* and the fat man in *Innocent Threat* are without fault!" Of course they are without fault. But why should that bar third-party action if it does not bar first-party action?

Some people may ask, "Who is the third party to choose who shall live as between two who are equally without fault?" You and the driver are both without fault in *Innocent Aggressor*; you and the fat man are both without fault in *Innocent Threat*. But why should that bar third-party choice if it does not bar first-party choice?

In addition, it should be remembered that if the driver in *Innocent Aggressor* and the fat man in *Innocent Threat* are about to violate your rights, then they are not merely people who are without fault. Not that the third party must intervene: I should think he may prefer to do noth-

ing at all. (Just as you may prefer to do nothing at all.) If, on the other hand, they are not about to violate your rights, then it is impermissible for the third party to intervene—just as it is impermissible for you to do so.

The account of self-defense that I gave in Section VII may of course be incorrect. But if the facts in Innocent Aggressor and Innocent Threat did not in *some* way make it permissible for the third party to intervene in your favor, how *could* they make it permissible for you to intervene in your own favor?

One kind of answer that has been offered is this: what makes it permissible for you to kill the driver in Innocent Aggressor and the fat man in Innocent Threat is the fact that you have an “agent-relative permission” to do so, a permission that the third party lacks. The idea is that X (and only X) is permitted to kill Y when Y will otherwise kill X, since it is X (and only X) whom Y will otherwise kill.¹⁵ But that cannot be right.

In the first place, not just anything goes in self-defense: we have no across-the-board agent-relative permission to kill others to save our lives. (You certainly may not eat the baby in Starvation.) Could it be said that we have an agent-relative permission to kill another to save our lives but that the permission is limited to cases in which the other will otherwise kill us? What is supposed to be the rationale for this limit? If agent-relativity is what is crucial (Me! Me! I’m the one at risk!), why *isn’t* the permission an across-the-board permission? (Compare my comments in the preceding section about the Hobbesian idea that all bets are off when Y will kill X unless X kills Y.)

Moreover, if the agent-relative permission is limited in this way, why *isn’t* there a comparable limited third-party-centered permission? Is it just to be taken, flatly, as a datum, that while I have a permission to kill a person who will otherwise kill me, a third party lacks a permission to kill a person who will otherwise kill me?

Most important, it just is not acceptable to say that a person may do to save his own life something that it would not be permissible for him or her to do to save the life of another—considerations of the other’s autonomy apart—for whatever I may do to save my own life I may surely do to save the life of someone I love.

15. Nancy Davis offers this kind of answer in regard to a similar case in “Abortion and Self-Defense,” *Philosophy & Public Affairs* 13, no. 3 (Summer 1984): 175–207. As her title indicates, she brings out the bearing of these issues on the problem of abortion.

Well, on some views of the agent-relative permission it extends to defending those I love as well as to defending myself. (After all, those I love are those *I* love, so that it's still Me! Me! that is crucial.) But do we really wish to have it that a man's being rather a bore is going to make him later be undefendable in circumstances in which he would have been defendable had he only been charming enough to be loved?

No doubt X may have an excuse for doing something to save his or her own life that it was wrongful in X to do to save it, when a third party who saved X's life in those circumstances would have acted not merely wrongly but also inexcusably. (Just as X may have an excuse for doing something wrongful to save his or her child's life, when a third party who saved X's child's life in those circumstances would have acted not merely wrongly but also inexcusably.) So far as I can see, this is the only *fact* that lies behind appeals to agent-relative permission here. And it does not come to much.¹⁶ For having an excuse for doing something wrongful is just that: doing something wrongful, though having an excuse for doing it. But our question was whether it is permissible (and not merely excusable) for you to proceed in these cases.

In short, it is not because of the personal fact of your special relation to those who will kill you in those cases, it is not because they will otherwise kill *you*, that you may proceed; it is because of the entirely impersonal fact that they will *otherwise violate your rights that they not kill you* that you may proceed. But that impersonal fact may be acted on by a third party as well as by you.

X

A second interesting kind of variant on these cases is what we get when we imagine that what is in question is not self-defense but other-defense, and moreover, not merely other-defense but other-defense of more than one. So, for example, let us imagine that the villain in Villainous Aggres-

16. I should perhaps make clear that I am not saying that appeals to agent-relative permissions are unsuccessful everywhere in moral theory. For example, they certainly do seem to have a role to play in cases that involve only the distribution of benefits, i.e., in cases of the kind discussed by John M. Taurek in "Should the Numbers Count?" *Philosophy & Public Affairs* 6, no. 4 (Summer 1977): 293-316.

sor is driving toward five, not one, and that none of the five has an anti-tank gun. Is it permissible for a third party to use his antitank gun to save the five? Yes. If it is permissible for a third party to use his antitank gun to save only one, it is surely permissible for him to do so to save five. Similarly for similar variants on Innocent Aggressor and Innocent Threat. Let us call these Third-Party Different Number cases.

What is of interest here are the Third-Party Different Number variants on the No cases we surveyed in Section IV. In Trolley, a villain has started a trolley down a track toward you. You cannot stop the trolley, but you can deflect it. Unfortunately, the only path onto which you can deflect it will take it onto a bystander. It is impermissible for you to deflect the trolley. In a Third-Party variant on this case, you cannot do anything at all to save yourself, but a third party can save you—he can deflect the trolley onto the bystander. Given that it is impermissible for you to deflect the trolley in Trolley, the thesis of the preceding section tells us it is also impermissible for the third party to deflect the trolley in the Third-Party variant of Trolley. That consequence of the thesis is surely welcome. But now consider a Third-Party Different Number variant of Trolley in which the third party will save five if he deflects the trolley.¹⁷ In *this* case it would be permissible for the third party to deflect the trolley: the third party's turning the trolley here would yield a net saving of four lives. Well, not just anything is permissible on the ground that it yields a net saving of four lives (supplying five who are starving with knives, forks, and the neighbors' baby obviously will not do), and what has come to be known as the Trolley Problem is the problem of explaining why it is permissible to do what would yield this net saving of lives—when it is.

I do not address that problem here, except to draw attention to the fact that a satisfactory solution to it must make clear why altering the numbers makes a difference. That is, it is *not* permissible for the third party to proceed in a variant on Trolley in which only one will be saved; it *is* permissible for the third party to proceed if five instead of one will be saved. The answer to the question why it is permissible to proceed when five will be saved had better be sensitive to the numbers: it had better

17. The case comes, of course, from Philippa Foot's "The Problem of Abortion and the Doctrine of the Double Effect," reprinted in her *Virtues and Vices* (Oxford: Basil Blackwell, 1978), pp. 19–32.

explain why it matters that five instead of one will be saved.¹⁸ It is not enough to say *just*, "Well, five is four more than one"; we need an account of why adding the four makes a difference. Solutions to the Trolley Problem that focus on the means the agent uses to save those he saves do not, and I think cannot, answer to this need.

18. I mention with some diffidence that the solution to this problem offered in my *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990) is sensitive to the numbers, for what that solution focuses on is the increased probability of advantage secured for all six by a decision made in advance to turn the trolley when it later comes to threaten five and can be turned onto a sixth.

For what it is worth, however, I should mention that my discussion of self-defense here departs from that of chap. 14 of that book: I now think I was mistaken about some of the cases discussed there.

נספח ג'

Collective War and Individualistic Ethics: Against the Conscription of “Self- Defense”

Noam J. Zohar

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הרחבה על העיקרון של מוסכס הלחימה , והתקפת רעיונה של תומסון
בתפיסת השוויון המוסרי של החיילים.

COLLECTIVE WAR AND INDIVIDUALISTIC ETHICS Against the Conscription of “Self-Defense”

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IS WAR EVER MORALLY JUSTIFIED? Any theory of a just war must, of course, define the conditions mandating war in terms of state behavior. But this is not enough, for it is morally obtuse to offer an answer to the question “When may we fight the enemy state?” without also focusing explicitly on the question “How can we kill all these (enemy) persons?”

A clear indication of suppressing this latter question is adherence to a doctrine of “total war.” Where the specter of an “enemy collective” has completely displaced attention to individual persons, then indeed justification appears to be required only for the state act of going to war without further (moral) regard for the means and the cost in human lives.

The alternative to “total war” is a war ethic, which distinguishes between permitted and prohibited bloodshed. The fundamental distinction of the war ethic (or “war convention”)¹ is between enemy soldiers and civilians. Its primary tenet is that, unlike the killing of soldiers in combat, killing enemy civilians is no better than ordinary murder. Thus the problem of justifying bloodshed in battle—which is the focus of this discussion—is significantly two-sided, for, on the terms defined, an account of the license for killing soldiers is worth having only if it does not, by the same token, allow the slaying of civilians.

Some initial formulations of the war ethic in contemporary discourse dubiously employed the term “innocent” in defining the class of protected

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persons (i.e., civilians).² Taken at face value, this not only implies that some guilty civilians might be legitimately killed but also—more problematic—brands all the enemy soldiers as guilty. As long as the objective is to oppose shooting at civilians, proclaiming that they are “innocent” seems straightforward enough; truly they do not deserve to die. The corollary of this is, however, that the “noninnocent” soldiers somehow *deserve* their deaths, but what can warrant such a sweeping imputation?

The point is that, even if we suppose the enemy state guilty of aggression—which is, presumably, why our state is justified in its war effort—many (or even most) of the enemy soldiers *as individuals* cannot necessarily be saddled with the blame for that aggression. Frequently, they believe sincerely that it is their side that is the victim of aggression, its war thus being a justified defensive campaign. As Michael Walzer emphasizes, the function of the war convention is to bind those conducting warfare independently of the question of which side is collectively in the wrong regarding the war itself.³

But if even the enemy *soldiers* are mostly innocent, can there be any justification for killing them—and, by implication, for the conduct of any war? Finding no good answer, some have endorsed pacifism. Others have asserted that the crucial distinction of the war ethic can rely on nothing but convention, on the force of tradition.⁴ Still others, seeking for this convention some grounding in our everyday moral judgments, have turned to the context of self-defense. For these thinkers, analysis of individual self-defense has seemed to promise moral illumination of the war ethic by connecting it to an “everyday” type of situation where necessity alone appears to justify killing.

One attempt along these lines has been R. K. Fullinwider’s discussion of a man driven to murder by mobsters’ threats. Supposedly, the coercion renders him innocent; yet his prospective victim is clearly permitted to act in self-defense and (if necessary) kill him.⁵ This suggests a similar account regarding enemy soldiers, who attack us under the threat of court-martial; despite their “innocence,” they can be destroyed for our self-defense. But the war ethic significantly distinguishes soldiers following legitimate orders from a person who is merely coerced to comply. Moreover, it seems that such threats could at most offer an *excuse* rather than a true justification.⁶

This approach has been of late refined and defended in detail by Judith J. Thomson.⁷ Through a critique of her reasoning, I argue for an alternative view of individual self-defense, one which refuses to condone elimination of blameless people. This in turn undercuts the attempt to justify the war ethic in terms of individual morality. In conclusion, I offer an alternative moral analysis of the war ethic, in terms of a compromise between individualist and collectivist views of human reality.

I. CAN THERE BE AN INNOCENT KILLER?

Thomson depicts a hypothetical case of a man pushed off a high cliff, who will nevertheless be safe because he is about to fall on me—whereby I shall be crushed to death. May I save myself by deflecting him to his death? She thinks that I can, under the principle permitting self-defense, formulated in terms of mutual rights. He is about to “violate my right that he not kill me,” which prospect voids his right that I not kill him. This case is meant to show that self-defense can be asserted even against an “Innocent Threat” (as Thomson captions this case) and thus lays the foundation for an analogous account of the permissibility of killing enemy combatants.

Thomson realizes that some will object, claiming that the falling victim cannot properly be perceived as “about to kill me.” Against this, she points out that were it an inanimate thing that fell on a person we might quite naturally say “the piano killed him.” But this is nothing more than an argument from a linguistic ambiguity, which is readily clarified once we extend the piano analogy to the discussion of rights and their violations.

Do I have a right that the piano not kill me? And is the piano therefore, in falling toward me, about to violate this right of mine? Clearly, such talk is quite silly. A piano cannot commit any violation, precisely because it is an object and not a moral agent. By the same token, I can hold no rights against the piano, including a “right that it not kill me.” This does not mean that my life has no value or that I deserve to be killed by such an accident. Not all the humanly significant aspects of the situation pertain to rights. But any rights I have can only be understood as relating to the actions of other people. “Rights” belong to discourse on moral relationships and can be held only against moral agents.

To return to the “innocent threat” of the falling person: the mass of a human body is also not a moral agent. So I can have no right that the falling body not kill me, although it will be tragic if I am killed by it. And if the person, as moral agent, is not about to violate my right to life, then it is misleading to say that he is “about to kill me.” We must conclude that self-defense cannot serve as the grounds for permitting the deflection, unless we are prepared to broaden the notion of “self-defense” to permit any destruction of another to buy one’s own life.

Well, should we perhaps contemplate such a broadening? Suppose a killer is brought to trial and seeks to show that he was “coerced” to murder by a threat of death. If substantiated, this would perhaps extenuate his guilt, but ought it be accepted as a *justification*? In most modern jurisdictions, duress cannot be pleaded as defense on a charge of murder. Some might doubt the soundness of this as legal policy, but my concern here is not with legal culpability but with moral judgment. A justification for self-defense must

stop well short of a general license to save one's life by *substituting* the death of another. Otherwise, we should by the same token have to condone throwing someone out of a lifeboat to make room for oneself or even killing humans for food to avert starvation (two extreme instances of what Thomson rightly calls the "No Cases").

Killing can never be morally justified by the result alone—that a life is saved, for just as surely a life is lost.⁸ Something more is required to tip the scales: a minimal measure of moral guilt (on the part of the aggressor), which distinguishes self-defense from mere substitution.

How is it, then, that we are moved by Thomson's hypothetical case to consider killing the "Innocent Threat" in order to survive? Wherein lies the rhetorical power of this example, in which we hesitate to demand—even as a moral ideal—that one stay put and be crushed rather than save oneself by killing another? I think the answer far from simple and am (unlike Thomson) unsure about the proper behavior in such circumstances. Yet what complicates matters is an issue quite unrelated to self-defense, which is brought out if we consider an alternative option: that of simply moving out of the way.

Supposing that I can and *may* simply move out of the way.⁹ Is there a significant difference between moving away and actually deflecting the person's fall? I believe it is this doubt that causes our hesitation here rather than any unsound allegation that the falling person is, in the involuntary fall of his body, about to "kill" me. "Self-defense" is a justification for *killing* an aggressor, whereas deflecting the victim here is justified—if at all—only insofar as it is seen *not as killing* him but as merely avoiding sacrificing oneself to save him. This is not an instance of self-defense, and it thus fails to substantiate Thomson's notion that self-defense can include lethal action against a person who is an "innocent threat."

II. MINIMAL GUILT: MADMAN AND CHILD AS "AGGRESSORS"

I have argued that it is only *some measure of moral guilt* that brands one as an aggressor who can be killed to save the prospective victim. To illuminate this, let us look at cases in the "gray range," where it is hard to say whether a person is acting as a moral agent. May I defend myself against an assault by a madman if I can only stop him by killing him? This is Thomson's "innocent aggressor" case, regarding which she asserts (correctly, I think) that fewer would dispute her judgment, which allows self-defense despite the aggressor's (purported) innocence.

But on what basis is this innocence proclaimed? It is difficult enough (though not, I believe, impossible) to present a sound argument for the insanity defense in criminal law. Such an argument might take the form of asserting a deficiency in the capacities underlying human agency:¹⁰ a lack of sufficient understanding and/or emotional control. But although this might well justify acquittal in a criminal court, it is far from establishing complete moral innocence.

Thomson's stark description of the aggressor as "mad" is too imprecise to facilitate a moral judgment. If I am about to be exploded by an epileptic clutching a lever in a seizure, this seems not very different from the tragedy of being crushed by a falling victim. If, on the other hand, I am attacked by a person "unable" to stand my appearance, then—even if it can be shown that the aggressor truly lacks the normal capacity for restraint and could therefore not be found criminally culpable—I could well be justified in exercising self-defense, for the aggressor is not totally innocent.

Once we do not insist that the aggressor's guilt be established beyond a reasonable doubt in the same manner required for a criminal conviction, the question arises, how low should the threshold be set? This question can perhaps be best addressed (following in the footsteps of a Talmudic discussion) by examining the issue of an attacking child.¹¹

Suppose I am attacked by a nine-year-old waving a gun. Should I refrain from defending myself, if I can (only) do so by killing the child, because this minor is (admittedly) not capable of full criminal guilt? If I have any doubts about this, they ought to be allayed by reference to the above discussion. The crucial question is this: Is there anything significant to tip the scales between the child's life and my own? Well, this is certainly a bad child, who could—and should—avoid such evil behavior. It is hard to say what proportion of mature guilt can be attributed here, but this hardly matters: *some measure* of guilt is involved, and this is sufficient to tip the scales. The attacking minor's immunity is compromised by his guilt.

Would the same apply to a baby "attacking" its mother through endangering her life at birth? Obviously not. Nor, I think, can we impute any guilt to a two-year-old waving a gun. Between such clear innocence and the significant guilt of an older child there is a continuum, somewhere along which a threshold of minimal guilt is crossed.

The notion of minimal guilt requires, of course, a fuller elaboration than I have provided.¹² But in the context of the present discussion, it serves to illuminate the role of aggression in justifying self-defense. What is at stake is not an attribution of guilt such that would justify a death penalty (if such a penalty can be justified), for self-defense is not the administration of punishment; its legitimate goal is—to reiterate—saving the (prospective)

victim's life. The relevance of (the aggressor's) guilt is only in that it tips the otherwise balanced scales of "life versus life."

Yet even regarding a simple aggressor, Thomson denies the relevance of his or her guilt for permitting self-defense. She asks, "Who are you, private person that you are, to be dishing out punishment to the villainous for the things that they do?"—and she might have added, "Anyway, when ever is punishment meted out for something not yet done?" Indeed, it is clearly not the goal of punishment but that of saving one's life that defines self-defense. But the fact that the context is crucially different from that of a courtroom does not exclude the relevance of the aggressor's guilt. Rather, it is only the existence of some measure of guilt that labels an agent an "aggressor." The contrary idea that "self-defense" can be extended to permit eliminating an innocent party once he or she has been depicted as an "(innocent) threat" to my life dangerously perverts the moral character of this basic justification.

III. CAN "CAUSAL INVOLVEMENT" BE A (DECISIVE) FACT?

An understanding of "self-defense" purely in terms of self-preferment goes far beyond the traditional bounds of this justification. Such a view would put killing a vicious murderer on essentially the same footing as, say, killing someone to obtain her kidney (or indeed her flesh), where either is crucial for my survival. We need not dwell here on this view, for it has been consistently rejected by proponents of "self-defense" accounts of the war ethic. This could hardly be otherwise because the main point of the war ethic is to prohibit the pursuit of military advantage through killing noncombatants: it is precisely not a doctrine of self-preferment.

What thinkers like Fullinwider and Thomson have sought is an argument for singling out combatants, making it permissible to kill them qua *combatants* despite their innocence—not a license to kill all innocents. Seeking an analogy for this distinction from the realm of individual self-defense, Thomson argues for a crucial distinction between one who is a "threat," on the one hand, and a mere "bystander," on the other. As explained above, a person's being a "threat" in this fatal sense is not meant to necessarily involve any moral guilt or even agency. By what, then, is he or she set apart from the protected class of "innocent bystanders"?

Thomson's answer is that cases of (justified) self-defense are distinguished from cases of (impermissible) substitution by the presence of a decisive fact: namely, that the person whom I kill to save myself is causally

involved in my (impending) death. In application to the war ethic, combatants are meant to be covered by this description and noncombatants excluded. Against this, I argue in this section that a causal connection is not an objective fact but, rather, necessarily expresses a normative judgment. Whether or not a person is perceived as a (prospective) cause of my death depends on how the situation is judged and therefore cannot—on pain of circularity—serve as a basis for formulating such a judgment.

Suppose, for example, that I am attempting to flee from mortal danger—let us say, from someone shooting at me—and to do so must cross a certain bridge. Now suppose also that someone else is driving along the riverside in such a manner that her car will block my access to the bridge at the crucial moment. Is she “causally involved” in producing the threat to my life—and may she thus be killed (either by myself or by a well-motivated third party) if that is the only way to halt her? Several different tests might be proposed for determining the answer, with varying results:

1. *The “active/passive” test.* Is some (further) *action* on her part crucial for the finality of the threat? Well it is, for unless she continues driving, my route to safety will not be blocked. If this test is adopted, our judgment should be entirely different if she had parked there before the shooting began.
2. *The test of duty.* Does she have a duty to refrain from endangering me? Well, she surely *ought* to let me pass. Yet perhaps she is unaware of the surrounding drama; should this make a difference? Perhaps she is a callous and egocentric type, whose (unworthy) practice is to ignore the plight of others; it is only this quality that explains why she notices nothing while all the drivers around her blow their horns in a vain attempt to alert her. Or again, perhaps she could in no way conceivably know the grave significance of her car’s position. Does the question of her ignorance (and concomitant innocence) then determine whether she is “causally involved”?
3. *The intention test.* What if she is an accomplice of those shooting at me and is purposely cutting off my escape? It would surely be absurd to describe her as a “mere bystander”; yet in Thomson’s terms, it seems she is here no more “causally involved” than in a case of blameless ignorance.

Anyone familiar with the theory of tort law (or of criminal negligence) will immediately recognize the mazelike intricacies encountered once we set out to “describe” causal connections. Myriad things are each a necessary but insufficient condition for any result. The selection of one (or some) as the “cause(s)” for that result, relegating a host of others to the status of a “given” background, is never a purely factual determination. Causal attributions are, in H.L.A. Hart’s phrase, “ascriptive,” not descriptive: rather than reporting an “objective” sequence of events, they *ascribe* responsibility to an agent.¹³

Realizing all this, one could yet adhere to the standard of “causal involvement,” enhanced now by moral significance. The “innocent obstructor” would be distinguished from the “villainous obstructor”: only the latter can be legitimately seen as causally involved in the threat to my life. But this would be, of course, totally at odds with Thomson’s intent. The whole point in adopting the causality criterion was to find an objective way of distinguishing between those “innocent threats,” whom one could legitimately eliminate in self-defense, and others (equally innocent)—“bystanders”—who were to be immune.

The point in the above analysis was to show, on the contrary, that no recourse can be had to a “neutral factuality.” Rather, on all accounts, it is the moral guilt of the aggressor that defines him or her as such, regardless of the technicalities of the situation. Where such guilt exists, it makes no difference whether its owner is shooting at me, blocking my escape, or cutting the telephone lines to prevent me from summoning help: each of these is a legitimate target of my action in self defense (and, as Thomson rightly adds, of similar action by a third party). Where I am, however, endangered by a thoroughly innocent person, no action in “self-defense” is permissible. Whether the danger results from that person’s blocking my escape, falling on me, or driving over me, there is nothing—where guilt is excluded—to tip the scales of “life versus life” in my favor.

IV. NONCOMBATANTS, CAUSALITY, AND INNOCENCE

To further illustrate the feebleness of “causality” as a foundation for moral guidance, let us look at the very norms for which the doctrine of “innocent threat” was meant to illuminate: those of the war convention. Attacking noncombatants either separately or in conjunction with an attack on military targets has frequently tempted military strategists. In ancient times, the most common mode for this was the siege; in the age of aircraft, we think primarily of bombing.

Thomson applies the causality criterion to two versions of bombing noncombatants: terror bombing and strategic bombing. The first term refers to bombing civilian targets in themselves, an action intended to force the enemy to yield. Let us suppose that our war against this enemy is wholly justified, that it is being conducted in defense against outright aggression. Still, such bombing is prohibited, for it is not these civilians who are threatening us but only the soldiers, and it is thus the latter alone whom we are permitted to kill.

But what about civilians who happen to be located near, say, a munitions factory, which is itself part of the enemy war effort, that is, part of the aggressive threat? If we cannot hit the factory without also killing such noncombatants, Thomson holds to a moral injunction that would seem to prohibit such strategic bombing.¹⁴

I shall have more to say below about the moral dilemma posed by such a situation. At this point, let us concentrate on the reason offered for the distinction between the factory workers and the surrounding civilians. Unlike the munitions workers, the neighboring civilians have not lost their right to life because they are not part of the threat against our lives. All these people might be morally innocent, but by Thomson's understanding of "self-defense," the munitions workers—like the enemy soldiers—are perceived as causally involved in an "Innocent Threat" and can be legitimately eliminated. The neighboring civilians, on the other hand, not being part of the threat, are properly perceived as *noncombatants* and are immune.

But could not the Air Force planners press a contrary claim, based on an alternative ascription of causal responsibility? First, let us suppose that the noncombatants had *volunteered* to come and live near the military target so as to "shield" it from air attacks. Then, insofar as the military target is (part of) a threat, these noncombatants are no less "causally involved" in that threat than are the antiaircraft defenses surrounding the target. As long as these obstacles bar us from destroying the target, it is (also) because of them that it continues to endanger us. Moreover, this is true even if the people did not choose their ill-fated location: their very presence, by making us hesitate about bombing the target, contributes directly to the threat.

Well, says the Air Force, people have made this case and are urging us to go forward with such bombing. What could we answer them? Pointing to the "innocence" of the proposed victims is excluded because it has already been granted that even the enemy combatants are mostly innocent. In fact, if ascription of "causal involvement" alone could justify killing in "self-defense," it becomes all too easy to justify not only strategic bombing but even terror bombing: all it takes is some imaginative thinking. Suppose the enemy soldiers believe (falsely, let us say) that we are the aggressors; then surely their prime motive for fighting us is a commitment to protect their families. Because it is not guilt but causation that counts, it again should make no moral difference whether the wives and children are cheering them on or clamoring for surrender: in any case, their very existence is crucial to the continuance of the threat. Alive, these spouses and children contribute to the threat; their death (by breaking the military will to fight) will immediately remove it. Being thus "causally involved," how are they to escape fatal classification as "innocent threats"?

The plausibility of the naive definition of noncombatants as “not causally involved” in the threat (posed by their compatriot combatants) is undermined by contemplating alternative causal ascriptions. Indeed, some noncombatants—for instance, bakers of bread—are, even in a more conventional sense, causally involved in sustaining the military threat. But the whole point of noncombatant immunity is to protect classes of persons from attack precisely where that would bring military advantage.

So much for the causality criterion as key to the distinction between combatants and noncombatants. But if killing enemy soldiers is not to be justified in terms of eliminating “innocent threats,” then on what grounds can it be justified, while maintaining the prohibition on killing noncombatants? Is there any moral force to the expectation that armies should fight within certain bounds? As mentioned above, there are those who believe that the expectation itself, embodied in tradition, is the best authority we can expect. The war convention in itself is seen as constituting a moral tradition, whose distinctions cannot and need not be further justified. Against this, I shall—in the concluding section—suggest why this tradition, at least in its essentials, is not morally arbitrary.

V. INDIVIDUAL AND COLLECTIVE: DUAL REALITY AND THE WAR CONVENTION

We have seen that an account of permissible and impermissible killing in warfare cannot draw on a direct analogy to private self-defense. Where the basic analogy to self-defense does function is on the collective level, justifying defensive war itself despite its necessary cost in innocent lives. Yes, we speak of self-defense—but it is a collective that defends itself against attack from another collective rather than simply many individuals protecting their lives in a set of individual confrontations.

For defensive war, as for private self-defense, the moral sanction relies on a crucial tipping of the scales. But whereas in self-defense this requires a minimal measure of individual guilt, in warfare the issue is and must be weighed on the great collective scale. Trying to make sense of warfare as though it were an aggregate of individual confrontations can only produce moral vertigo. The enemy soldiers are not all murderous aggressors; judged as individual persons, only some of them can be killed: the machinating leaders and generals and those officers and soldiers who knowingly participate in their country’s criminal aggression. Only viewing it as a collective aggressor can sanction the very killing of combatants, despite the impossi-

bility of determining their individual guilt or innocence, for in fact we cannot act against the enemy as a collective without killing particular persons.

Lest this argument seem trite, it must be clearly distinguished from the all-too-common admission that (in Michael Walzer's words) war always takes place "under a cloud," forcing us, as it were, to act immorally. Adherents to this view hold that, because notions of individual self-defense cannot be made to apply to warfare, we should see collective self-defense as dictated by a sort of *amoral* (if not *immoral*) imperative. This approach implies a commitment to moral individualism: what is considered real—and therefore deserving of moral concern—is the human individual; collectives, lacking separate reality, are denied any separate moral standing. Moral individualism most plausibly flows from ontological individualism.

However, thinking about war, and international politics generally, can easily—and, I think, properly—generate serious doubts about ontological individualism. The reality of international confrontation is not adequately described by reduction to individualistic terms. We are not only individuals facing other individuals but also a nation confronting another nation.

Now in discussions of the methodology of social science, these two modes of describing human realities are usually taken to be, on the fundamental level, mutually exclusive. Proponents of methodological individualism deny that collective "entities" have any real existence: their description can (and, in principle, should) be reduced to that of relationships between individuals. The opposing school adheres, on the contrary, to the primacy of sociocultural reality, in terms of which alone can human individuals be described.¹⁵

Actually, even some opponents of methodological individualism tend to subscribe to moral individualism. They often appear willing to grant that, although (ontologically) collectives do exist, their actions and relations qua collectives are (at best) morally neutral. Moral analysis is supposed to proceed along the individualist groove alone, subjecting collective confrontation to judgment *solely* in terms of individual morality. The cause of this inconsistency is, I suspect, that—accepting the basic dichotomy—they find the alternative far worse: namely, a collectivist morality that would reduce the value of the individual to his or her contribution to the nation.

But is this radical dichotomy—presupposed in the impassioned and enduring debate—truly valid? Is it true that the ontologically primary entity must be *either* the individual *or* the collective?

With respect to entities far less complex than a human society, it has been convincingly argued that the whole, although not identical to the sum of its parts, is ontologically on a par with them. D. Wiggins, in his provocatively titled essay "On Being in the Same Place at the Same Time,"¹⁶ discusses the simple example of a jug and its constitutive parts. The jug is one object and

its clay particles a particular set of objects; that they are not identical to each other becomes clear once we contemplate the substitution of a few particles.¹⁷ For the purpose of describing the reality before us, neither has any claim to primacy: the two entities simply coexist.

Going beyond mere description, we might try to trace an etiology: in the case of an artifact (like the jug), we easily know that the particles antedate the constructed object. But regarding a nation, no comparable knowledge is readily available. No single perspective yields a picture of the dual realities before us: a set of individuals, on the one hand, and a nation (or collective), on the other. If our moral thinking is to relate to the real world it cannot but share this dual perspective.

Against this, it might be argued that “collectives”—whatever their ontological status—are in fact ephemeral and therefore cannot be accorded moral status on par with that of individuals. Do not nations suddenly come together, swiftly uniting myriad individuals into a “collective”? And do they not also disintegrate into smaller collectives, with each then claiming for itself the same ontological and moral status? The individual persons seem to be the only constant reality, constituting now one gallery of nations, now another. The identity and boundaries of national collectives are clearly contingent, depending on convention rather than on nature. It is not even easy to produce a clear-cut definition of a “collective,” by which we might readily distinguish true claimants to the title from, say, mere clans or gangs.

The simple naturalness of individual existence might, however, be more apparent than real. Work by E. Zemach,¹⁸ D. Parfit,¹⁹ and others focusing on issues of personal identity and individuation has cast doubts on the ontological standing of the “individual self.” Change and reconstitution over time are the fate not only of nations but also of persons, and critical reflection reveals the difficulties in positing a unified and constant “individual person.” The individual might well be no more a “natural given” than is the collective, his or her existence as a unified entity being no less constructed by convention.

Now these thinkers tend to believe that undermining the ontological status of personal identity would herald great moral advances—for example, the dissolution of the logical basis for selfishness. Against this, it has been argued that the conceptual conventions by which we think of ourselves and of each other as persons are too deeply entrenched and/or too precious to be so readily overthrown.²⁰ With this I definitely agree: fundamental concepts are not set adrift through recognizing that their moorings are cultural rather than natural.

My purpose here, however, is not to offer the abandonment of familiar individualism in favor of novel concepts of collectivity. On the contrary, I

aim for recognition of conceptual foundations long inherent in our modes of thought and action. Because individualism cannot claim ontological supremacy it should not eclipse alternative perspectives in our view of human reality.

If the individual and the collective are *both* taken seriously as facets of human existence, then this dual reality properly yields a dual morality. Humans relate to each other as individuals, and these relations are governed by individual morality. Humans also (exist, and therefore) relate to each other as collectives, and these relations are governed by collective morality. In fact, these two modes of relating are coextensive, producing conflicts between equally valid moral demands.

The point is that the imperative of collective self-defense is not some alien intrusion tragically compelling us to compromise our moral standards. Rather, what is involved is a conflict between opposing moral imperatives. It is the striving to accommodate—however partially—both moral perspectives,²¹ which, above all, give moral force to the war convention.

Instead of trying to force all aspects of war into a false harmony with individual morality, the war ethic effects a *moral* compromise—giving some weight to each of the incompatible descriptions. It guides us to regard some members of the enemy society solely as individuals while subsuming others under their collective identity as “the enemy people.” The key factor is participation: combatants are those marked as participating in the collective war effort, whereas the rest of the enemy society retain their exclusive status as individuals.

A somewhat similar intuition has found expression in applications to dilemmas of warfare—and to those of strategic bombing in particular—of the “double effect” doctrine. This doctrine, worked out in detail in the Catholic tradition, allows a distinction between two effects of an action, one direct and the other indirect. If the direct effect—that is, the one primarily intended (such as bombing the factory)—is legitimate, a bad indirect effect (such as the deaths of noncombatants) can be tolerated.²² Yet “double effect” justifications ultimately depend on choosing one description over another: we are not “bombing the noncombatants” but merely “bombing the factory with collateral damage to noncombatants.” The very plausibility of such redescriptions rests on a recognition of dual *reality*, which forms the basis for a dual *moral perspective*.

It is worth noting that this double perspective is indispensable for understanding central ethical issues not only in warfare but also in several other realms. This claim calls, of course, for some elaboration; in the present context, I wish merely to illustrate it by mentioning two such issues. First, concerning peacetime international ethics, it is extremely difficult to formu-

late coherent demands for international distributive justice without reference to rights of collectives. Second, within societies, the moral force of demands for “affirmative action” depends entirely on the notion that there are moral claims and obligations between *groups*. If fairness is owed only to individuals, how can anyone request special preferment as a member of a particular group? Indeed, “affirmative action” seems to presuppose not only the moral standing of collectives but their continuance across generations.²³

VI. CONCLUSION

Moral deliberation about international relations in general, and about the conduct of warfare in particular, must include explicit recognition of the moral status of collectives. Analogies that proceed directly from relations among individuals to the realm of relations among states, without emphasizing the two disparate perspectives involved, produce more confusion than illumination. It is only when the individual and collective perspectives are recognized as distinctly valid aspects of our ethical view that we can appreciate the moral force of the war convention, without a dubious conscription into moral service of individual self-defense.

From the individual perspective, even the enemy soldiers ought not to be killed. The very license for killing them derives from a compromise, which subsumes them—the primary participants in the enemy war effort—under the collective identity of “aggressors.” Collectively, we must and may act against the enemy war effort, despite the fact that this involves destroying innocent lives. It is by virtue of a similar compromise that we might sometimes also be justified in conducting strategic bombing. Terror bombing, however, in erasing all distinctions, abandons the individual perspective altogether. Abrogating the war convention, it violates—under the banner of total collective confrontation—the crucial commitment to the individual moral perspective.

As long as we maintain—against this—the critical distinction captured and fostered by the war convention we preserve the dual character of our moral vision. Recognizing the collective perspective, the convention allows that some innocent lives can be destroyed in war—within the circumscribed scope of collective confrontation. But condoning the killing of innocents outside this scope amounts to a total abandonment of the individual perspective, whereas remaining true to our (dual) human reality requires continuing to abhor murder—even in the midst of war.

NOTES

1. I use these two terms interchangeably; for the difference between their precise connotations, see section V of this essay.

2. See E. Anscombe, "War and Murder," in Walter Stein, ed. *Nuclear Weapons and Christian Conscience* (Merlin Press, 1961; Cardinal Books, 1965), 45-62; J. C. Ford, "The Hydrogen Bombing of Cities," in W. J. Nagle, ed., *Morality and Modern Warfare* (Baltimore, 1960), at 98.

3. M. Walzer, *Just and Unjust Wars* (Basic Books, 1977), at 127.

4. See, e.g., G. I. Mavrodes, "Conventions and the Morality of War," *Philosophy and Public Affairs* 4 (1975): 117-31. For a systematic argument regarding the significance of tradition in international ethics, see T. Nardin, "Ethical Traditions in International Affairs," in T. Nardin and D. R. Mapel, eds., *Traditions of International Ethics* (Cambridge University Press, 1992).

5. See R. K. Fullinwider, "War and Innocence," *Philosophy and Public Affairs* 5 (1975): 90-97.

6. I say a bit more on this below in section I.

7. Judith Jarvis Thomson, "Self Defense," *Philosophy and Public Affairs* 20 (1991): 283-310.

8. The Talmud tells of a man who approached a fourth-century sage, relating his predicament: "The master of my town has said to me: 'Go kill so-and-so; if you don't, I shall kill you!'" The sage replied, "Let him kill you and do not kill. Who is to say that your blood is redder—perhaps his blood is redder?" (Babylonian Talmud, Sanhedrin 74a).

9. This itself requires some discussion. The issue might be thought to hang on whether that would constitute killing him or merely letting him die, for surely I have no duty to sacrifice my life for him any more than I have a duty to volunteer to get out of a lifeboat to make room for someone else. Hence it would seem that just as I would have no duty to move in under the trajectory to cushion his fall I equally have no duty to stay put and do the same. Yet is it not true that, in the second case, because if I do nothing he will be saved, moving away amounts to killing him? I think this is a misstatement of the case, in that it disregards the indeterminacy of outcome where human choice is involved. The predictive "description," which states that "he will fall and be saved," depends on the assumption that I will not move—which is, as long as I am debating my decision, an unwarranted assumption. Unless I have a duty to save him, I retain my freedom to move, so, assuming I do that, the situation can equally be described as "he will fall and die." No trick of "neutral description" can substitute for taking a moral stand. What matters morally is not some technical contrast between moving and freezing but the boundaries of one's duties, which define the scope of liability for omissions.

10. See, e.g., Joel Feinberg, "What Is So Special About Mental Illness?" in his *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, 1970), 272 ff.

11. The Talmud (Sanhedrin 72b) concludes that an attacking minor can be killed in self-defense, whereas a half-born baby cannot be killed to save its mother. For a detailed discussion, see my "Killing a Rodef," *S'vara* 1 (1990): 55-58.

12. One crucial and intriguing question is that of holding a person culpable for inadvertent actions or consequences, such as those involving some degree of negligence. For an illuminating analogy, we might look at the debate among legal theorists about "strict liability" in the contexts of criminal negligence and of tort liability; see, e.g., G. P. Fletcher, "The Search for Synthesis in Tort Theory," *Law and Philosophy* 2 (1983): 64-88.

13. H.L.A. Hart, "The Ascription of Responsibility and Rights," *Proceedings of the Aristotelian Society* 49 (1948-9): 171-94. See, further, J. L. Mackie, "Responsibility and Language,"

Australasian Journal of Philosophy 33 (1955): 143-59; and J. Feinberg, "Action and Responsibility," in M. Black, ed., *Philosophy in America* (London, 1965), 134-60.

14. In both types of bombing, the civilians (depicted, for emphasis, as children) are only bystanders, and killing them cannot be justified in terms of self-defense. The sole justification (if there is one) for such strategic bombing might stem from the extremely high stakes in war—and these, Thomson believes, might equally justify terror bombing. Strangely, Thomson ("Self Defense", at 297 n. 11) attributes this view to Michael Walzer; in fact, a major theme of his *Just and Unjust Wars* (Basic Books, 1979) is, quite to the contrary, a passionate defense of the war convention and a condemnation of attacking noncombatants. True, Walzer is prepared to concede exceptions to the war convention in circumstances of "Supreme Emergency" (chap. 16, 251-61), but this should not be confused with the grounds for permitting strategic bombing.

15. For a short survey of this debate, see I. C. Jarvie, *Concepts and Society* (London, 1972), appendix: "The Methodological Individualism Debate," 173-78.

16. See *Philosophical Review* 77 (1968): 90-95.

17. The point is that the jug retains its identity through some changes in its parts, whereas the set of parts does not; this recalls the ancient paradox of Theseus's ship. The major alternative to Wiggins's approach is known as the "relative identity theory," whose adherents would say not that we are facing two objects but, rather, that the vague object out there is *perceived* under various descriptions. See E. M. Zemach, "In Defence of Relative Identity," *Philosophical Studies* 26 (1974): 207-18. For an application of these considerations to the genetic identity of a human individual, see my "Prospects for 'Genetic Therapy'—Can a Person Benefit from Being Changed?" *Bioethics* 4 (1991): 275-88.

18. E. M. Zemach, "Looking Out for Number One," *Philosophy and Phenomenological Research* 48 (1987): 209-33.

19. D. Parfit, *Reasons and Persons* (Oxford, 1984). The argument against a unitary self seems to hark back at least to Nietzsche; cf. T. B. Strong, *Friedrich Nietzsche and the Politics of Transfiguration* (expanded ed., University of California Press, 1988), 298-302.

20. See the various discussions of Parfit's *Reasons and Persons* in *Ethics* 96 (1986): 703 ff., especially that by S. Wolf, "Self-Interest and Interest in Selves," 704-20.

21. This is akin to the sort of conflict between *values* discussed by T. K. Seung and D. Bonevac in their "Plural Values and Indeterminate Ranking," *Ethics* 102 (1992): 799-813 (cf. esp. "The Indeterminacy of Values," 809 ff.). A conflict between two moral *perspectives* does, however, carry the basic disharmony a significant step farther.

22. Notably by Elizabeth Anscomb (cf. *supra* note 2). Insofar as "double effect" depends on distinctions of intention, I must side with Thomson's sharp criticism of the doctrine ("Self Defense," at 292-96). Walzer (*Just and Unjust Wars*, 151-59), continuing in a direction suggested by Anscomb, offers a somewhat different account of "double effect," emphasizing a requirement that the nonintentionality of the prohibited result (i.e., noncombatant deaths) be exhibited in a determined effort (to the point of taking risks) to prevent it. Such an effort is surely obligatory, and its lack would expose as hypocritical pleas of "military necessity"; yet I believe the permission to proceed—after all is said and done to save some noncombatants—with strategic bombing, which will doom others, must still be justified.

23. An illuminating instance of resistance to the collectivist view, in the cognate context of "cultural rights," is C. Kukathas's critique of W. Kymlicka's *Liberalism, Community and Culture* (Oxford University Press, 1989), "Are There Any National Rights?" *Political Theory* 20 (1992): 105-39. The entire debate, including Kymlicka's response (ibid., 140-46), is based on it being easily ceded that "it is the individual sentient being . . . whose welfare is the subject-matter of morality" (Kukathas, at 124).

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נספח ד'

Risking and Protecting Lives: Soldiers and Opposing Civilians

Noam J. Zohar

How we Fight: Issues in Jus in Bello

2011

לאחר דיון בכיתה על עקרון כפל התוצאות, פרופסור זהר שלח לנו את
המאמר הזה לסיכום העיקרון והצגת השכלול העדכני שלו.

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Introduction: Double Effect, Double Intention, and Preventing Harm

A fairly large segment of recent debates about the morality of conduct in warfare has focused on the question of civilian casualties. Much hangs on the way the question is formulated, and I will argue below that one prevalent formulation is highly misleading; but one must begin somewhere, so I shall at first set forth the question in that very form, which concerns preventing such casualties. The twofold question is thus: "(1) Do soldiers have a duty to prevent deaths of noncombatants; and if they do, (2) to what extent must they incur risk for the sake of such prevention?"

My main purpose is to clear up some of the confusion arising from this misleading formulation; this will facilitate better definition of norms and guidelines for particular, characteristic scenarios. In order to do that, I shall first have to briefly cover some well-known ground, recapitulating the discourse that provides the context for the question itself and for its common formulation in terms of prevention. I will then focus on some of the arguments surrounding "preventing harm to opposing noncombatants". I hope to show that, although there is some merit in the claim that soldiers are not obligated to risk their lives in order to protect civilians other than those under the domain of their own state, this is irrelevant for most combat situations. For actual warfare ethics, the question is not one of prevention but rather of a nefarious permission for soldiers to harm civilians or put them at significant risk, for the sake of the soldiers' enhanced safety.

The widespread moral indignation that rightly motivates the war against terrorism depends crucially on the moral assessment of foreseen (though unintended) killing of noncombatants. Since some extent of such killing seems unavoidable in many contemporary settings, those seeking – and claiming – to fight in a morally justified way must account for how their actions are significantly different from those of intentional terrorists and indeed permissible. Unless such an account can be provided, states and armies will have to yield the moral high ground that they aspire to hold in their campaigns against insurgents and terrorists; the battle will then be reduced, at best, to one between two sorts of terrorists – intentional and unintentional.

Even if it is granted that intentional terrorism is still worse than the unintentional kind, all parties will have on their hands the blood of the innocent.¹

Permission for such unintended killing is commonly asserted by citing the classical doctrine of double effect (DDE). But this venerable doctrine merely defines conditions under which a bad (side) effect, if unintended, shall not preclude an action undertaken for the sake of a legitimate purpose (=the main or intended effect). The doctrine does not offer a justification for the distinction between intending a bad effect – to be specific, in the present context, killing people – and knowingly bringing it about. Rather, this distinction serves as the doctrine's point of departure.

It seems that most (if not all) contemporary combat activities cannot be permitted without this crucial distinction. But in order to sustain the distinction, it is necessary to counter the accusation that both kinds of killing involve callous disregard for human life. For the intentional terrorist, there is only one defense against that accusation, namely, asserting tragic necessity. He would rather not have to kill innocent people, but it is unfortunately required in order to free his nation from (say) repressive tyranny. The obvious retort is that rejecting that kind of justification is the very core of the just war tradition: however justified the goals of a war may be, they cannot translate into a permission to kill noncombatants. People's lives have inherent value; they carry a weight that cannot be swept aside by the force of military necessity. But then mere lack of intention also does not amount to respecting the value of the victims' lives. If the DDE were to allow an agent to pursue a worthy goal while having no regard for people killed incidentally, it would indeed amount to an endorsement of unintended terrorism.

The DDE, as restated in Mangan's oft-cited modern formulation, seems to avert this pitfall through the condition of proportionality, requiring "that there be a proportionately grave reason for permitting the evil effect".² But in the context of warfare, this condition will mostly not pose a significant hurdle. In effect, it allows the value of human lives to be outweighed by any military-political objective deemed to be important. Sufficient importance is routinely taken to exist, except when the

¹ For an extended discussion, see David Rodin, "Terrorism without Intention", *Ethics* 114 (2004), 752-771.

² J. T. Mangan, "An Historical Analysis of the Principle of Double Effect", *Theological Studies* 10 (1949) pp. 41-61, at 43, summarizing the 19th century detailed formulation by Joannes Gory (see *ibid* 60-61).

number of noncombatant casualties is extremely large (and note that the restrictions of proportionality could in principle be accepted by terrorists³).

We should therefore not be surprised that the following guideline regarding unintended harm to noncombatants has been presented as an expression of the traditional law of warfare (specifically, the 1907 Hague conventions): "the attacker may, given the presence of innocents in a combat zone, do anything that it would be permissible to do if there were no innocents there – subject to the restrictions entailed by the principle of proportionality... This... allows the indiscriminate shelling or bombing of defended areas containing innocents".⁴ This formulation has been recently quoted sympathetically by Pavlischek, claiming that it represents "the more traditional understanding of double effect"⁵

This version of the DDE implies the following perverse permission. Suppose a military unit is assigned an important military objective, and by consulting standard operating procedures a plan is devised – let us call it "Plan A" – that will lead to the objective while causing some noncombatant deaths. If these are assessed (rightly, let us stipulate) as not disproportionate in light of the important objective, it seems that the unit and its planners have no obligation to consider or to seek non-standard Plan B, whereby they can attain the same objective with fewer noncombatant casualties, or the more imaginative Plan C, which can (almost surely) spare the noncombatants altogether. This cannot be right, yet it is precisely what is prescribed by the above guideline, which mandates ignoring the presence of the noncombatant victims (provided that the proportionality threshold has been met).

Instead, moral guidance for combat must give serious weight to human lives. A crucial improvement is thus found in the NCE formulation of the DDE, which explicitly adds a requirement of necessity: the unintended bad effect must be necessary, not in the sense that it serves as a means toward the good objective but in

³ Admittedly, the challenge for terrorists would be relatively greater, since harming many civilians is inherent to their strategy, and thus they might more often run afoul of the proportionality condition.

⁴ Sheldon Cohen, *Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century* 1989, p. 33. Cohen's discourse on "Bombardment and Civilian Casualties" (pp. 25-35) explicitly takes issue with Walzer's view (presented below) regarding the soldiers' obligation to accept certain risks; but see further in my discussion of the "Proximity" scenario below.

⁵ Keith Pavlischek, "Proportionality in Warfare", *The New Atlantis* Spring 2010, 21-34, at 29.

the sense that it is unavoidable – the good objective cannot be attained except through the act that also produces the bad effect.⁶

This version of the DDE excludes, in principle, both Plan A and Plan B: neither is necessary, since Plan C is available. As we shall see below, things are by no means so simple, as it is naïve to assume that there is no difference between the plans in terms of their various costs. But even without attending to costs, it is crucial to note that the lack of necessity will often not be obvious. Within the framework of Plan A, each of its component-acts is necessary. Consider an officer engaged in working out its details, looking at maps and intelligence reports, and noticing with alarm that one of these acts is likely to bring about noncombatant deaths. Having stopped to assess proportionality (and being satisfied in that regard), he might well move ahead, deeming the act necessary. It is only by thinking outside the box of standard procedures that Plan B will be noticed; and only by a further exercise of the imagination that Plan C might be devised – rendering some or all of the noncombatant deaths unnecessary and thus impermissible.

It follows that if the necessity condition is to have practical value, it is morally imperative that a tension be retained between the importance of military objectives and the value of civilian lives. This shall be expressed through a constant balancing, with proactive attention regularly directed to seeking alternative plans, reducing or eliminating harm to noncombatants. Otherwise, the near-absolute priority that is routinely assigned to military objectives will effectively allow soldiers to kill noncombatants as long as that is not what they intend – amounting to unintended terrorism.

Walzer (1977, p. 155) thus insists that the DDE must be explicitly amended to require a "double intention", the second intention being "that the foreseeable evil be reduced as far as possible". Specifically, recognizing the presence of the noncombatants who are being put at risk requires an effort to reduce both the magnitude of that risk and the extent of the expected harm.

Walzer also demands that such an effort involve a willingness, on the part of the soldiers, to themselves incur some risk for the sake of preventing noncombatant

⁶ This seems to be stated explicitly in the classical source of the DDE, namely, the discussion of self-defense in Thomas's *Summa Theologica* (Part 2 of Part 2, Question 64 Article 7). Thomas states that "if a man, in self-defense, uses more than necessary violence, it will be unlawful".

casualties. As I have argued elsewhere,⁷ this cannot be accepted as a necessary condition for validating the "second intention" (in my discussion below, I shall focus on the issue of risk and safety for the soldiers). The underlying consideration is that true respect for human life requires a genuine effort to spare the lives of noncombatants in the course of military operations. Accordingly, the IDF code of ethics (revised version, 2000) speaks of such an effort without explicitly referring to undertaking risk:

'Purity of Arms' (Morality in Warfare)

The soldier shall make use of his weaponry and power only for the fulfillment of the mission and solely to the extent required; he will maintain his humanity even in combat. The soldier shall not employ his weaponry and power in order to harm noncombatants or prisoners of war, and *shall do all he can to prevent harm to their lives, bodies, honor and property.* (emphasis added)

From here it is easy to see how the language of "prevention" (or also: "protection") has gained prevalence in discourse about war ethics. Those who, like Walzer, reject the crude application of DDE that would in effect allow disregard for opposing noncombatants, demand that military campaigns be accompanied by a consistent effort to prevent harm to noncombatants.

There is something curious about talk of "preventing" here, as though someone else is about to harm these civilians and the virtuous soldier is being asked to protect them. Actually, the question is not about *preventing* harm but rather about *refraining* from inflicting it. Yet it is easy to see how this way of putting things arises naturally in the context of verifying necessity. Permission for the planned military operation is assumed, since the proportionality condition is met. Thus it is taken as given that the operation will go ahead, causing noncombatant casualties. The necessity condition requires an effort to find alternative plans, averting (or at least reducing) these casualties; this is plausibly described as "preventing" them, or even as "protecting" the putative victims. Yet as I shall proceed to argue, framing the issue in these terms can entail a morally corrosive confusion – especially in light of the difference in costs between alternative ways of obtaining the military objective

⁷ Noam Zohar, Double Effect and Double Intention: A Collectivist Perspective", *Israel Law Review* 40(3) 2007, 730-742

Sparing Lives: Costs, Risks and Necessity

The discussion above about plans A, B and C omitted the crucial dimension of costs. Costs are, however, inherent to the question of necessity. If we are to deny that Plan A (with its concomitant civilian deaths) is necessary on the grounds that Plan B is available, we must face the question of constraints. Suppose that Plan B requires a great concentration of forces, drawing on most of our strategic reserves, and therefore no responsible commander would consider adopting it. Risking our side's entire strategic prospects is an unacceptable cost of Plan B. The comparison needed to determine necessity must therefore be subject to a constraint of the form: "Is there an alternate Plan B that can achieve the same objective as Plan A, without incurring cost X?"

There are many kinds of costs. Plan B may be literally more expensive, e.g., in that it utilizes costly precision ordnance. Or it might take more time, either in execution (the objective will be attained, but a few hours later) or in preparation (to work out its details, the unit's operation officer and her team will have to spend several extra hours). Or, finally, plan B might involve a slightly higher risk to the soldiers. Should any or all of these costs be translated into constraints on the comparison between the prospective plans?

Note that virtually every kind of cost can be seen as entailing a military disadvantage. Using up expensive materiel, delaying the achievement of an important objective, taking up the limited time of key personnel, exposing one's soldiers to extra risk – each of these might entail some sub-optimal outcome down the road. In one sense, risk to one's soldiers is, of course, uniquely unpalatable. Yet any military disadvantage can also imply a greater risk of casualties.

Realizing this, one way of response can be to insist on a strict constraint, disallowing any cost whatever. Plan B shall count as a viable alternative to Plan A only if (besides reducing noncombatant deaths) all other things are equal. If Plan B involves expending an extra round, dollar, or minute – and needless to say, if it involves even a minuscule extra risk to our soldiers – then it is ruled out, and Plan A is deemed as meeting the necessity condition: under the given constraint, there is no other way of achieving the military objective.

Clearly, such an approach renders the necessity condition effectively vacuous. The lives of these people – the prospective noncombatant victims – have value, in theory; and to this lip service is paid: we would spare them if it would cost us nothing.

But in reality this value will be routinely outweighed by the importance of our military objectives. On rare occasions, perhaps, an alternative plan will present itself, whereby the victims' lives can be spared at no cost (of any kind), and then we shall indeed steer clear of gratuitous bloodshed. But in practice, when the standard operating procedures yield a single plan A, even the effort needed to look beyond that will be construed as an undue burden. Rather than seeking a more complicated way to achieve the same objective, the officers' time will surely be better spent in thinking a step or two ahead, planning for the day after tomorrow.

This helps explain why Walzer insists on a willingness to incur some cost, which he defines poignantly in terms of risk undertaken by the soldiers themselves. Without such willingness, there is no balancing of values: the lives of the opposing civilians are simply swept aside, and those who bring about their deaths exhibit a disregard for human life similar (though not identical) to that which characterizes terrorism.

Nevertheless, as we have seen, there are those who expressly reject Walzer's position. I shall dub their position "Soldiers' Safety First" (SSF), since it places the safety of soldiers above that of the local civilians.⁸ Some of them have offered a seemingly compelling argument against what they call a "duty to protect" local civilians in the course of military action. They argue that no such duty should be recognized – particularly if that would impinge upon the military operation, and most emphatically if it would involve any risk to the soldiers themselves. Thus J. Fleury asserts that "soldiers do not have the same positive duty to protect innocents among the enemy population, as they have to protect their own population."⁹ This claim has been endorsed and defended extensively by Asa Kasher and Amos Yadlin, who take special care to steer clear of any form of nationalist or ethnocentric stance. The soldiers owe less to the local civilians not because they belong to another people, nor even because they are not co-citizens. It is simply that the soldiers are agents of their state, and a state owes special duties of protection only to people residing under its control.¹⁰

⁸ See Kasher & Yadlin (2005), at 14-15. Clearly, the prioritization enumerated there is meant to trump the earlier-stated condition of "minimizing collateral damage" (p. 11).

⁹ As cited in Pavlischek 2009. p. 30 (I have been unable to locate Fleury's 1998 military research paper cited there)

¹⁰ Asa Kasher and Amos Yadlin, "Military Ethics of Fighting Terror: An Israeli Perspective", *Journal of Military Ethics* 4 (1) 2005, 3-32; idem, "Military Ethics of Fighting Terror: Principles", *Philosophia*

This is true as far as it goes, but as I shall proceed to show, is virtually irrelevant to moral guidance in the setting of military action. As I suggested above, the false impression of its relevance reflects a confusion that is due, at least in part, to the ambiguity in the talk of "protection" (or "prevention") in this context. In order to dispel the ambiguity and reduce the confusion, I will begin with two scenarios in which what is required of soldiers seems rather clear-cut. These will furnish the sharpest contrast as a backdrop for analyzing more perplexing situations, and also spell out the notion that – pace adherents of SSF – respect for human life is inseparable from consideration of risk. I will then move on to several more complex scenarios that lie in between, in one sense or another.

Risk and Protection: Two Initial Scenarios

1. Humanitarian Aid

Kasher and Yadlin derive what is perhaps the most compelling support for their position from an analogy to duties of rescue and protection owed by the state and its agents in cases of natural disasters. Part of the very purpose of the political association constituting a state is providing protection and help, particularly in life-threatening situations. In the face of plague or fire, for example, healthcare workers or firefighters are the agents of the government (whether national or local), fulfilling its special obligations toward those residing in its domain. As such, they may also be expected to incur some risk in the course of their urgent work. Neither these agents nor the state as such has any similar obligations toward people in other countries, far or near.

Likewise, argue Kasher and Yadlin, for soldiers, whose mission is to protect their compatriots from certain man-made disasters: they have no duty of protection toward other people, including the civilians of the territory where the soldiers operate

34 (2006); idem, "Israel and the Rules of War: an Exchange" *New York Review of Books* June 11, 2009. The latter also includes a response by Michael Walzer and Avishai Margalit, whose earlier essay had occasioned the response by Kasher and Yadlin (cf. M. Walzer and A. Margalit, "Israel: Civilians and Combatants" *New York Review of Books* 56 (8), May 14 2009, pp.21-22).

in the national defense. As I indicated above, this is perfectly correct as far as it goes; let me now introduce a scenario that will help to see just how far that may be.

Think of a humanitarian aid operation, delivering crucial food to a population; the operation comes under attack by armed groups (who seek to disrupt and/or co-opt the supplies, in either case preventing it from reaching the starving people). Foreign soldiers are present, as they are conducting a military operation in the same territory. Are these soldiers required to undertake risk (or to incur other costs, e.g., to divert their efforts from their military mission) in order to protect the flow of aid, and thereby the lives of the population who needs it for survival? Here Kasher and Yadlin's argument seems convincing: whatever these soldiers would owe their own people if something similar should take place back home, they have no similar obligations to these other people.

Indeed, it would be foolhardy and illicit for a commanding officer to order his or her soldiers into such action. Even if the problems in delivering food were aggravated by the soldiers' military campaign, their duty in that regard is fully discharged by removing whatever obstacles they have introduced. They must ensure that their own operations pose no hindrance to the food's delivery, and conduct any co-ordination with the aid operation required for its safe passage. They are not obligated further to counteract the threat to the food supply introduced independently by local evil forces.¹¹

This scenario truly involves protection, and is well served by the comparison to relief in the face of natural disasters. Let us now examine to what extent this might be relevant to combat situations, and whether it offers any support for a broad SSF position.

2. Free-Fire Zone

In the course of anti insurgency/ anti-terrorist military operations, soldiers are located in an urban environment, and face possible attack. A "free-fire zone" is declared, that is, an instruction is issued that anyone approaching within a certain distance be deemed a threat and shot. Let us suppose that efforts are undertaken to inform the local residents of this instruction, but it is known that some are unaware of it or

¹¹ The qualifier "independently" is meant to suggest that if the threat to the food supply was somehow caused by the army's military operations, that army may have a special obligation to contribute to a remedy.

unable to leave. During the night, figures are seen approaching. Is it permissible to shoot them?

This can be construed in terms of incurring risk to the soldiers for the sake of protecting civilians. Imagine a debate between two soldiers. One says: "How can I shoot at these people, who may well be civilians?" – and the other answers: "Well, by not shooting you are risking your own life (as well as mine). We are not obligated to protect these civilians, certainly not where – as in our current situation – we thereby endanger ourselves".

This version of SSF is, however, clearly misguided. The question here is not about preventing harm or protecting lives – it is about directly harming and killing. Suppose that if an enemy combatant gets too close and a shootout takes place, the odds are even, i.e., there is a 50% chance that one of the soldiers will be killed. But suppose also that a person crossing the forbidden line is – with a probability of 98% – a noncombatant. If our soldiers' safety is deemed paramount (as argued by Kasher and Yadlin – subject to protecting the lives of our civilians and to fulfilling the military mission), then eliminating the 1% risk to one of them justifies the near-certain killing of a civilian. This is of course an unacceptable conclusion, although it would presumably be endorsed also by Cohen, who would allow soldiers to behave as if no civilians are present. So such a free-fire zone is an impermissible tactic. The soldiers must wait for the person to come nearer, or shine a light to better determine who is approaching, even if they thereby incur some risk – not because they must "protect" noncombatants, but because they have no permission to slay them.

One could start asking about proportionality or necessity; as we shall see below, delineating those conditions can in some cases present no small challenge. But doing so here would be misguided, since such shooting cannot in any event be justified by the DDE. In fact, what we have here is an act with just a single effect. To try a DDE justification, one would have to resort to sophistry, e.g. "I am shooting at this suspected terrorist, not intending the effect of killing a noncombatant". Or maybe one would employ tools of act-individuation: "I intend this qua shooting a suspect, but do not intend it qua slaying a teenager hurrying to get medication for her ailing father". It is this type of "mental gymnastics" that has given DDE a bad name.¹²

¹² Another try is to change the unit of analysis from the acts of individual soldiers to the unit's policy. On this view, the deed in question is the organization's act of declaring a free-fire zone. Its legitimate and desired effect is safeguarding the unit's soldiers; the unfortunate side-effect is shooting the

I do not mean to deny that some acts can be ambiguous, and that their proper description can depend on mental states. It is just that given the probabilities as stipulated, the agent cannot in good faith declare (or think) "I do not intend this as slaying a noncombatant". A serious concern with probabilities is required in attending to what it means to foresee a particular effect or result. If a doctrine of "minimizing risk to our soldiers" implies acting to enhance their safety even when the acts consist (almost certainly) in pointless killings, then neither the doctrine nor the ensuing acts are consistent with valuing human lives.

In our first scenario – "Humanitarian Aid" – what is at stake for the soldiers is indeed preventing harm to alien civilians, and the SSF argument was seen to have merit. By contrast, in the second scenario – "Free-fire Zone" – an argument in terms of SSF would be spurious. Here, putting the question in the terms cited at the outset ("should soldiers risk their lives to prevent harm to opposing civilians?") represents a breath-taking distortion. What places the soldiers at risk is not any attempt to serve local civilians, but entering the enemy area. There is no question of incurring risk in order to protect anyone. Rather, the question is: "May soldiers kill civilians in order to enhance their own safety?" – to which the answer is emphatically: "No." These two diametrically opposed scenarios can now serve as a backdrop for considering more complex ones.

Complex Scenarios

3. Proximity (with a note on human shields)

In this ubiquitous scenario, the soldiers' fire is directed against an appropriate military target, but there are noncombatants nearby. This kind of case has furnished the classic examples of double effect in warfare: the act of shooting has two clearly distinct effects, one legitimate and important, the other bad and undesired.

This is also the original context of the discussion of double intention. Suppose again that – after excluding options with disproportionate civilian casualties – there are several ways of destroying the target. How should the planners assess the competing risks? Is it appropriate to frame the question here in the contested terms of

civilians. Even if one were to buy in to this, the declaration would still not be permitted by DDE, since the shooting is the means by which the safety is achieved. And at any rate, even though it is appropriate to think also in terms of collective agency, that cannot be a substitute for moral evaluation of the actions of individual persons.

our title (as done by the adherents of SSF), asking about soldiers incurring costs – and risking their lives – to prevent harm to noncombatants?

This time, let us suppose that standard operating procedures indicate Plan B, which involves a high probability of some civilian deaths. But one of the planners thinks up Plan C, much safer for the civilians but somewhat riskier for the soldiers. Walzer seems to require that they should adopt this alternate plan; does that mean that he is asking them to risk their lives *in order to protect* these (alien) civilians? Are the proponents of SSF right in claiming that this case is akin to scenario #1 (Humanitarian Aid)?

Before answering, let us consider an additional possibility. Another planner proposes Plan A, which – again, compared to Plan B – is even safer for the soldiers, but is expected to kill even more civilians (though still within the bounds of proportionality, since the target is quite important). Following the same linguistic form, it seems that a shift to Plan A would amount to allowing the soldiers *to cause extra civilian deaths* in order to enhance their own safety – plainly an impermissible option, akin to scenario #2 (Free-fire Zone).

If substituting Plan C for Plan B counts as "protecting noncombatant lives", then substituting Plan A for Plan B should count as "causing noncombatant deaths". But both these accounts are equally unwarranted, because they characterize the act not in terms of its actual effect(s), that is, the difference in outcome as compared to what would have happened were the act not performed, but rather as compared to some other act. In particular, when this alternate act is simply what is suggested by standard operating procedures (or perhaps, just whatever the planners happened to think of first) it is a morally arbitrary baseline.

The same is true with regard to choosing how to describe the soldiers' action in terms of its effect on their own fate. Are they "risking their own lives" or "enhancing their own safety"? As long as the selection of description depends on comparison to something else they could have done instead, it is subject to arbitrariness or bias.

In fact, in the various "Proximity" cases the soldiers cannot be said in good faith to be "protecting" the civilians at all. They are in any event *killing* the noncombatants, or at least endangering them, except perhaps in the limiting case of Plan D that entirely avoids the bad side-effect. Even that does not really constitute

preventing harm to noncombatants; rather it is a matter of refraining from harming them

Along similar lines, the soldiers are risking their lives not by the selection they make among the available plans but rather by the very enterprise of engaging the enemy or of moving into enemy territory, and then specifically by setting out to achieve the military objective in question. The choice among the several ways to do that is, in this regard, a choice about how to *minimize* this risk (=maximize their safety).

Thus the terms employed in our title are by no means the most natural manner of reflecting the quandary posed by Proximity scenarios. If the only objectives were "protecting" opposing civilians and avoiding risk to our soldiers, they could both be achieved wonderfully by withdrawing our forces altogether, or still better, by not undertaking military action in the first place. The soldiers, however, reject this option – rightly, let us grant, in light of the great importance of the campaign's goals in general, and of the current objective in particular. By committing to this objective, they are also unfortunately committed both to risking their own lives and to endangering noncombatants. The quandary is how to balance these negative outcomes. Putting the issue instead in terms of "risking soldiers' lives to prevent harm to noncombatants" is quite artificial; rather than illuminating the problem, it merely facilitates a bogus analogy to the Humanitarian Aid scenario. The analogy is bogus because the issue here is not whether the soldiers have any special obligation to "protect" these noncombatants, but whether they are permitted to kill them. A demand to refrain from killing people need not invoke any special obligation.

Returning to the DDE perspective, the question is – as discussed above – what constraints should define the "necessity" condition. E.g., Plan B is only necessary if Plan C (with fewer noncombatant casualties) is ruled out on account of excessive risk to our soldiers.

Cohen insists that "The law of war implies that soldiers are not obligated to raise their already high risks to even higher levels in order to lower further the risk to innocents in combat zones... even where [departure by the innocents is] not possible¹³... the rights of innocents are defeasible when honoring those rights would

¹³ Kasher and Yadlin (2009) do seem to endorse efforts to avert Proximity situations, by issuing advance warnings and calling upon civilians to leave the prospective combat areas. But where such

push the soldiers' risks beyond what it is reasonable to expect any group to endure" (ibid, p. 33). This sounds reasonable, not only in terms of law but also in terms of morality; and Cohen rightly notes that the risks to soldiers are repeated and hence cumulative. Here are the kinds of odds he has in mind:

In the Normandy campaign a rifleman in the Ninetieth Division could expect to last fourteen days before becoming a casualty. By contrast, in heavily bombed Germany, a civilian had only a one in seventy chance of being killed or seriously wounded by a bomb during the six years of the war.

I suspect the odds against the civilian would look rather worse were the focus narrowed from Germany in its entirety to certain particular locations. But the point regarding soldiers is well taken: if the odds in a particular battle or campaign are already as high as those against riflemen on D day and its sequel, it is hard to justify adding any significant risk, especially if the risk to noncombatants is quite low already. In other Proximity cases, the comparison will yield an opposite conclusion, and it will be clear that attaining somewhat greater safety for soldiers who are already relatively safe cannot justify imposing significant risks on noncombatants. Thus Cohen's approach – looking closely at the comparative magnitude of risks – actually undermines his sweeping rule, quoted above, that calls for virtually ignoring the presence of civilians near military targets.

At any rate, the bogus analogy to Humanitarian Aid scenarios should be avoided, along with any arbitrary formulation in the terms employed in our title. The lives of noncombatants must be respected, so that necessity may not be defined so as to exclude any risk to soldiers, however small it may be. Alternate plans that reduce risk to noncombatants must be sought and adopted even if they involve additional risk to the soldiers -- up to some hard-to-define limit, lower than the intolerable level rejected by Cohen, but definitely higher than zero.

A Note on Human Shields

Up to now, I have been discussing Proximity scenarios as simply given: as it happens, there are noncombatants near the target, so that attacking the target has the side effect of harming them. But the literature on ethics of warfare – and the reality that it

efforts have been ineffective or ignored, they join forces with Cohen and other members of the SSF camp.

(partly) reflects – includes also the special case of a "human shield", where the proximity is intentionally set up by the enemy combatants in order to "shield" themselves from our fire. The shield is moral rather than physical; it is designed to work through deterrence, in that moral considerations (such as those enumerated above) will bar us from shooting at the military target.¹⁴

Often it will be the case that applying the revised DDE – exercising the requisite double intention, and according sufficient weight to the lives of the civilian "shields" – will still allow the soldiers to attack despite the knowledge that the human shield will be killed. This can be due to the importance of the target and to the likelihood that there will be few options of executing the attack while sparing the "shields", or at least of achieving this without unacceptable losses to the soldiers. But it may well be that even beyond that, there are special reasons to disregard the moral bar formed by the presence of the shield.

The reasons are rather straightforward. Respecting the said moral bar has two unacceptable results. First, it rewards brutal immorality by granting its perpetrators immunity from military action. Second, it encourages further employment of human shields, in the long run placing in jeopardy an ever-greater number of noncombatants. The enemy operatives who employ human shields are breaking the rules, and the only hope of getting them to stop is to refuse to go along with them – that is, to disregard the moral bar they have thrust in our path.

Policy considerations of this kind are akin to those adopted by some governments facing hostage situations. In both cases, they override the rights of the innocent victims, since respecting those rights would unacceptably deliver coercive power into the hands of the most ruthless evildoers, as well as produce harm to more victims down the road.

Yet my main concern here is not to defend the permission to shoot without regard for the lives of shields or hostages. Rather, it is to emphasize that even if such a permission exists, it is based on the said policy considerations, which apply narrowly (if they apply at all) to these perverse setting, where the moral bar has been intentionally manipulated by the enemy. Since it is only this intentional manipulation that warrants such considerations, extra care must be taken to avoid conflation of Proximity scenarios in general with those involving "human shields". Every fighting

¹⁴ See R. Nozick, *Anarchy, State and Utopia*, Basic Books 1974, p. 35.

organization (regular or irregular) will have many of its bases, installations, and staging areas in proximity to civilian habitations. And despite urgent calls and demands to leave their homes which have (or are about to) become a combat zone, many civilians have no realistic option of safe evacuation. Thus a position that sweepingly reduces Proximity scenarios to the terms of "human shields" is entirely unjustifiable.

4. Force Protection

Up till now, I have been examining scenarios where soldiers' safety figures as a factor in – or constraint upon – the selection of the means for pursuing a military objective. Sometimes, however, a unit's mission may consist directly in "force protection", that is, in defending another unit from enemy fire. Here the soldiers' safety itself constitutes the military objective. If there are civilians near the source of this enemy fire, the defending unit faces a special kind of Proximity scenario.

In classic Proximity scenarios, risks to soldiers and to opposing noncombatants operate as competing constraints upon the pursuit of a military objective whose importance derives from its function in the overall battle plan and from the goals of the war itself. These objective and goals furnish the crucial "grave reason" that outweighs, in the assessment of proportionality, the very lives of innocent people. Indeed, the same objective and goals are what justifies the sacrifice of the soldiers' lives as well. In other words, whatever balance is struck between risk to civilians and to soldiers, the combined harm to both is justified by the military objective, because of its role in attaining the goals that (we assume) justify the military campaign.

For the sake of clarity, let us consider a Force Protection scenario in which the unit requesting protection (say, from mortar fire) is not currently engaged in action, and thus defending it does not directly serve any (other) military objective. Of course, avoiding casualties (and demoralization) is important for the success of the overall campaign. Moreover, soldiers are people and it is important to save their lives – which are here under direct attack. But the absence of current engagement can often mean that the soldiers of the threatened unit are able to provide for their own safety by taking temporary protective measures such as getting under cover (or remaining therein), selecting a roundabout route, and the like.

Now suppose that the defending unit consists of an artillery battery, this being the most effective weapon by which to quickly target the enemy mortars. But it becomes evident that a group of vans carrying noncombatants¹⁵ are passing near the source of enemy fire, so that the artillery shelling (by its very nature, which hits an area rather than a precise point) will hit the vans along with the mortar-shooters. The crucial issue is thus timing: How urgent is it to take out those mortars? Suppose it is known that in twenty minutes the civilian vehicles will have moved on (such things are nowadays often knowable with drones providing real-time intelligence). Should the defending unit not hold its fire, advising the threatened unit to hunker down for the time being? Indeed, even if the threatened unit is on its way to strike some military objective, waiting might be possible.¹⁶ If, however, its soldiers are inescapably exposed or are unable take cover since they are in the midst of battle, there might not be time to wait or to seek alternatives, and DDE may mandate destroying the mortars despite the loss of civilian lives.

But who is to judge the urgency – and hence the moral permissibility – of Force Protection actions? The inherent difficulty of these scenarios lies in the split agency. The commander who must decide about endangering noncombatants is not the same commander who is considering how best to ensure the safety of his soldiers. They are in separate locations and do not have timely access to the same information. Therein lies the particular moral feature of such situations, namely, the salience of moral interdependence.

The commander of the threatened unit is likely to be unaware of the presence of noncombatants near the source of the mortar fire directed at his unit. Hence in calling for an artillery barrage to suppress the mortars he is unable to weigh the risk to civilians against the risk to his soldiers – something he can (and ought to) do in many classic Proximity scenarios. Likewise, the artillery commander – who is in a position to assess risk to noncombatants – will likely not know the degree and the urgency of the danger to the soldiers of the threatened unit, and thus is also unable to balance the competing moral factors.

¹⁵ We might imagine that they are a convoy of evacuees who have heeded the army's calls to depart from combat zones.

¹⁶ It is worth noting that even in the midst of a low-intensity engagement there might be options of temporary evasive action.

However, it is precisely such a balancing that is morally required (and prescribed by the DDE, properly rendered). To reiterate, *pace* the SSF approach, failure to accord significant weight to noncombatant lives amounts to unintended terrorism.¹⁷

This implies, first of all, an imperative of communication. Those requesting protection should give consideration to the possible moral costs of artillery fire in populated areas, and thus ought to indicate how urgent their need is. More important, those about to shoot must inform the requesting unit of the presence of civilians. Ideally, they should together address the problem and try to agree on an overall assessment. In practice, the requisite, nuanced give-and-take will often be extremely difficult to achieve via rushed and restricted voice communication. But the basic, crucial information should be conveyed and then weighed.

The inherent moral interdependence means that the commanders must rely on each other and be able to trust each other's commitment to the moral conduct of warfare. Having received the request for Force Protection, the artillery commander must be able to respond, e.g., "Heavy civilian traffic near target during next 20 minutes", to which the other commander might respond, "OK, can stay under cover that long", or conversely "Sorry, but we are entirely exposed and taking casualties, your support is urgently needed right now!".

The underlying moral understandings¹⁸ must be shared by the several agents and be part of the organizational culture. Moral responsibility begins with individual agents – both ordinary soldiers and officers – but is also crucially a matter for the army as a whole.¹⁹

¹⁷ It is worth considering that the artillery commander might be misled by the formulation in terms of prevention or protection. If he believes that his duty toward the prospective civilian victims is a duty of "protection", he may well conclude that he owes a greater duty of protection toward his comrades, wrongly assigning absolute priority to Force Protection.

¹⁸ Cf. Margaret Walker, *Moral Understandings*, Oxford University Press 2008.

¹⁹ I have sought here to illustrate the collective aspect of morality in warfare through this example of Force Protection, where the interdependence is immediate and the individual agents can readily identify each other. In fact, moral interdependence within an army is far more complex, involving agents who cannot identify each other, acting at disparate points in time etc. For a brief discussion of this regarding so-called "target banks" and the collection of intelligence, see my "Double Effect and Double Intention: A Collectivist Perspective", *Israel Law Review* 40(3) 2007, (section *iii*: pp. 735-40)

Conclusion: You Shall not Kill

In employing the language of the Ten Commandments, I do not mean to posit an absolute prohibition upon causing deaths of innocent people in warfare. I do mean, however, to emphasize that in most combat situations involving possible harm to noncombatants, it is misleading to speak of the soldiers' relevant obligation in terms of "preventing" such harm. As illustrated through the various scenarios we have examined, what is at stake is not whether the soldiers shall (or should) "protect" the lives of civilians, but rather whether they will (or may) knowingly kill them, albeit as a side-effect of pursuing their military objectives.

Gaining clarity in this matter removes the appearance of legitimacy from the doctrine I have dubbed SSF – "Soldiers' Safety First". The detailed examination of combat scenarios involving risk to both soldiers and civilians served not only to decry the misleading language of "protection" and its morally dangerous effects, but also – I hope – to show what is required when the lives of opposing civilians are accorded proper value. Individual soldiers as well as the army as an organization are required to continually balance the lives of our soldiers and the lives of noncombatants whom we are at risk of killing.

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נספח ה'

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בסופו של השיעור האחרון של הסמסטר, פרופסור זהר המליץ על
המאמר הזה לאחר דיון בנושא שעת חירום עליונה והרתעה גרעינית.

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Political Action: The Problem of Dirty Hands¹

In an earlier issue of *Philosophy & Public Affairs* there appeared a symposium on the rules of war which was actually (or at least more importantly) a symposium on another topic.² The actual topic was whether or not a man can ever face, or ever has to face, a moral dilemma, a situation where he must choose between two courses of action both of which it would be wrong for him to undertake. Thomas Nagel worriedly suggested that this could happen and that it did happen whenever someone was forced to choose between upholding an important moral principle and avoiding some looming disaster.³ R. B. Brandt argued that it could not possibly happen, for there were guidelines we might follow and calculations we might go through which would necessarily yield the conclusion that one or the other course of action was the right one to undertake in the circumstances (or that it did not matter which we undertook). R. M. Hare explained how it was

1. An earlier version of this paper was read at the annual meeting of the Conference for the Study of Political Thought in New York, April 1971. I am indebted to Charles Taylor, who served as commentator at that time and encouraged me to think that its arguments might be right.

2. *Philosophy & Public Affairs* 1, no. 2 (Winter 1971/72): Thomas Nagel, "War and Massacre," pp. 123-144; R. B. Brandt, "Utilitarianism and the Rules of War," pp. 145-165; and R. M. Hare, "Rules of War and Moral Reasoning," pp. 166-181.

3. For Nagel's description of a possible "moral blind alley," see "War and Massacre," pp. 142-144. Bernard Williams has made a similar suggestion, though without quite acknowledging it as his own: "many people can recognize the thought that a certain course of action is, indeed, the best thing to do on the whole in the circumstances, but that doing it involves doing something wrong" (*Morality: An Introduction to Ethics* [New York, 1972], p. 93).

that someone might wrongly suppose that he was faced with a moral dilemma: sometimes, he suggested, the precepts and principles of an ordinary man, the products of his moral education, come into conflict with injunctions developed at a higher level of moral discourse. But this conflict is, or ought to be, resolved at the higher level; there is no real dilemma.

I am not sure that Hare's explanation is at all comforting, but the question is important even if no such explanation is possible, perhaps especially so if this is the case. The argument relates not only to the coherence and harmony of the moral universe, but also to the relative ease or difficulty—or impossibility—of living a moral life. It is not, therefore, merely a philosopher's question. If such a dilemma can arise, whether frequently or very rarely, any of us might one day face it. Indeed, many men have faced it, or think they have, especially men involved in political activity or war. The dilemma, exactly as Nagel describes it, is frequently discussed in the literature of political action—in novels and plays dealing with politics and in the work of theorists too.

In modern times the dilemma appears most often as the problem of "dirty hands," and it is typically stated by the Communist leader Hoerderer in Sartre's play of that name: "I have dirty hands right up to the elbows. I've plunged them in filth and blood. Do you think you can govern innocently?"⁴ My own answer is no, I don't think I could govern innocently; nor do most of us believe that those who govern us are innocent—as I shall argue below—even the best of them. But this does not mean that it isn't possible to do the right thing while governing. It means that a particular act of government (in a political party or in the state) may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong. The innocent man, afterwards, is no longer innocent. If on the other hand he remains innocent, chooses, that is, the "absolutist" side of Nagel's dilemma, he not only fails to do the right thing (in utilitarian terms), he may also fail to measure up to the duties of his office (which imposes on him a considerable responsibility for consequences and outcomes). Most often, of course, political leaders accept the utilitarian

4. Jean-Paul Sartre, *Dirty Hands*, in *No Exit and Three Other Plays*, trans. Lionel Abel (New York, n.d.), p. 224.

calculation; they try to measure up. One might offer a number of sardonic comments on this fact, the most obvious being that by the calculations they usually make they demonstrate the great virtues of the “absolutist” position. Nevertheless, we would not want to be governed by men who consistently adopted that position.

The notion of dirty hands derives from an effort to refuse “absolutism” without denying the reality of the moral dilemma. Though this may appear to utilitarian philosophers to pile confusion upon confusion, I propose to take it very seriously. For the literature I shall examine is the work of serious and often wise men, and it reflects, though it may also have helped to shape, popular thinking about politics. It is important to pay attention to that too. I shall do so without assuming, as Hare suggests one might, that everyday moral and political discourse constitutes a distinct level of argument, where content is largely a matter of pedagogic expediency.⁵ If popular views are resistant (as they are) to utilitarianism, there may be something to learn from that and not merely something to explain about it.

I

Let me begin, then, with a piece of conventional wisdom to the effect that politicians are a good deal worse, morally worse, than the rest of us (it is the wisdom of the rest of us). Without either endorsing it or pretending to disbelieve it, I am going to expound this convention. For it suggests that the dilemma of dirty hands is a central feature of political life, that it arises not merely as an occasional crisis in the career of this or that unlucky politician but systematically and frequently.

Why is the politician singled out? Isn't he like the other entrepreneurs in an open society, who hustle, lie, intrigue, wear masks, smile and are villains? He is not, no doubt for many reasons, three of which I need to consider. First of all, the politician claims to play a different part than other entrepreneurs. He doesn't merely cater to our interests; he acts on our behalf, even in our name. He has purposes in mind, causes and projects that require the support and redound to the bene-

5. Hare, “Rules of War and Moral Reasoning,” pp. 173-178, esp. p. 174: “the simple principles of the deontologist . . . have their place at the level of character-formation (moral education and self-education).”

fit, not of each of us individually, but of all of us together. He hustles, lies, and intrigues *for us*—or so he claims. Perhaps he is right, or at least sincere, but we suspect that he acts for himself also. Indeed, he cannot serve us without serving himself, for success brings him power and glory, the greatest rewards that men can win from their fellows. The competition for these two is fierce; the risks are often great, but the temptations are greater. We imagine ourselves succumbing. Why should our representatives act differently? Even if they would like to act differently, they probably can not: for other men are all too ready to hustle and lie for power and glory, and it is the others who set the terms of the competition. Hustling and lying are necessary because power and glory are so desirable—that is, so widely desired. And so the men who act for us and in our name are necessarily hustlers and liars.

Politicians are also thought to be worse than the rest of us because they rule over us, and the pleasures of ruling are much greater than the pleasures of being ruled. The successful politician becomes the visible architect of our restraint. He taxes us, licenses us, forbids and permits us, directs us to this or that distant goal—all for our greater good. Moreover, he takes chances for our greater good that put us, or some of us, in danger. Sometimes he puts himself in danger too, but politics, after all, is his adventure. It is not always ours. There are undoubtedly times when it is good or necessary to direct the affairs of other people and to put them in danger. But we are a little frightened of the man who seeks, ordinarily and every day, the power to do so. And the fear is reasonable enough. The politician has, or pretends to have, a kind of confidence in his own judgment that the rest of us know to be presumptuous in any man.

The presumption is especially great because the victorious politician uses violence and the threat of violence—not only against foreign nations in our defense but also against us, and again ostensibly for our greater good. This is a point emphasized and perhaps overemphasized by Max Weber in his essay “Politics as a Vocation.”⁶ It has not, so far as I can tell, played an overt or obvious part in the development of the convention I am examining. The stock figure is the lying, not the murderous, politician—though the murderer lurks in the background,

6. In *From Max Weber: Essays in Sociology*, trans. and ed. Hans H. Gerth and C. Wright Mills (New York, 1946), pp. 77-128.

appearing most often in the form of the revolutionary or terrorist, very rarely as an ordinary magistrate or official. Nevertheless, the sheer weight of official violence in human history does suggest the kind of power to which politicians aspire, the kind of power they want to wield, and it may point to the roots of our half-conscious dislike and unease. The men who act for us and in our name are often killers, or seem to become killers too quickly and too easily.

Knowing all this or most of it, good and decent people still enter political life, aiming at some specific reform or seeking a general reformation. They are then required to learn the lesson Machiavelli first set out to teach: "how not to be good."⁷ Some of them are incapable of learning; many more profess to be incapable. But they will not succeed unless they learn, for they have joined the terrible competition for power and glory; they have chosen to work and struggle as Machiavelli says, among "so many who are not good." They can do no good themselves unless they win the struggle, which they are unlikely to do unless they are willing and able to use the necessary means. So we are suspicious even of the best of winners. It is not a sign of our perversity if we think them only more clever than the rest. They have not won, after all, because they were good, or not only because of that, but also because they were not good. No one succeeds in politics without getting his hands dirty. This is conventional wisdom again, and again I don't mean to insist that it is true without qualification. I repeat it only to disclose the moral dilemma inherent in the convention. For sometimes it is right to try to succeed, and then it must also be right to get one's hands dirty. But one's hands get dirty from doing what it is wrong to do. And how can it be wrong to do what is right? Or, how can we get our hands dirty by doing what we ought to do?

II

It will be best to turn quickly to some examples. I have chosen two, one relating to the struggle for power and one to its exercise. I should stress that in both these cases the men who face the dilemma of dirty hands have in an important sense chosen to do so; the cases tell us

7. See *The Prince*, chap. XV; cf. *The Discourses*, bk. I, chaps. IX and XVIII. I quote from the Modern Library edition of the two works (New York, 1950), p. 57.

nothing about what it would be like, so to speak, to fall into the dilemma; nor shall I say anything about that here. Politicians often argue that they have no right to keep their hands clean, and that may well be true of them, but it is not so clearly true of the rest of us. Probably we do have a right to avoid, if we possibly can, those positions in which we might be forced to do terrible things. This might be regarded as the moral equivalent of our legal right not to incriminate ourselves. Good men will be in no hurry to surrender it, though there are reasons for doing so sometimes, and among these are or might be the reasons good men have for entering politics. But let us imagine a politician who does not agree to that: he wants to do good only by doing good, or at least he is certain that he can stop short of the most corrupting and brutal uses of political power. Very quickly that certainty is tested. What do we think of him then?

He wants to win the election, someone says, but he doesn't want to get his hands dirty. This is meant as a disparagement, even though it also means that the man being criticized is the sort of man who will not lie, cheat, bargain behind the backs of his supporters, shout absurdities at public meetings, or manipulate other men and women. Assuming that this particular election ought to be won, it is clear, I think, that the disparagement is justified. If the candidate didn't want to get his hands dirty, he should have stayed at home; if he can't stand the heat, he should get out of the kitchen, and so on. His decision to run was a commitment (to all of us who think the election important) to try to win, that is, to do within rational limits whatever is necessary to win. But the candidate is a moral man. He has principles and a history of adherence to those principles. That is why we are supporting him. Perhaps when he refuses to dirty his hands, he is simply insisting on being the sort of man he is. And isn't that the sort of man we want?

Let us look more closely at this case. In order to win the election the candidate must make a deal with a dishonest ward boss, involving the granting of contracts for school construction over the next four years. Should he make the deal? Well, at least he shouldn't be surprised by the offer, most of us would probably say (a conventional piece of sarcasm). And he should accept it or not, depending on exactly what is at stake in the election. But that is not the candidate's

view. He is extremely reluctant even to consider the deal, puts off his aides when they remind him of it, refuses to calculate its possible effects upon the campaign. Now, if he is acting this way because the very thought of bargaining with that particular ward boss makes him feel unclean, his reluctance isn't very interesting. His feelings by themselves are not important. But he may also have reasons for his reluctance. He may know, for example, that some of his supporters support him precisely because they believe he is a good man, and this means to them a man who won't make such deals. Or he may doubt his own motives for considering the deal, wondering whether it is the political campaign or his own candidacy that makes the bargain at all tempting. Or he may believe that if he makes deals of this sort now he may not be able later on to achieve those ends that make the campaign worthwhile, and he may not feel entitled to take such risks with a future that is not only his own future. Or he may simply think that the deal is dishonest and therefore wrong, corrupting not only himself but all those human relations in which he is involved.

Because he has scruples of this sort, we know him to be a good man. But we view the campaign in a certain light, estimate its importance in a certain way, and hope that he will overcome his scruples and make the deal. It is important to stress that we don't want just *anyone* to make the deal; we want *him* to make it, precisely because he has scruples about it. We know he is doing right when he makes the deal because he knows he is doing wrong. I don't mean merely that he will feel badly or even very badly after he makes the deal. If he is the good man I am imagining him to be, he will feel guilty, that is, he will believe himself to be guilty. That is what it means to have dirty hands.

All this may become clearer if we look at a more dramatic example, for we are, perhaps, a little blasé about political deals and disinclined to worry much about the man who makes one. So consider a politician who has seized upon a national crisis—a prolonged colonial war—to reach for power. He and his friends win office pledged to decolonization and peace; they are honestly committed to both, though not without some sense of the advantages of the commitment. In any case, they have no responsibility for the war; they have steadfastly opposed it. Immediately, the politician goes off to the colonial capital to open negotiations with the rebels. But the capital is in the grip of a terrorist

campaign, and the first decision the new leader faces is this: he is asked to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings around the city, set to go off within the next twenty-four hours. He orders the man tortured, convinced that he must do so for the sake of the people who might otherwise die in the explosions—even though he believes that torture is wrong, indeed abominable, not just sometimes, but always.⁸ He had expressed this belief often and angrily during his own campaign; the rest of us took it as a sign of his goodness. How should we regard him now? (How should he regard himself?)

Once again, it does not seem enough to say that he should feel very badly. But why not? Why shouldn't he have feelings like those of St. Augustine's melancholy soldier, who understood both that his war was just and that killing, even in a just war, is a terrible thing to do?⁹ The difference is that Augustine did not believe that it was wrong to kill in a just war; it was just sad, or the sort of thing a good man would be saddened by. But he might have thought it wrong to torture in a just war, and later Catholic theorists have certainly thought it wrong. Moreover, the politician I am imagining thinks it wrong, as do many of us who supported him. Surely we have a right to expect more than melancholy from him now. When he ordered the prisoner tortured, he committed a moral crime and he accepted a moral burden. Now he is a guilty man. His willingness to acknowledge and bear (and perhaps to repent and do penance for) his guilt is evidence, and it is the only evidence he can offer us, both that he

8. I leave aside the question of whether the prisoner is himself responsible for the terrorist campaign. Perhaps he opposed it in meetings of the rebel organization. In any case, whether he deserves to be punished or not, he does not deserve to be tortured.

9. Other writers argued that Christians must never kill, even in a just war; and there was also an intermediate position which suggests the origins of the idea of dirty hands. Thus Basil The Great (Bishop of Caesarea in the fourth century A.D.): "Killing in war was differentiated by our fathers from murder . . . nevertheless, perhaps it would be well that those whose hands are unclean abstain from communion for three years." Here dirty hands are a kind of impurity or unworthiness, which is not the same as guilt, though closely related to it. For a general survey of these and other Christian views, see Roland H. Bainton, *Christian Attitudes Toward War and Peace* (New York, 1960), esp. chaps. 5-7.

is not too good for politics and that he is good enough. Here is the moral politician: it is by his dirty hands that we know him. If he were a moral man and nothing else, his hands would not be dirty; if he were a politician and nothing else, he would pretend that they were clean.

III

Machiavelli's argument about the need to learn how not to be good clearly implies that there are acts known to be bad quite apart from the immediate circumstances in which they are performed or not performed. He points to a distinct set of political methods and stratagems which good men must study (by reading his books), not only because their use does not come naturally, but also because they are explicitly condemned by the moral teachings good men accept—and whose acceptance serves in turn to mark men as good. These methods may be condemned because they are thought contrary to divine law or to the order of nature or to our moral sense, or because in prescribing the law to ourselves we have individually or collectively prohibited them. Machiavelli does not commit himself on such issues, and I shall not do so either if I can avoid it. The effects of these different views are, at least in one crucial sense, the same. They take out of our hands the constant business of attaching moral labels to such Machiavellian methods as deceit and betrayal. Such methods are simply bad. They are the sort of thing that good men avoid, at least until they have learned how not to be good.

Now, if there is no such class of actions, there is no dilemma of dirty hands, and the Machiavellian teaching loses what Machiavelli surely intended it to have, its disturbing and paradoxical character. He can then be understood to be saying that political actors must sometimes overcome their moral inhibitions, but not that they must sometimes commit crimes. I take it that utilitarian philosophers also want to make the first of these statements and to deny the second. From their point of view, the candidate who makes a corrupt deal and the official who authorizes the torture of a prisoner must be described as good men (given the cases as I have specified them), who ought, perhaps, to be honored for making the right decision when it was a hard decision to make. There are three ways of developing this argument.

First, it might be said that every political choice ought to be made solely in terms of its particular and immediate circumstances—in terms, that is, of the reasonable alternatives, available knowledge, likely consequences, and so on. Then the good man will face difficult choices (when his knowledge of options and outcomes is radically uncertain), but it cannot happen that he will face a moral dilemma. Indeed, if he always makes decisions in this way, and has been taught from childhood to do so, he will never have to overcome his inhibitions, whatever he does, for how could he have acquired inhibitions? Assuming further that he weighs the alternatives and calculates the consequences seriously and in good faith, he cannot commit a crime, though he can certainly make a mistake, even a very serious mistake. Even when he lies and tortures, his hands will be clean, for he has done what he should do as best he can, standing alone in a moment of time, forced to choose.

This is in some ways an attractive description of moral decision-making, but it is also a very improbable one. For while any one of us may stand alone, and so on, when we make this or that decision, we are not isolated or solitary in our moral lives. Moral life is a social phenomenon, and it is constituted at least in part by rules, the knowing of which (and perhaps the making of which) we share with our fellows. The experience of coming up against these rules, challenging their prohibitions, and explaining ourselves to other men and women is so common and so obviously important that no account of moral decision-making can possibly fail to come to grips with it. Hence the second utilitarian argument: such rules do indeed exist, but they are not really prohibitions of wrongful actions (though they do, perhaps for pedagogic reasons, have that form). They are moral guidelines, summaries of previous calculations. They ease our choices in ordinary cases, for we can simply follow their injunctions and do what has been found useful in the past; in exceptional cases they serve as signals warning us against doing too quickly or without the most careful calculations what has not been found useful in the past. But they do no more than that; they have no other purpose, and so it cannot be the case that it is or even might be a crime to override them.¹⁰ Nor is it

10. Brandt's rules do not appear to be of the sort that can be overridden—except perhaps by a soldier who decides that he just *won't* kill any more civil-

necessary to feel guilty when one does so. Once again, if it is right to break the rule in some hard case, after conscientiously worrying about it, the man who acts (especially if he knows that many of his fellows would simply worry rather than act) may properly feel pride in his achievement.

But this view, it seems to me, captures the reality of our moral life no better than the last. It may well be right to say that moral rules ought to have the character of guidelines, but it seems that in fact they do not. Or at least, we defend ourselves when we break the rules as if they had some status entirely independent of their previous utility (and we rarely feel proud of ourselves). The defenses we normally offer are not simply justifications; they are also excuses. Now, as Austin says, these two can *seem* to come very close together—indeed, I shall suggest that they can appear side by side in the same sentence—but they are conceptually distinct, differentiated in this crucial respect: an excuse is typically an admission of fault; a justification is typically a denial of fault and an assertion of innocence.¹¹ Consider a well-known defense from Shakespeare's *Hamlet* that has often reappeared in political literature: "I must be cruel only to be kind."¹² The words are spoken on an occasion when Hamlet is actually being cruel to his mother. I will leave aside the possibility that she deserves to hear (to be forced to listen to) every harsh word he utters, for Hamlet himself makes no such claim—and if she did indeed deserve that, his words might not be cruel or he might not be cruel for speaking them. "I must be cruel" contains the excuse, since it both admits a fault and suggests that Hamlet has no choice but to commit it. He is doing what he has to do; he can't help himself (given the ghost's command, the rotten state of Denmark, and so on). The rest of the sentence is a justification, for it suggests that Hamlet intends and expects kindness to be the outcome of his actions—we must assume that

ians, no matter what cause is served—since all they require is careful calculation. But I take it that rules of a different sort, which have the form of ordinary injunctions and prohibitions, can and often do figure in what is called "rule-utilitarianism."

11. J. L. Austin, "A Plea for Excuses," in *Philosophical Papers*, ed. J. O. Urmson and G. J. Warnock (Oxford, 1961), pp. 123-152.

12. *Hamlet* 3.4.178.

he means greater kindness, kindness to the right persons, or some such. It is not, however, so complete a justification that Hamlet is able to say that he is not *really* being cruel. "Cruel" and "kind" have exactly the same status; they both follow the verb "to be," and so they perfectly reveal the moral dilemma.¹³

When rules are overridden, we do not talk or act as if they had been set aside, canceled, or annulled. They still stand and have this much effect at least: that we know we have done something wrong even if what we have done was also the best thing to do on the whole in the circumstances.¹⁴ Or at least we feel that way, and this feeling is itself a crucial feature of our moral life. Hence the third utilitarian argument, which recognizes the usefulness of guilt and seeks to explain it. There are, it appears, good reasons for "overvaluing" as well as for overriding the rules. For the consequences might be very bad indeed if the rules were overridden every time the moral calculation seemed to go against them. It is probably best if most men do not calculate too nicely, but simply follow the rules; they are less likely to make mistakes that way, all in all. And so a good man (or at least an ordinary good man) will respect the rules rather more than he would if he thought them merely guidelines, and he will feel guilty when he overrides them. Indeed, if he did not feel guilty, "he would not be such a good man."¹⁵ It is by his feelings that we know him. Because of those feelings he will never be in a hurry to override the rules, but will wait until there is no choice, acting only to avoid consequences that are both imminent and almost certainly disastrous.

The obvious difficulty with this argument is that the feeling whose usefulness is being explained is most unlikely to be felt by someone who is convinced only of its usefulness. He breaks a utilitarian rule (guideline), let us say, for good utilitarian reasons: but can he then

13. Compare the following lines from Bertold Brecht's poem "To Posterity": "Alas, we/ Who wished to lay the foundations of kindness/ Could not ourselves be kind . . ." (*Selected Poems*, trans. H. R. Hays [New York, 1969], p. 177). This is more of an excuse, less of a justification (the poem is an *apologia*).

14. Robert Nozick discusses some of the possible effects of overriding a rule in his "Moral Complications and Moral Structures," *Natural Law Forum* 13 (1968): 34-35 and notes. Nozick suggests that what may remain after one has broken a rule (for good reasons) is a "duty to make reparations." He does not call this "guilt," though the two notions are closely connected.

15. Hare, "Rules of War and Moral Reasoning," p. 179.

feel guilty, also for good utilitarian reasons, when he has no reason for believing that he *is* guilty? Imagine a moral philosopher expounding the third argument to a man who actually does feel guilty or to the sort of man who is likely to feel guilty. Either the man won't accept the utilitarian explanation as an account of his feeling about the rules (probably the best outcome from a utilitarian point of view) or he will accept it and then cease to feel that (useful) feeling. But I do not want to exclude the possibility of a kind of superstitious anxiety, the possibility, that is, that some men will continue to feel guilty even after they have been taught, and have agreed, that they cannot possibly *be* guilty. It is best to say only that the more fully they accept the utilitarian account, the less likely they are to feel that (useful) feeling. The utilitarian account is not at all useful, then, if political actors accept it, and that may help us to understand why it plays, as Hare has pointed out, so small a part in our moral education.¹⁶

16. There is another possible utilitarian position, suggested in Maurice Merleau-Ponty's *Humanism and Terror*, trans. John O'Neill (Boston, 1970). According to this view, the agony and the guilt feelings experienced by the man who makes a "dirty hands" decision derive from his radical uncertainty about the actual outcome. Perhaps the awful thing he is doing will be done in vain; the results he hopes for won't occur; the only outcome will be the pain he has caused or the deceit he has fostered. Then (and only then) he will indeed have committed a crime. On the other hand, if the expected good does come, then (and only then) he can abandon his guilt feelings; he can say, and the rest of us must agree, that he is justified. This is a kind of delayed utilitarianism, where justification is a matter of actual and not at all of predicted outcomes. It is not implausible to imagine a political actor anxiously awaiting the "verdict of history." But suppose the verdict is in his favor (assuming that there is a *final* verdict or a statute of limitations on possible verdicts): he will surely feel relieved—more so, no doubt, than the rest of us. I can see no reason, however, why he should think himself justified, if he is a good man and knows that what he did was wrong. Perhaps the victims of his crime, seeing the happy result, will absolve him, but history has no powers of absolution. Indeed, history is more likely to play tricks on our moral judgment. Predicted outcomes are at least thought to follow from our own acts (this is the prediction), but actual outcomes almost certainly have a multitude of causes, the combination of which may well be fortuitous. Merleau-Ponty stresses the risks of political decision-making so heavily that he turns politics into a gamble with time and circumstance. But the anxiety of the gambler is of no great moral interest. Nor is it much of a barrier, as Merleau-Ponty's book makes all too clear, to the commission of the most terrible crimes.

IV

One further comment on the third argument: it is worth stressing that to feel guilty is to suffer, and that the men whose guilt feelings are here called useful are themselves innocent according to the utilitarian account. So we seem to have come upon another case where the suffering of the innocent is permitted and even encouraged by utilitarian calculation.¹⁷ But surely an innocent man who has done something painful or hard (but justified) should be helped to avoid or escape the sense of guilt; he might reasonably expect the assistance of his fellow men, even of moral philosophers, at such a time. On the other hand, if we intuitively think it true of some other man that he *should* feel guilty, then we ought to be able to specify the nature of his guilt (and if he is a good man, win his agreement). I think I can construct a case which, with only small variation, highlights what is different in these two situations.

Consider the common practice of distributing rifles loaded with blanks to some of the members of a firing squad. The individual men are not told whether their own weapons are lethal, and so though all of them look like executioners to the victim in front of them, none of them know whether they are really executioners or not. The purpose of this stratagem is to relieve each man of the sense that he is a killer. It can hardly relieve him of whatever moral responsibility he incurs by serving on a firing squad, and that is not its purpose, for the execution is not thought to be (and let us grant this to be the case) an immoral or wrongful act. But the inhibition against killing another human being is so strong that even if the men believe that what they are doing is right, they will still feel guilty. Uncertainty as to their actual role apparently reduces the intensity of these feelings. If this is so, the stratagem is perfectly justifiable, and one can only rejoice in every case where it succeeds—for every success subtracts one from the number of innocent men who suffer.

But we would feel differently, I think, if we imagine a man who believes (and let us assume here that we believe also) either that capital

17. Cf. the cases suggested by David Ross, *The Right and the Good* (Oxford, 1930), pp. 56-57, and E. F. Carritt, *Ethical and Political Thinking* (Oxford, 1947), p. 65.

punishment is wrong or that this particular victim is innocent, but who nevertheless agrees to participate in the firing squad for some overriding political or moral reason—I won't try to suggest what that reason might be. If he is comforted by the trick with the rifles, then we can be reasonably certain that his opposition to capital punishment or his belief in the victim's innocence is not morally serious. And if it is serious, he will not merely feel guilty, he will know that he is guilty (and we will know it too), though he may also believe (and we may agree) that he has good reasons for incurring the guilt. Our guilt feelings can be tricked away when they are isolated from our moral beliefs, as in the first case, but not when they are allied with them, as in the second. The beliefs themselves and the rules which are believed in can only be *overridden*, a painful process which forces a man to weigh the wrong he is willing to do in order to do right, and which leaves pain behind, and should do so, even after the decision has been made.

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That is the dilemma of dirty hands as it has been experienced by political actors and written about in the literature of political action. I don't want to argue that it is only a political dilemma. No doubt we can get our hands dirty in private life also, and sometimes, no doubt, we should. But the issue is posed most dramatically in politics for the three reasons that make political life the kind of life it is, because we claim to act for others but also serve ourselves, rule over others, and use violence against them. It is easy to get one's hands dirty in politics and it is often right to do so. But it is not easy to teach a good man how not to be good, nor is it easy to explain such a man to himself once he has committed whatever crimes are required of him. At least, it is not easy once we have agreed to use the word "crimes" and to live with (because we have no choice) the dilemma of dirty hands. Still, the agreement is common enough, and on its basis there have developed three broad traditions of explanation, three ways of thinking about dirty hands, which derive in some very general fashion from neoclassical, Protestant, and Catholic perspectives on politics and morality. I want to try to say something very briefly about each of them, or rather about a representative example of each of

them, for each seems to me partly right. But I don't think I can put together the compound view that might be wholly right.

The first tradition is best represented by Machiavelli, the first man, so far as I know, to state the paradox that I am examining. The good man who aims to found or reform a republic must, Machiavelli tells us, do terrible things to reach his goal. Like Romulus, he must murder his brother; like Numa, he must lie to the people. Sometimes, however, "when the act accuses, the result excuses."¹⁸ This sentence from *The Discourses* is often taken to mean that the politician's deceit and cruelty are justified by the good results he brings about. But if they were justified, it wouldn't be necessary to learn what Machiavelli claims to teach: how not to be good. It would only be necessary to learn how to be good in a new, more difficult, perhaps roundabout way. That is not Machiavelli's argument. His political judgments are indeed consequentialist in character, but not his moral judgments. We know whether cruelty is used well or badly by its effects over time. But that it is bad to use cruelty we know in some other way. The deceitful and cruel politician is excused (if he succeeds) only in the sense that the rest of us come to agree that the results were "worth it" or, more likely, that we simply forget his crimes when we praise his success.

It is important to stress Machiavelli's own commitment to the existence of moral standards. His paradox depends upon that commitment as it depends upon the general stability of the standards—which he upholds in his consistent use of words like good and bad.¹⁹ If he wants the standards to be disregarded by good men more often than they are, he has nothing with which to replace them and no other way of recognizing the good men except by their allegiance to those same standards. It is exceedingly rare, he writes, that a good man is willing to employ bad means to become prince.²⁰ Machiavelli's purpose is to persuade such a person to make the attempt, and he holds out the supreme political rewards, power and glory, to the man who does so and succeeds. The good man is not rewarded (or excused), how-

18. *The Discourses*, bk. I, chap. IX (p. 139).

19. For a very different view of Machiavelli, see Isaiah Berlin, "The Question of Machiavelli," *The New York Review of Books*, 4 November 1971.

20. *The Discourses*, bk. I, chap. XVIII (p. 171).

ever, merely for his willingness to get his hands dirty. He must do bad things well. There is no reward for doing bad things badly, though they are done with the best of intentions. And so political action necessarily involves taking a risk. But it should be clear that what is risked is not personal goodness—*that is thrown away*—but power and glory. If the politician succeeds, he is a hero; eternal praise is the supreme reward for not being good.

What the penalties are for not being good, Machiavelli doesn't say, and it is probably for this reason above all that his moral sensitivity has so often been questioned. He is suspect not because he tells political actors they must get their hands dirty, but because he does not specify the state of mind appropriate to a man with dirty hands. A Machiavellian hero has no inwardness. What he thinks of himself we don't know. I would guess, along with most other readers of Machiavelli, that he basks in his glory. But then it is difficult to account for the strength of his original reluctance to learn how not to be good. In any case, he is the sort of man who is unlikely to keep a diary and so we cannot find out what he thinks. Yet we do want to know; above all, we want a record of his anguish. That is a sign of our own conscientiousness and of the impact on us of the second tradition of thought that I want to examine, in which personal anguish sometimes seems the only acceptable excuse for political crimes.

The second tradition is best represented, I think, by Max Weber, who outlines its essential features with great power at the very end of his essay "Politics as a Vocation." For Weber, the good man with dirty hands is a hero still, but he is a tragic hero. In part, his tragedy is that though politics is his vocation, he has not been called by God and so cannot be justified by Him. Weber's hero is alone in a world that seems to belong to Satan, and his vocation is entirely his own choice. He still wants what Christian magistrates have always wanted, both to do good in the world and to save his soul, but now these two ends have come into sharp contradiction. They are contradictory because of the necessity for violence in a world where God has not instituted the sword. The politician takes the sword himself, and only by doing so does he measure up to his vocation. With full consciousness of what he is doing, he does bad in order to do good, and surrenders his soul. He "lets himself in," Weber says, "for the diabolic forces

lurking in all violence.” Perhaps Machiavelli also meant to suggest that his hero surrenders salvation in exchange for glory, but he does not explicitly say so. Weber is absolutely clear: “the genius or demon of politics lives in an inner tension with the god of love . . . [which] can at any time lead to an irreconcilable conflict.”²¹ His politician views this conflict when it comes with a tough realism, never pretends that it might be solved by compromise, chooses politics once again, and turns decisively away from love. Weber writes about this choice with a passionate high-mindedness that makes a concern for one’s soul seem no more elevated than a concern for one’s flesh. Yet the reader never doubts that his mature, superbly trained, relentless, objective, responsible, and disciplined political leader is also a suffering servant. His choices are hard and painful, and he pays the price not only while making them but forever after. A man doesn’t lose his soul one day and find it the next.

The difficulties with this view will be clear to anyone who has ever met a suffering servant. Here is a man who lies, intrigues, sends other men to their death—and suffers. He does what he must do with a heavy heart. None of us can know, he tells us, how much it costs him to do his duty. Indeed, we cannot, for he himself fixes the price he pays. And that is the trouble with this view of political crime. We suspect the suffering servant of either masochism or hypocrisy or both, and while we are often wrong, we are not always wrong. Weber attempts to resolve the problem of dirty hands entirely within the confines of the individual conscience, but I am inclined to think that this is neither possible nor desirable. The self-awareness of the tragic hero is obviously of great value. We want the politician to have an inner life at least something like that which Weber describes. But sometimes the hero’s suffering needs to be socially expressed (for like punishment, it confirms and reinforces our sense that certain acts are wrong). And equally important, it sometimes needs to be socially limited. We don’t want to be ruled by men who have lost their souls.

21. “Politics as a Vocation,” pp. 125-126. But sometimes a political leader does choose the “absolutist” side of the conflict, and Weber writes (p. 127) that it is “immensely moving when a *mature* man . . . aware of a responsibility for the consequences of his conduct . . . reaches a point where he says: ‘Here I stand; I can do no other.’” Unfortunately, he does not suggest just where that point is or even where it might be.

A politician with dirty hands needs a soul, and it is best for us all if he has some hope of personal salvation, however that is conceived. It is not the case that when he does bad in order to do good he surrenders himself forever to the demon of politics. He commits a determinate crime, and he must pay a determinate penalty. When he has done so, his hands will be clean again, or as clean as human hands can ever be. So the Catholic Church has always taught, and this teaching is central to the third tradition that I want to examine.

Once again I will take a latter-day and a lapsed representative of the tradition and consider Albert Camus' *The Just Assassins*. The heroes of this play are terrorists at work in nineteenth-century Russia. The dirt on their hands is human blood. And yet Camus' admiration for them, he tells us, is complete. We consent to being criminals, one of them says, but there is nothing with which anyone can reproach us. Here is the dilemma of dirty hands in a new form. The heroes are innocent criminals, just assassins, because, having killed, they are prepared to die—and will die. Only their execution, by the same despotic authorities they are attacking, will complete the action in which they are engaged: dying, they need make no excuses. That is the end of their guilt and pain. The execution is not so much punishment as self-punishment and expiation. On the scaffold they wash their hands clean and, unlike the suffering servant, they die happy.

Now the argument of the play when presented in so radically simplified a form may seem a little bizarre, and perhaps it is marred by the moral extremism of Camus' politics. "Political action has limits," he says in a preface to the volume containing *The Just Assassins*, "and there is no good and just action but what recognizes those limits and if it must go beyond them, at least accepts death."²² I am less interested here in the violence of that "at least"—what else does he have in mind?—than in the sensible doctrine that it exaggerates. That doctrine might best be described by an analogy: just assassination, I want to suggest, is like civil disobedience. In both men violate a set of rules, go beyond a moral or legal limit, in order to do what they believe they should do. At the same time, they acknowledge their responsibility for the violation by accepting punishment or doing penance. But

22. *Caligula and Three Other Plays* (New York, 1958), p. x. (The preface is translated by Justin O'Brian, the plays by Stuart Gilbert.)

there is also a difference between the two, which has to do with the difference between law and morality. In most cases of civil disobedience the laws of the state are broken for moral reasons, and the state provides the punishment. In most cases of dirty hands moral rules are broken for reasons of state, and no one provides the punishment. There is rarely a Czarist executioner waiting in the wings for politicians with dirty hands, even the most deserving among them. Moral rules are not usually enforced against the sort of actor I am considering, largely because he acts in an official capacity. If they were enforced, dirty hands would be no problem. We would simply honor the man who did bad in order to do good, and at the same time we would punish him. We would honor him for the good he has done, and we would punish him for the bad he has done. We would punish him, that is, for the same reasons we punish anyone else; it is not my purpose here to defend any particular view of punishment. In any case, there seems no way to establish or enforce the punishment. Short of the priest and the confessional, there are no authorities to whom we might entrust the task.

I am nevertheless inclined to think Camus' view the most attractive of the three, if only because it requires us at least to imagine a punishment or a penance that fits the crime and so to examine closely the nature of the crime. The others do not require that. Once he has launched his career, the crimes of Machiavelli's prince seem subject only to prudential control. And the crimes of Weber's tragic hero are limited only by *his* capacity for suffering and not, as they should be, by *our* capacity for suffering. In neither case is there any explicit reference back to the moral code, once it has, at great personal cost to be sure, been set aside. The question posed by Sartre's Hoerderer (whom I suspect of being a suffering servant) is rhetorical, and the answer is obvious (I have already given it), but the characteristic sweep of both is disturbing. Since it is concerned only with those crimes that ought to be committed, the dilemma of dirty hands seems to exclude questions of degree. Wanton or excessive cruelty is not at issue, any more than is cruelty directed at bad ends. But political action is so uncertain that politicians necessarily take moral as well as political risks, committing crimes that they only think ought to be committed. They override the rules without ever being certain that they have found the best

way to the results they hope to achieve, and we don't want them to do that too quickly or too often. So it is important that the moral stakes be very high—which is to say, that the rules be rightly valued. That, I suppose, is the reason for Camus' extremism. Without the executioner, however, there is no one to set the stakes or maintain the values except ourselves, and probably no way to do either except through philosophic reiteration and political activity.

“We shall not abolish lying by refusing to tell lies,” says Hoerderer, “but by using every means at hand to abolish social classes.”²³ I suspect we shall not abolish lying at all, but we might see to it that fewer lies were told if we contrived to deny power and glory to the greatest liars—except, of course, in the case of those lucky few whose extraordinary achievements make us forget the lies they told. If Hoerderer succeeds in abolishing social classes, perhaps he will join the lucky few. Meanwhile, he lies, manipulates, and kills, and we must make sure he pays the price. We won't be able to do that, however, without getting our own hands dirty, and then we must find some way of paying the price ourselves.

23. *Dirty Hands*, p. 223.

מוסר, מלחמה וטוהר הנשק

(שחזור)

פרופסור נעם זהר

מועד א', סמסטר א', תשע"ד

זיהוי התשובה הנכונה היה 4 נקודות, וכל נימוק היה 6. סה"כ $10 \cdot (4+6) = 100$

1. איך ניתן להצדיק הרתעה גרעינית?
 - א. בעזרת עקרון כפל התוצאות
 - ב. ע"י פגיעה במטרות צבאיות
 - ג. ע"י שימוש כאיום שלעולם לא ימומש.
 - ד. תשובות ב' וגי' נכונות
 - ה. אם השימוש בנשק יהיה לשם פגיעה בטרור

נימוק:

2. למה צריך את עקרון כפל התוצאות?
 - א. כי להסתכל על פעולה כבעלת תוצאה אחת זו הסתכלות נאיבית
 - ב. כדי לאפשר פגיעה ישירה באזרחים אם על הדרך פוגעים בחיילים
 - ג. כדי לאפשר פעולה מוצדקת וחשובה גם במחיר של פגיעה בחפים מפשע שאי אפשר למנוע
 - ד. כדי להסביר את ההשלכות של כל פעולה
 - ה. תשובה ג' וד' נכונות.

נימוק:

3. מה משמעות המושג השוויון המוסרי של החיילים?
 - א. שמותר לחיילים מצד כלשהו להרוג את חיילי הצד השני בלי תלות בצדקת מלחמתם.
 - ב. שאסור לחיילים מדרגות גבוהות יותר לדבר בצורה לא ראויה לחיילים בדרגות נמוכות יותר
 - ג. שמותר לחיילים מצד אחד להרוג חיילים מהצד השני בלי הבדלי דרגה (קצינים, רבי סרן, אלופים, וכו')
 - ד. מותר לפגוע באזרחים של הצד השני אם החיילים של הצד השני פגעו באזרחים מהצד שלנו
 - ה. ב' וגי' ביחד

נימוק:

4. מהם התנאים לשעת חירום עליונה?

- א. מצב בו התבוסה כמעט וודאית
- ב. מצב בו התבוסה תעלה מחיר כלכלי גבוה
- ג. מצב בו במקרה של תבוסה התוצאה תהיה בלתי נסבלת
- ד. א' וג' ביחד
- ה. מצב בו מדינה אחת מאוימת ע"י מדינה אחרת.

נימוק:

5. מתי מותר לפגוע בריבונות של מדינה?
- א. כאשר השלטון מדכא את האזרחים ופוגע בזכויות רבות שלהם
 - ב. כאשר האזרחים מואסים בשלטון ולא רוצים אותו
 - ג. אף פעם לא פוגעים בעקרון הריבונות של שלטון על מדינה
 - ד. תשובות א' וב' הן נכונות
 - ה. במקרה בה המדינה שומרת על ניטרליות וע"י כך תורמת לצד הלא צודק של הלחימה.

נימוק:

6. בנוסח המעודכן של רוח צה"ל (2,000) ערך טוהר הנשק הוא...
- א. מחמיר יותר מהדין הבינלאומי
 - ב. מתאים להשקפתו של סדג'ויק בדבר מלחמות
 - ג. מתאים לעקרון כפל התוצאות
 - ד. אוסר פגיעה בחפים מפשע בצורה מוחלטת
 - ה. אף תשובה אינה נכונה

נימוק:

7. מה מותר ללוחמי גרילה לעשות על פי וולצר?
- א. לפגוע בפקידי הממשלה
 - ב. להילחם בחיילי השלטון
 - ג. להתחזות לאזרחים כדי לאפשר קרבות עם יתרון שלהם.
 - ד. לבצע מארב ורק אז להתקיף
 - ה. אף אחת מתשובות מא' ד' לא נכונה

נימוק:

8. מהי התפיסה הדיאונטולוגית?
- א. שישנם איסורים שאסור לעבור אותם גם במחיר של פגיעה במאזן התועלת

נימוק:

9. מה יהיו ההשלכות אם לא יהיו הגבלות על מלחמות מנע?
- א. יהיו הרבה פשעי תוקפנות
 - ב. אף מלחמת מנע לא תוכל להיות מוצדקת

- ג. ייווצר מצב של גיוס בכפיה.
- ד. שילוב של ג' וב'.

נימוק: _____

10. במושג ריאליזם איתנו התעסקנו, מה היתה משמעות המושג?
- א. ההחלטות של המדינות נובעות מאינטרסים של השלטון בלבד
 - ב. לא נכון להחיל שיפוטיים מוסריים על ההחלטות של המדינות
 - ג. א' וב' ביחד

נימוק: _____
