

REACTION TO TERRORISM: A JEWISH LAW CAVEAT

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I suppose that it is axiomatic that not everything that is legal is moral, and conversely, not everything that is moral is legal. Professor Halberstam asked me to discuss the concept of war, both within a general philosophical framework and within the framework of Jewish law. In a certain sense I feel that my comments are entirely irrelevant; I am unaware that any government has ever consulted a moralist before embarking upon a course of military activity. Yet, at the same time, my comments may not be entirely irrelevant because international law, although certainly not determined by moral systems, is at least informed by them. Natural law doctrines, in particular, have exercised a profound influence over the development of international law concepts such as necessity and proportionality. These concepts are clearly rooted in philosophical traditions.

I am going to assume certain facts with regard to the various examples that Professor Halberstam has set out. Facts must be assumed because moral judgment in any specific case will hinge upon determination of the particular facts of the case. If my analysis of the facts is correct—and it may not be, since I have no claim to knowledge of all the relevant facts—it would seem to me that, on the basis of the facts as I perceive them, the various military incursions in response to terrorism could very well be defended on the basis of natural law theories, but could not be defended on the basis of Jewish law and morality.

The notion of a just war is a natural law concept. Let me try to summarize the concept very briefly, and then plug it into the relevant fact patterns. The concept of a just war flows from the notion of natural rights. Natural rights, or at least perfect rights, involve rights which command deference from other individuals. If an individual has a certain right which he can exercise vis-à-vis others, and which others must adhere and defer to, then the natural law argument is that those rights become vacuous and totally nugatory unless they are enforceable. The only manner in which those rights can be enforced, in the ultimate sense, is by physical might. Hence, as a corollary to the notion of a natural

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right, there is the idea of a subsidiary right of coercion. The notion in natural law theory is that not only do individuals possess such rights, but that states possess those rights as well.

The state may enforce those rights against both individuals and other states. A just war, then, according to natural law theory, may be undertaken for a variety of different reasons. The first is to protect or recover the subject matter of that right, *i.e.*, self-defense, defense of property or protection of any other natural right. Secondly, a just war may be undertaken to execute the equivalent of that right when the right itself is not enforceable. That is simply a code phrase for reparations; according to natural law theory, a war undertaken for the purpose of securing reparations is an entirely legitimate enterprise. The third purpose for which a just war may be undertaken is for the purpose of imposing punishment upon individuals or states that have violated these natural rights; war is justified as a form of retributive justice which is predicated upon the notion of restoring a proper balance as a means of maintaining law and justice. Punishment for the violation of norms of justice serves as a sufficient validating motive for a just war. Finally, a just war may be undertaken for the purpose of assuring future security; if a war is necessary as a deterrent in order to prevent others from committing similar wrongs in the distant future, the war is regarded as a just war.

There are, however, limitations upon the exercise of the right of engaging in just warfare. The first and most significant limitation is necessity: war is permitted only as a last resort. If there are other methods that can be employed to achieve any of the legitimate goals of war, those methods must be utilized first; only as a last resort may a state engage in war. The second limitation is proportionality, *i.e.*, the damage inflicted must be proportionate to the subject matter of the right it is designed to secure. I confess to an inability to define proportionality in any rigorous way. But it is clear that a concept of proportionality does exist within natural law theory. Finally, the right of just war is restricted to public authority.

The right to wage war is restricted to public authority for a variety of reasons. First, the state is entrusted with the waging of war in its role as the natural guardian of justice, peace and order; others, not charged with that responsibility, are denied the exercise of this right. Secondly, and probably more significantly, there is no higher court of appeal; there is no one other than the state to whom an aggrieved individual or society—a collective aggregate of individuals—can appeal. This, of course, is linked to the concept of necessity. Other individuals and groups have an appeal, at least in theory, to the state to defend their rights and protect their interests. Therefore, they have no right to engage in armed warfare.

However, since the state cannot appeal to any other body, it has the right to engage in warfare. Finally, a negative reason: No individual has the right to imperil the good of the members of the society. It is only the state, which acts as the spokesman, the executive arm, of all members of society, that has the right to engage in activities which may ultimately result in danger to the members of that society.

I think that if one examines any of the recent responses to terrorist activity in light of these considerations, it would not be difficult to justify, in terms of natural law, the use of force and arms in order to eliminate potential threats. This assumes, of course, that proportionality has been preserved and that necessity is also present in the sense that there is no other way to restore the legitimate natural rights which are inherent in members of all societies.

There is one question which I have not addressed and which I will not address in any great detail, namely, the extent to which these natural rights may be limited by covenant, and hence, the degree to which the right to engage in an otherwise just war is limited by covenant, particularly by the United Nations Charter, which is binding upon the member states of the United Nations. Resolution of that involves a matter of exegesis, an enterprise designed to determine what is banned by the Charter and what is not banned by the Charter. Moreover, it involves the more fundamental question of whether certain rights can be waived by covenant. It seems to me that this is a question which requires a great deal more analysis than it has received, certainly more than it has received in recent years.

Taking this general framework, and comparing it with Jewish teaching with regard to precisely the same issues, there are a number of points that must be made which are essentially negative in nature. Some of them, in fact, have been made by natural law theorists. The first is that, in terms of Jewish teaching, no evidence can be adduced from Scripture with regard to the legitimacy of warfare, or with regard to the concept of a just war. This was something that was of particular interest and concern to exponents of the concept of a just war within the framework of natural law theory. There are countless biblical narratives concerning warfare in which the war in question seems to be regarded as entirely legitimate. Natural law theorists dispose of those narratives very simply by indicating that in each and every instance the war described was undertaken at divine behest. Wars undertaken upon divine command must be examined in an entirely different perspective. Generally, those wars also involve some form of retributive justice; as such, they could readily be justified under natural law, particularly because it was the Deity who

ordained the punishment. In point of fact, this is entirely compatible with Jewish teaching with regard to the particular wars in question.

Exodus 15:3, which is usually translated as "the Lord is a man of war," is understood in the rabbinic tradition in an entirely different way: "The Lord is the master of war." Since God alone is the master of war, there is no authority to engage in warfare other than upon specific divine command. That explains very simply the requirement for the *Urim* and *Thummin*, the consultation of the breastplate of the High Priest, before embarking on war. The consultation of the breastplate of the High Priest was, in effect, an appeal for divine guidance; hence, all warfare was undertaken under color of divine license and dispensation. With limited exceptions, other forms of warfare were regarded as illicit and unlawful.

Jewish morality embodies, at most, a very limited concept of natural law, and certainly no concept of a just war as being sanctioned by natural law. That does not mean, however, that any military response, under any and all circumstances, is unlawful and illegitimate. On the contrary, wars of defense are legitimate, but are legitimate not as a new juridical concept of warfare, but under the general rubric of self-defense. However, the law of defense in Jewish morality is much broader than it is under most systems of law. In Jewish law it is not termed self-defense; rather, it is termed the *law of pursuit* or the *law of the pursuer*. It extends not only to the individual who is the actual or potential victim of aggression, but also legitimizes intervention on behalf of any innocent individual. Protection of any innocent party is legitimate under the general category of the law of pursuit. There are, however, a number of significant limitations: Proportionality is not one of them. An individual has a right to protect himself and his property. Anticipation that a person will defend hearth and home and any other property right gives rise to the assumption that the aggressor will employ physical force in achieving his goal and thus threaten the life of his potential victim. Not only the potential victim, but any third party may intervene, if necessary, in order to preserve the life of the innocent victim. The element of necessity is, however, very much present. The taking of a human life cannot be sanctioned unless there is no other way to eliminate the threat of aggression.

There is another limitation which turns out to be extremely significant and also serves as a crucial limiting factor, particularly when dealing with acts of terrorism: The law of pursuit permits the elimination of the aggressor, and of the aggressor only. The notion of proportionality enters under an entirely different guise when a third party is concerned. The law of pursuit cannot be invoked against an individual who is not an aggressor and who is not in a position of aiding and abetting the act of

aggression; that individual's life remains inviolate. Hence, if one is responding to an act of aggression, it is unlawful and immoral to take the life of an innocent noncombatant, even if the taking of that life is unintended.

Judaism, unlike other theological systems, does not posit a double-effect theory, certainly not in cases where the harm to the innocent party is a necessary and unavoidable consequence of the contemplated act. The net result is that to justify response to acts of terrorism under this broadened concept of self-defense, it is necessary to limit the response to only those individuals who pose a threat. The threat must be one which is imminent; it must be certain, or must be present with near certainty. If the threat is not certain, or if a response will require the elimination of an individual who is not a combatant and who is not a participant in the act of aggression, it cannot be justified under the law of pursuit.

Yet, it is clear that Judaism does recognize the legitimacy of a war of self-defense even under circumstances where the war could not be regarded as legitimate under the general rubric of the law of pursuit. The problem is the source of that dispensation; how to categorize the legitimacy of this response; and what are its parameters and limitations. A general justification is found in exegesis associated with *Genesis 9:5*. *Genesis 9:5* reads as follows: "But your blood of your lives will I require; . . . from the hand of man from the hand of a person's brother will I require the life of man." The phrase which presented difficulty to the classical rabbinic commentators was the seemingly redundant phrase, "from the hand of a person's brother." There is a history of exegesis which understands that phrase as a limitation upon the prohibition against homicide. The limitation seems to present a philosophical and legal framework for justifying wars of self-defense, at least under some conditions. The general understanding of that phrase is that the prohibition against homicide is binding in situations in which brotherly love either exists or should exist. But when prevailing circumstances reflect the antithesis of a state of brotherhood, and man is living in a state in which brotherly love and affection are nonexistent, the prohibition against homicide does not apply.

When do those circumstances pertain? From the formulation of the definition of a war of self-defense in Jewish law, it is clear that the obligation of brotherly love is suspended only in the face of direct aggression. To put it in somewhat different terms, only when a state of belligerency actually exists may one embark upon a course of self-defense in the form of warfare involving, as it does, civilian casualties, rather than merely elimination of the aggressor himself—what otherwise would be called a just war. It may very well turn out to be the case, as Professor Reisman

has stressed, that such conditions do not exist when there is a limited armed attack, an incident which is isolated in nature, but exist only when there are repeated armed incursions, *i.e.*, a level of belligerency which rises beyond mere isolated acts to a state of actual warfare. Essentially, warfare is sanctioned only in situations in which one can no longer anticipate that common rules of morality will pertain—when there is a total and complete breakdown of international law and order. Absent a breakdown of the general fabric of international law and order, an armed response to isolated acts of aggression could not be sanctioned under the rubric of a war of self-defense.

If one examines the many recent responses to acts of terrorism, the crucial fact, from this vantage point, is that in virtually all cases casualties were inflicted upon noncombatants—individuals who were totally innocent of any aggressive intent. That cannot be sanctioned unless one is prepared to defend the action as rising to the level of a war of self-defense; in order to do so, a state of belligerency must exist. I submit that in most, if not all, of the cases that were presented earlier this evening, those conditions simply did not pertain. The net result is that on my analysis of the fact patterns, in some, and perhaps all, of the specific examples that were given, although the response in question might have been justified in terms of the notion of a just war under natural law doctrines, it seems to me that those responses cannot be justified on the basis of application of the principles of Jewish law.