A DEFENCE OF TERRORISM

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ABSTRACT: After the events of September 11, 2001, most Americans cannot understand why anyone would want to cause innocent persons such devastating harm. Few of us can understand, much less identify with, the ideas in the minds of terrorists who brought down the towers of the World Trade Center. In his paper, Paul Viminitz gives us a chilling look inside a type of reasoning that could be used to support terrorists' actions. It is likely that, after the shock of the reasoning, few will find this defense of terrorism convincing, but Viminitz lays down the challenge to the reader to find the flaws in the reasoning.

In this paper I want to argue that—their high dudgeon notwithstanding—the victims of 9-11 hold no entitlement to that high dudgeon. No injustice has been dealt them. I make this case in the following stages.

The case *for* the victims of 9-11 having been dealt an injustice—which is rehearsed in Section II—rests on its being a violation of the laws of war to attack non-combatants. So in Sections III though VI I disabuse these complainants of their misconception of the nature of law, and then in Section VII I legitimize terrorism—and hence the targeting of non-combatants—within the practice of war. But first . . .

I. A POLEMIC

My mother was already old when, finally accepting her barrenness, she acceded to my father to have their maidservant Hagar bear them a son. His name, recall, was Ishmael. Subsequently Sarah *did* conceive. But when Isaac was born Sarah prevailed upon Abraham to send Hagar and Ishmael into the wilderness to perish. There God took pity on the hapless mother and child, led them to water, and blessed Ishmael as the father of a nation no less great than that God promised would be fathered by Isaac.

Three years ago—which is to say four thousand years later—my Anglican then-wife and I were at a conference in Tel Aviv. The only Palestinian we saw on the entire campus was an elderly charwoman, trucked in each morning from the desert to clean our toilets, and trucked back out again each evening when we had no further need of her. Apparently Hagar is still maidservant to Abraham and Sarah.

Two years earlier my then-wife was in Jerusalem without me, in the Old City. A young Palestinian—who, had history gone differently, might have been a scholar at that university in Tel Aviv—was selling himself as a guide to American and European tourists. He offered. She declined. He pressed. She refused. He insisted. She drew away. Whereupon he turned and over his shoulder shouted back to her, "Fucking Jew!" This he said to my Anglican then-wife! This is what my half-brother Ishmael has been reduced to by my rapacious mother Sarah, my spineless father Abraham, and my iniquitous brother Isaac.

As of 9-11, the Palestinians had been an occupied people for fifty-five years.[1] Some Palestinians—the so-called "moderates" represented by Yasser Arafat—have long since come to accept that this occupation is likely to be permanent. Since the occupying power has an official policy of apartheid, what remains to the Palestinians is some kind of semi-autonomous state in the very desert to which Ishmael was banished by Abraham and Sarah. They are prepared to accept this, not because they think it in any wise just, but because they have been litigating with Israel and the international community for their share of their inheritance for fifty-five years to no avail,[2] and they have come to think it is the best they can hope for under the circumstances.

Other Palestinians, by contrast, are *not* prepared to accept this. They think they can do better than cleaning Jewish toilets by *fighting* for their birthright, over the issue of Palestinian refugees, over the return of, or at least compensation for, expropriated lands, over the Jewish settlements question, over East Jerusalem, indeed over the very existence of the Jewish state!

And, it would appear, they are right. That is, it was the first Intifada that gave the Palestinians what little territory and provisional self-government they currently enjoy. This second Intifada, though costly, is designed to get them a tad more. But here is the point: **It is not for *us* to judge whether those gains are or are not worth the price being paid in Palestinian lives and limbs *to the Palestinians***.

But nor is this a judgment to be made by these so-called "extremists" alone, any more than it was for the IRA alone to judge whether the continued struggle for a free Northern Ireland was or was not worth the price of the Troubles. Just as it was in large measure the Catholic *mothers* of Belfast who finally forced their husbands and sons to give up the fight for a free Northern Ireland, so it might be that someday the mothers of Palestine will force their husbands and sons to give up the fight to expel the Israelis from Palestine. But the Palestinians are equally entitled to hope it will be the mothers of *Israel* who will break first and pressure *their* husbands and sons to make some kind of accommodation with the Palestinians.

This is a war of nerves, a war of resolve. But just as the Israelis had much less to lose in 1948—they, recall, had nowhere safe to go—so the Palestinians have

much less to lose now, which is why they can afford a much higher body count. Until 9-11 that body count was disproportionally in the favour of Israel and its allies. But even 9-11 has fallen far short of evening the score.

By supporting the State of Israel militarily since its inception, the United States of America has been at war with the Palestinian people for over half a century. But not just against the Palestinians. American forces in and within striking distance of Saudi Arabia are arguably all that stand between the Saudi royal family and ignominious overthrow. Likewise in Jordan and Egypt. Thus from the perspective of many Moslems, Egypt's Mubarak and Jordan's Hussein are no less Quislings than was the Shah of Iran, or the current regime in Pakistan.

The claim that Islam abhors liberal democracy is clearly disingenuous. None of the American puppet regimes in the region are democratic. And as to liberality, blasphemy remains a capital offence in many of these countries. Neither is Israel a democratic country any more than was South Africa under Apartheid. Most Palestinians are not Israeli citizens, and those that are are barred from bearing arms. Non-Israeli Palestinians have no civil liberty claims against the occupying power whatsoever. The Israeli Supreme Court has only recently reversed an earlier judgment allowing torture. The Israeli army has consistently violated the Hague and Geneva conventions concerning the rights of occupied peoples. Shatilla and Sabra in 1982 are precisely isomorphic to Babi Yar in 1943.

From what has just been said it might be supposed I am therefore pro-Palestinian. But I have said nothing of the sort. In fact if push came to shove, as a Jew I would be fighting for Israel with nary a thought to the Palestinian children whose heads I would be blasting off with the shells aimed at their hillside shanties. Two peoples, mine and theirs, each want the same piece of territory, and neither, it would seem, is prepared to share with the other. What choice is there but war?!

But going to war does not require that one bethink himself somehow in the right.[3] As I indicated earlier, we have as much right to go to war against those who would disturb our security, or even our prosperity, notwithstanding that it was we who disturbed theirs first. As Hobbes opined, in war "The notions of Right and Wrong, Justice and Injustice have there no place . . . no Propriety, no Dominion, no Mine and Thine distinct" (Lev. 13).

II. THE IMMUNITY OF NON-COMBATANTS

"Not so!" comes the rejoinder. Even supposing any notion of asymmetry in *jus ad bellum* is inappropriate here[4]—and only the propagandist who has swallowed his own propaganda could suppose otherwise—even in war there are rules of engagement. And among those rules, surely, is the immunity of non-combatants. So notwithstanding the right of the occupied peoples of the Middle East to make war on their occupier and its allies—and if need be to bring that war *to* the shores of those allies, e.g., the attack on the Pentagon—the attack on the World Trade Center violated the immunity of non-combatants. And it is for *that* reason that we are—and justifiably so—in such high dudgeon.

Let us translate this rejoinder into game theoretic terms. What has being said here—and quite rightly—is that war is a mixed motive game.[5] This is not an analytic claim, because it is at least logically possible that when we say, for example, "We shall suffer no Papist to live!" we mean that not as a mere battle cry but as our actual war objective. And if so, such a war would *not* be mixed motive, and so there would be no logical space for constraints on our behaviour. But no real war—including the so called "War on Terrorism"—is actually like that. We *talk* the talk of such uncompromise, but we would be fools to walk the *walk* of it. If bin Laden could credibly threaten the Americans with a weapon of *truly* mass destruction, the Israelis would be out of the West Bank within the hour.[6] Thus the rhetorical flourish, "We don't negotiate with terrorists!" though it makes for good press, is oxymoronic.

"We don't negotiate with terrorists!" is oxymoronic because if a terrorist is **someone who terrorizes a population with a view to persuading the government of that population to accede to his demands**, and if he *knows* that that government will not accede to his demands, then he is someone who undertakes an exercise, at considerable expense to himself, for a purpose he knows cannot be realized. But no rational person undertakes such an exercise. Thus to refuse to negotiate with a terrorist is, by definition, to render him no longer a terrorist. It is to render him at most a *vandal*, by which, presumably, is meant **someone who terrorizes a population as an end in and of itself**.

Much of the post 9-11 rhetoric makes precisely this charge, i.e. that there is nothing that bin Laden wants other than to destroy, and so there is nothing that can be offered him to dissuade him from *continuing* to destroy. Such rhetoric is innocuous enough, provided policy-makers do not buy their own rhetoric. But apart from the what's-the-go'ment-I'm-agin-it types, most of us know, in our heart of hearts, that policy-makers are not *really* that stupid!

One *could*, of course, adopt a policy of not negotiating with terrorists as a kind of *pre-commitment strategy*. But this just invites the terrorist to counter with a pre-commitment strategy of his own, namely to terrorize the target population *notwithstanding* its government has adopted a policy of not negotiating with terrorists. If the terrorist adopts *that* strategy—which is precisely what a savvy terrorist will do—the government will be well-advised to revise its pre-commitment strategy. Thus "We don't negotiate with terrorists!" is just double-speak for "*Of course* we negotiate with terrorists, but the terrorist in question has yet to convince us of a) the resources available to him, b) his resolve to employ those resources, and c) our inability to absorb the punishment attendant on those resources and that resolve."

But, it might be countered, though no rational person undertakes an exercise he knows to be futile, the terrorist remains a candidate for irrationality if either a) the *objective* of the exercise is itself irrational or b) the *means* of achieving that objective are disproportional. But this just returns us to our previous problem. It is certainly our right to *oppose* his ends and/or his means. But, as before, **it is not**

for us to judge whether those ends and/or means are proportional *for him*. *Of course* we do not think the way of life he wants to preserve is worth preserving. If we did we would be importing his way of life rather than exporting ours. *Of course* we do not think our loss of the World Trade Centre is a proportional means to getting our McDonalds and Patriot missiles out of Arabia. But that is because Arabia is not *our* country.

Still, presses the objector, as already noted, there are constraints on these means other than means-end efficiency, are there not? What about the Geneva and Hague conventions? What about international law? What about the whole Just War tradition, both *jus ad bellum* and *in bello*?

These what-abouts, quaint as they are, reveal an egregious misunderstanding of the nature of law. Let us clear up that misunderstanding.

III. WHAT IS A LAW?

Consider the following five pronouncements:

1) **Thou shalt p and**.
2) **Thou shalt p and not-p**.
3) **Thou shalt not exceed the posted speed limit by any speed greater than you are exceeding the posted speed limit**.
4) **Thou shalt not park in a handicapped zone**, but no provisions are made to enforce this prohibition. And
5) **Thou shalt not park in a handicapped zone unless you are handicapped**, but what it is to be handicapped is just to so self-identify.

None of these pronouncements could count as law. (1) is not law because it is incoherent. (2) is not law because ought-implies-can, and because one *cannot* simultaneously both p and not-p. (3) is not law because law must be coercive, and yet (3) is impossible *not* to follow. And (4) is not law because without enforcement it can only amount to entreaty.

Suppose that, unlike (4), (5) *is* coupled with provisions for enforcement. And, note, unlike (3), it *is* possible to run afoul of it. One could simply refuse to self-identity as handicapped and yet park in the handicapped zone nonetheless. But what (5) would amount to, at least *effectively*, is a requirement that all parkers self-identify as handicapped. This would be a law, albeit a silly one, since assuming its intent is accessibility for the handicapped, it can have no such effect. So, a law, to count as such, must be 1) coherent, 2) follow-able, 3) coercive, and 4) enforceable. And, if it is not to be just a *silly* law, it must show some promise of achieving what it hopes to achieve, a.k.a. it must be 5) efficacious.

But these are *necessary* conditions, not *sufficient* ones. What remains in dispute among philosophers of law is how, if at all, to understand each of two *further* conditions, namely 6) pedigree and 7) promulgation. Let us deal with pedigree first.

IV. PEDIGREE

1. Divine Command Theory:

Divine command theory—the view that a law is a law just in case it's authored by God—can be dismissed *ab initio* on what has come to be known as *Euthyphro* grounds. *Euthyphro* is the Platonic dialogue in which Socrates shows that for divine command to be of any normative import, the good must be ontologically prior to God. And so, since we have to consult our own moral judgments to identify which of God and Satan might be speaking, citing God as the author of law can do no work for us.

Worse yet, at least for our purposes, is that even if God's commandments *were* taken to be the authoritative with respect to *jus in bello*, *He*, recall, is neither a respecter of non-combatants—remember the first-born of Egypt?—nor even an *advocate* of such respect—recall His instructions for the ethnic cleansing of Canaan.

2. Legal Positivism:

Legal *positivism*, by contrast, hangs its account of pedigree on what H. L. A. Hart calls "rules of recognition." On this view, and baldly put, a law is a law just in case those subject to it give *uptake* to the procedures by which it became the law. If not, not. On Hart's view, then, the Nuremberg laws were laws alright, they were just *bad* laws. So bad, in fact, that one had no obligation to obey them. Perhaps, even, an obligation to *dis*obey them.[7]

3. Natural Law:

Natural law theorists, like Lon Fuller, by contrast, prefer to hold *on* to the intuition that if it is a law one ought to obey it. So to accommodate the further conviction that the Nuremberg laws ought not to have been obeyed, Fuller includes *moral acceptability* among the conditions of a command being a law in the first place. So on the positivist view a law is a law notwithstanding we need not, in the moral sense, obey it. On the natural law view if we need not obey it, it is not a law.

4. Rightful Authority:

If we parse this debate we quickly see that nothing substantive can hang in the balance. It is true that, according to Hart, if I defy the Nuremberg laws I am a criminal. But this is only an unwelcome consequence if, at the same time, we think criminality is something to be ashamed of, which, in the case of the defying the Nuremberg laws, it is not.

What *might* matter, however, is the notion of "right authority." If you rip me open with a knife, even *if* you repent and sew me back up afterwards, you have

committed an assault. Not so if you are a surgeon. Similarly, a jailer cannot be guilty of unlawful confinement. Likewise, then, not just *any* act of violence authored by *any*one can count as an act of war, and therefore fall under the *rules* of war. To make war, as distinct from committing a mere crime, one must have the *authority* to make war. And this, some might argue, is the sole prerogative of *sovereigns*. And it is for *this* reason that bin Laden is to be judged as a mere international *criminal* rather than a legitimate warrior.

But what counts as sovereign authority, and therefore authority to make war? It cannot be enough that

1) one be able to command the obedience of those subject to one's will.

For then there would be no way to distinguish taxation from highway robbery. Nor is it enough to add that

2) those subject to that will *regard* themselves as such.

For if (1) and (2) were sufficient, the conduct of *any* gang of thugs could count as subject to military rather than criminal judgment.[8] It must also be the case that

3) those with whom the gang in question are engaged *recognize* that conditions (1) and (2) are met.[9]

Of course by "recognition" here I do not intend an epistemic term but rather a *performative* one.[10]

The problem with insisting on (3), however, is that it rules out as oxymoronic the very idea of a war *for* recognition. *By definition* there could be no such thing as a war of independence. So, since the recognition component of the rightful authority requirement would seem to be ineliminably question-begging, some philosophers of war, myself included, would prefer to drop it altogether, leaving the distinction between war and criminality, if such a distinction be needed, hanging entirely on (1) and (2).

This has the virtue of making the attack on the World Trade Centre an act of war rather than of mere criminality. And of making Bobby Sands a *prisoner of war*.[11] But, *nota bene*, at considerable cost. For now we can no longer distinguish between a soldier and one of Tony Soprano's hit men. Nor can Timothy McVeigh be distinguished from Bobby Sands. Clearly *something* beyond (1) and (2) seems required. But what?

My own view is that this additional condition cannot but itself be military. That is, (3) should be replaced with

(4) it behoves those with whom the gang in question is engaged to process their strategic thinking about that gang in military rather than political categories.[12]

But nothing in the present analysis hangs on my being right about this.

V. PROMULGATION

What *does* have to be cashed out, however, is how we are to understand *promulgation*. The traditional view—running from Hobbes to Austin—would have it that law, to count as such, must be promulgated *explicitly*. Otherwise it amounts to arbitrary state action. Since the early 1950s, however, a more "liberal" view has emerged, inspired by Wittgenstein, motivated by the jurisprudential difficulties of the Nuremberg and Eichmann trials, and canonically articulated by Hart in his *Concept of Law*.[13]

The difficulty, recall, was that

1) no law, extant between 1934 and 1945, could be found that Eichmann could be said to have contravened, and
2) though retroactivity in tax law has long since been deemed indispensable for purely "policy reasons," retroactivity in *criminal* law is thought to be an egregious violation of both natural justice *and* policy requirements.

Hart's solution, to both (1) *and* (2), was to suppose the prior existence of an *implicit* law against genocide against which Eichmann offended.

The problem with *this* solution, of course, is that it courts rendering *positive* law epistemically indistinguishable from *natural* law. Natural laws are those which are supposed by their advocates to be either a) inscribed onto our hearts (legal intuitionism) or else b) rationally discoverable. And the problem with *postulating* natural law is that it quickly devolves into legal moralism. You just *know* that homosexuality is *contra natura*. I have rationally *derived* that the Sabbath is Saturday, not Friday or Sunday!

VI. LEGAL REALISM

We can avoid these dangers, however, by adopting an even more radically Wittgensteinian analysis, according to which law is a *report* on legal judgments rather than the, or even a, determinant of them.[14] That is, law is descriptive rather than normative. How so? Well, just as the rules of English grammar *describe* the way English-speakers speak rather than determine what is or is not an English utterance, so law, rather than governing the way the court can rule, merely *predicts* which way the courts will rule. Laws are normative, then, only insofar as prediction of consequence informs behaviour.

And why is this "radical"? Because in the wake of the O. J. Simpson trial, for example, one might reasonably predict that, in California at least, one will *not* be convicted of a crime if those investigating the crime are manifestly racist. Hence killing under such circumstances is *not*, in fact, illegal. And this is, if not counterintuitive, certainly an odd way of speaking. Odd but, on the view under examination, correct.

What is most important to note about this view, at least for our purposes, is that the law immunizing one from successful prosecution in such circumstances was in effect at the time of the killing but was only *promulgated at the moment of* O. J.'s

acquittal. And if that is so, then likewise can it be so that the law against genocide, though only *promulgated* at the moment of Eichmann's conviction, was already in effect at the time that genocide was committed. That Eichmann could not have *known* he was violating the law at the time he violated it is certainly a regrettable consequence of this view. But we *could* view this consequence as just a case of moral luck. O. J. Simpson lucked out. Adolf Eichmann did not.

VII. CHAMPIONING, PASSIVE RESISTANCE, AND TERRORISM

Now then, if this is right, or even approximately right, then we are finally in a position to look more specifically at the *jus in bello* "law"—so-called or not, we will have to see—concerning the targeting of non-combatants.

George Mavrodes argues that the laws of war—not unlike the rules of grammar—are neither natural nor posited. They are *reports* on the constraints constitutive of the *practice* of war. And as such they are to be updated as the practice evolves. How came we, then, to have thought there is a law against targeting innocents? As follows:

Mavrodes imagines an "original position" in which the immunity of non-combatants was *not* the convention. One day two brave souls—one from each of two sides poised to square off against each other—rushed forward, engaged in single combat, and your champion vanquished ours. Since the champion your champion vanquished was our best, we induced that, were the battle to continue, your side would best ours. And so rather than await this nigh-inevitable outcome, we raised our white flag and acceded to your demands.

In the wake of this we noticed that of the two practices—all against all and champion against champion—the latter was pareto-superior. That is, no one, including our vanquished champion, was any worse off, since he would have been killed anyhow, and at least someone—indeed most of us—were considerably better off. And so the practice took root and stuck. What began as an accident became an experiment, the experiment self-replicated, and eventually a purely descriptive claim—"We don't do that!"—came to be understood as a normative one—"That's just not done!"

Note, however, that the practice depends upon a key *meta*-understanding, that being that if your champions best ours we will accede to your demands. That is, you go to war against our champions, and *only* our champions, on the supposition, and *only* on the supposition, that **if you best our champions we will bend our will to yours**. *Absent* that understanding the practice forfeits its pareto-superiority. What we call passive *resistence*, then, is simply **the withdrawal of that understanding**. And we call it *passive* resistence because, absent that understanding, nothing is settled by your besting our champions, and so it ceases to make sense for us to even *have* any champions.

The most useful understanding of terrorism, in turn, then, is as **the withdrawal of the understanding that we are party to the practice of championing**, and

therefore of civilian immunity. And one engages in terrorism rationally, and therefore defensibly, when championing is not, or no longer, pareto-superior.

Neither pareto-superiority—nor, for that matter, pareto-optimality—is a *knock-down* reason to adopt the pareto-superior or pareto-optimal strategy or practice. We have already seen this earlier when we considered the rationality of pre-committing to pareto-inferior strategies or practices. But pre-commitment complications aside, there is powerful, nigh-irresistible, natural negative selective pressure against sub-paretian practices. In the war between Palestinians and Israelis, confining oneself to championing is *grossly* sub-optical for the Palestinians. Palestinian stone-throwers are no match for Israeli tanks. Targeting instead the Israeli civilian population is no *more* dangerous than stone-throwing. One dies either way. But the rest of the Palestinian population is considerably better off, since the outcome of any negotiations between the two sides is, ex hypothesi, a function of body count.[15]

Championing, passive resistence, and terrorism are what we might call *pure* strategies. But most conflicts—including the ongoing one in the Middle East—are conducted with recourse to a *mixture* of these strategies. No one wants to practice passive resistence. Nor is any terrorist unmindful that recourse to terrorism invites retaliation in kind. But the fewer the *conventional* military resources available to them, the more a people must rely on passive resistence and/or terrorism. The Palestinians rely on both. Likewise does bin Laden.

VIII. DOUBLE EFFECT[16]

But in noting that terrorists are well aware that their terrorism invites retaliation in kind, I have in mind the Israelis and Americans no less than the Palestinians and bin Laden. As I noted at the outset, the Israelis and Americans have been practising terrorism in the Middle East for over half a century. The hoi polloi and propagandists will pretend there is a morally relevant distinction between collateral damage and the intentional targeting of civilians. But no military strategist buys into this fatuous distinction. The Principle of Double Effect may be of Jesuitical use when justifying a therapeutic abortion, but it is utterly disingenuous when applied to military contexts. If champions and civilians cannot be separated physically without egregious prejudice to the former, an attack on our champions just *is* an attack on our civilians. It is, and it is *intended* as such, as revealed by the standard test for the intentional content of an act. That test is this: **In virtue of what is Israeli shelling of Palestinian residences self-replicating?** In virtue of the champions such shelling bests? Or in virtue of the terror it strikes? Clearly the latter. So Double Effect will *not* sustain a distinction between Israeli and Palestinian tactics.

IX. SUMMARY

Let us sum up. The term "terrorism," as it is currently employed—both by propagandists and, as a result, by the hoi polloi—is a plastic term, little more than a stand-in for "Them!" But if the term is to do *argumentative*, as distinct from

rhetorical, work for us, we are going to have to stipulate. Furthermore, if we want our disapproval of terrorism to be substantive rather than merely analytic, we need a morally *neutral* understanding of the term. Otherwise "Terrorism is wrong!" would be about as interesting as "Murder is wrong!" *Of course* murder is wrong, since it just *means* wrongful killing.

I have proposed that we understand terrorism as the failure to subscribe to the practice of championing or, more commonly, the *cancelling* of that subscription. Terrorism is wrong—or, if you prefer, unlawful—if but only if one's a subscriber to the practice of championing. It would be unconscionable for a people with a vastly inferior conventional military capacity to subscribe to that practice. So for them, at least, terrorism is not only morally acceptable, it may well be morally mandatory. It is certainly morally mandatory for those Palestinians who have been suffering under the yoke of Israeli occupation for over fifty years. And it is at least morally permissible for those, like the clients of bin Laden, bridling under satellite yokes.

And, last but not least, the much-touted immunity of non-combatants cannot be grounded in divine command, God having commanded nothing of the sort. Neither can it be grounded in natural law, there being no such thing. It must, therefore, be grounded, if grounded at all, in *positive* law. Positive law, in turn, requires both pedigree and promulgation. A law enacted by states cannot have pedigree for those who do not consider themselves subject to that state. Indeed who may be flighting to *free* themselves from that state. Thus enactment is a question-begging mechanism for the coming into being of law. A law that comes into being by convention, by contrast, needs neither explicit articulation nor external enforcement. Thus the law immunizing non-combatants, if it exists, exists whether or *not* it is explicitly articulated. Hence the Eichmann trial, though perhaps unjust on independent grounds, was not *ultra vires* on grounds of non-promulgation.

What remains, then, is whether there is a law immunizing non-combatants where the complainant and respondent stand in vastly asymmetrical positions vis a vis the rationality of subscribing to the practice of championing. And the answer is clearly no. So though it is quite understandable—perhaps even psychological *requisite*—for both the Israelis and the Americans to whip themselves into high moral dudgeon over the terrorism directed against them, that moral outrage is utterly unwarranted. They had it, quite literally, coming!

ENDNOTES

1. Some would argue that the occupation began in 1967 rather than 1948, on the grounds that Palestinians caught behind the cease-fire line in 1948 were given Israeli citizenship, and so cannot count as occupied. No doubt defenders of segregation in the South, Apartheid in South Africa, and the Reservation System in North America would like this line of reasoning. After all, nothing in the *concept* of citizenship necessitates equality of rights!

2. Not unlike the First Nations people of North America who have been litigating to no avail for threefold fifty years!

3. Or does it? I will be returning to this question in the final section of this paper.

4. By *jus ad bellum* is meant the conditions under which one might justly go *to* war. By *jus in bello* is meant the constraints on how war may be prosecuted.

5. According to game theory, human interactivities—a.k.a. games—come in three varieties: games of pure conflict, like a race, pure coordination games, like "Shall we drive on the right or the left?," and *mixed*-motive games, like Prisoners' Dilemma and Chicken. Popular misconception to the contrary notwithstanding, war is a mixed-motive game, because much as I would like to remove you from that hillside, not if all I am going to be able to do with it is plant my grave there.

6. "Weapons of mass destruction" is one of those plastic media terms that it does not pay to cash out too carefully. If one did she would quickly realize that more people die daily from the common cold than would ever die in an Anthrax attack.

7. Hart takes pains to point out that "recognition" or "uptake" is a much weaker condition than consent, or even *implied* consent. An occupied people do not *consent* to be governed by the occupier, but they *recognize* their occupation as such and that they are subject to the occupier's jurisdiction. Likewise, then, with the *internal* dissident.

8. This, recall, was precisely the issue between the IRA and the English during the Troubles.

9. This is why, diplomatic recognition being itself diplomatically recognized as a *transitive* relation, the French recognition of Biafra in 1974 rendered the Biafran War a war properly-so-called rather than a mere civil one.

10. Performatives are utterances of the form, "I hereby . . . "

11. Bobby Sands was the IRA internee who, during the Troubles, led a hunger strike against his British jailers for the right to be treated as a POW rather than a criminal. His post-mortem success became legendary.

12. This argument for the view that of all political categories are reducible to military ones is cashed out in my "Theory of War," manuscript.

13. Adolf Eichmann was the officer in charge of the transportation of Jews from their countries of origin to the extermination camps. He escaped to Argentina after the war, was kidnaped by Mossad in 1960, and brought to Israel, where he stood trial, was convicted, and executed. The Nuremberg Trials were the war crimes trials of Nazi officials conducted immediately after the war by the occupying powers.

14. This view approximates what has come to be called legal realism.

15. I use "body count" here metonymously for an (albeit only slightly) more complex function, which is articulated in my "Theory of War," manuscript.

16. According to the Principle of Double Effect, I am not morally accountable for such consequences of my actions which are anticipated but not intended, provided the consequence is indeed a consequence rather than a means, and provided the direness of the consequence is not disproportional. Though the product of Catholic moral theology, the Principle of Double Effect is one without which no moral system could be viable. Still, the issue is always how we determine that the consequence truly was unintended. As we are about to see, the test for the intention of an action in military contexts is not the psychological state of the soldier but the replicability of the practice in which he is engaged.