

Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2011

Risk Taking and Force Protection

David Luban
Georgetown University Law Center, luband@law.georgetown.edu

Georgetown Public Law and Legal Theory Research Paper No. 11-72

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/654
http://ssrn.com/abstract=1855263

David Luban, Risk Taking and Force Protection, in READING WALZER (Itzhak Benbaji & Naomi Sussman eds., London: Routledge forthcoming)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

 Part of the Criminal Law Commons, Defense and Security Studies Commons, International Law Commons, International Relations Commons, Military and Veterans Studies Commons, and the Military, War, and Peace Commons

5/29/2011 11:09 AM

RISK TAKING AND FORCE PROTECTION

David Luban
Georgetown University Law Center

to appear in *Reading Walzer* (edited by Itzhak Benbaji and Naomi Sussman)

A central argument in *Just and Unjust Wars* is Michael Walzer's reconstruction of the Doctrine of Double Effect (DDE) and its implications for the risks that just warriors must take to minimize harm to civilians. In 2009, Walzer and co-author Avishai Margalit revisited the topic in an exchange with Asa Kasher and Amos Yadlin.[1] In this paper I shall defend a version of Walzer's conclusion on grounds somewhat different than his own.

The DDE concerns foreseen but unintended effects of intentional action and, in its most general form, it partially or wholly exonerates agents from blame for the unintended bad effects of permissible intended actions, even if the agent foresees the unintended bad consequences. In military affairs, it takes the form of exonerating soldiers for the unintended bad consequences—chiefly, damage to civilians and civilian objects[2]—of otherwise-permitted violence. Soldiers cannot target civilians, but they can target military objectives even when they know that civilians will inevitably suffer harm, provided that the civilian harm isn't disproportionate to the military advantage. Under the right

---

[1] Avishai Margalit and Michael Walzer, "Israel: Civilians and Combatants," *New York Review of Books*, May 14, 2009; Asa Kasher and Major General Amos Yadlin, with a reply by Margalit and Walzer, " 'Israel & the Rules of War: An Exchange," *New York Review of Books*, June 11, 2009. I presented this paper at the conference on The Enduring Legacy of *Just and Unjust Wars* at NYU's Tikvah Center, the Wharton School, the Tel Aviv University political science department, and the University of Michigan international law workshop. I am grateful to the participants for their helpful comments.

[2] But also the natural environment, objects of cultural and historical value, and objects like dams that might cause danger.

conditions the DDE exonerates soldiers (morally and legally) for unintended civilian harm, even when the soldiers see it coming.

Walzer argues that merely *not intending* civilian harm isn't good enough: soldiers must *intend not* to harm civilians. The former seemingly allows soldiers to purchase blamelessness on the cheap, simply by narrowing their intentions. Knowing that an attack will hit both military and civilian objects, the soldier must take care to intend only to hit the military target, not the civilians. That seems like an absurd and dishonest mental game. How do you avoid war crimes? Close your eyes, take a deep breath, concentrate hard, and refocus your intentions. Then go ahead and do what you were about to do anyway. Intending not to harm civilians, as Walzer explains it, requires action and not thought alone. Soldiers must take precautions, including risky precautions if necessary, to safeguard civilians.

He illustrates with a World War I case where a soldier (Frank Richards) was tasked with opening cellar doors in France and throwing hand grenades into the cellars in case German soldiers were there. Richards worried that civilians might be hiding in the cellars, and decided to call out a warning before he threw in the grenades, so that civilians could evacuate. Otherwise, Richards thought, he might be committing "innocent murder." Of course, if there were German soldiers hidden in the cellar, they could come out shooting when they heard the warning—so Richards was taking on extra personal risk to spare civilians.[3] In Walzer's view Frank Richards "was surely doing the right thing when he shouted his warning. He was acting as a moral man ought to act; his is not an example

[3] Michael Walzer, Just and Unjust Wars, p. 152.

of fighting heroically, above and beyond the call of duty, but simply of fighting well. It is what we expect of soldiers."[4]

The issue of "innocent murder" is a fundamental one, particularly in asymmetrical conflicts, where one side possesses technologies that permit it to destroy the other with almost no risk to its own forces, but at the cost of extra civilian casualties among the enemy's population. For brevity's sake, I will call civilians from the adversary's group "enemy civilians." This emphatically does *not* mean they are enemy fighters. If they are, they become legitimate targets. In the functional sense relevant to my topic, civilians who take up arms are not really civilians. Genuine enemy civilians, by contrast, may not even be enemies: for all we know they are opponents or victims of their own government whose sympathies lie with the invaders. Some are too young for meaningful enmities; some are infants. All I mean by the shorthand term "enemy civilians" is that they are civilians who belong to "them" rather than "us."

In 2005, Kasher and Yadlin published an article in which they asserted a difference between civilians who are a state's own nationals or under the "effective control" of the state, and civilians who are not.[5] Kasher and Yadlin argue that soldiers must take risks to spare the former, but not the latter. In their formulation, minimizing injury to the former is a higher moral priority to a military than minimizing casualties to its own troops; but minimizing casualties to its own troops—*force protection* for short—is a higher priority than minimizing casualties to enemy civilians not under the military's

---

[4] Ibid. p. 154.

[5] Asa Kasher and Amos Yadlin, "Assassination and Preventive Killing," *SAIS Review* 25 (Winter-Spring 2005): 49-51. The article is a shortened form of a longer article; I use it because it is the version Margalit and Walzer criticize.

effective control.[6] To think otherwise, Kasher and Yadlin claim, is "immoral," because a "combatant is a citizen in uniform. In Israel, quite often, he is a conscript…." The state has an obligation to protect its own citizens and those in occupied territories; it has no such responsibilities to other civilians.[7] And its soldiers *are* its citizens.

Margalit and Walzer respond that the nationality of civilians is irrelevant; the sole relevant distinction is that between combatants and non-combatants. They argue their case through a series of hypotheticals. Suppose Hezbollah fighters succeed in capturing a kibbutz filled with Israeli citizens, and the Israeli Defense Forces (IDF) must recapture it. Troops must take precautions to minimize civilian casualties, and that might mean assuming personal risks; that is what we expect of soldiers. But what if the hostages are not Israelis but pro-Israel U.S. Jews who have come to the kibbutz to support Israel? Under Kasher and Yadlin's formula, IDF troops would *not* need to take the extra risks, but that seems like an intuitively wrong result, premising the difference on nothing but an accident of nationality.[8] Intuitively, the IDF should take the same risks in both cases. If that conclusion is right, consider a hypothetical in which the U.S. Jews are not sympathizers but protestors against Israeli policies. The sole difference between this and the previous hypothetical is the ideological beliefs of the U.S. non-combatants; and, presumably, these must not matter to the military. So the third case must be treated on a par with the first and second.

---

[6] Ibid., p. 49. The qualification about effective control is Kasher and Yadlin's acknowledgment that an occupying army owes protective obligations to enemy civilians in occupied territory; "effective control" is the legal test of occupation under Article 42 of the 1907 Hague Convention Annex.

[7] Ibid., pp. 50-51.

[8] Kasher and Yadlin reject the hypotheticals because the kibbutz is under effective Israeli control, being within the territory of Israel; Margalit and Walzer respond that if it was under effective Israeli control the IDF would not have to fight its way in. I take it that Margalit and Walzer have the better of this round of the exchange.

Finally, suppose that the kibbutzniks successfully evacuated shortly before the Hezbollah attack, and that Hezbollah had moved in civilian villagers from South Lebanon, to use as human shields. Here, the only difference from the preceding hypothetical is that the civilians are Lebanese nationals rather than unsympathetic U.S. nationals. Surely, that fact cannot matter to the moral obligations of the soldiers—both are foreign nationals sharing (let's suppose) similar ideological views. Margalit and Walzer conclude that the IDF troops must take the same risks (whatever those may be) in all four cases. If so, Kasher and Yadlin's distinction between "our" civilians and "theirs" cannot survive.

There were additional rounds to the debate, as Kasher, Yadlin, and others went back and forth with Margalit and Walzer in subsequent issues of the *New York Review of Books* (where the English version of Margalit and Walzer's article was first published). I will bring in some of the additional arguments later in this paper, but for the moment let this suffice to set the stage.

Why the problem matters

The possibility of low-risk or risk-free warfare leapt into prominence on August 6, 1945, when the *Enola Gay* dropped the atomic bomb on Hiroshima. But the same possibility exists with conventional weapons. In the first Persian Gulf war, Iraqi fire killed only 200 coalition fighters, as compared with Iraqi losses in the tens of thousands. In the Kosovo war, NATO suffered no combat deaths, while its air strikes killed at least a few hundred Yugoslav army troops and more than a thousand—perhaps several thousand—civilians. In Operation Cast Lead, the Israeli Defense Force suffered ten

deaths (some by friendly fire) while killing hundreds of Hamas fighters and more than a thousand Gazan civilians.

Kosovo was the first conflict where the dilemma between risks to the military and risks to civilians became a prominent public issue. NATO aircraft bombed from a high altitude, to avoid the risk of anti-aircraft fire. Reportedly, the result was less precision and higher civilian casualties than low-altitude bombing.

The deadly trade-off between military and civilian risk becomes even more pronounced in so-called fourth generation warfare between regular forces with superior technology and non-state adversaries who live, work, and fight in the midst of civilians. Here, state forces face a terrible decision that appears at every level of combat, from overall strategy to individual soldiers' decisions on a house by house basis.[9] Facing fire from a house in an urban neighborhood, state forces can obliterate the house from a safe distance through artillery or air strikes, or they can send their own soldiers into the house with rules of engagement (ROEs) that strictly forbid wholesale or remote fire that endangers civilians.

If ever there was an appropriate use of the overworked phrase "existential dilemma," this is it. Should soldiers expose themselves to greater risk—or should their headquarters writing ROEs require them to do so—in order to diminish civilian casualties?[10] Does the morality of warfare demand it of them? To what degree?

---

[9] Of course the state's adversaries face terrible decisions as well about how much they will risk their own communities in order to wage their struggle. I won't discuss their moral issues in this paper, but that is not meant to signify that I think them less important than the state's issues.

[10] This is an important difference. Intuitively, it may seem like too much to ask of the individual soldier to make the decision in the stress of combat. It makes more sense to focus on the author of ROEs as the decision-maker—not because it would be emotionally easier or morally less weighty to impose danger on his or her own troops, but because the officer in headquarters is in a calmer environment for reflection. Furthermore, the soldier himself or herself has what philosophers call "first-personal reasons" for self-preference—as does everyone, of course. Without in any way suggesting that I am more important "in

The laws of war provide no direct answer to these questions—they never explicitly address the question of how much risk soldiers must assume to minimize "collateral" civilian casualties.[11] International humanitarian law requires soldiers to do everything feasible to avoid unintended civilian casualties, but it never defines "feasible." It represents the question of how much risk soldiers must take to spare civilians in less direct terms, namely what weight force protection carries as a "concrete and direct military advantage" of an operation. The more weight force protection carries, the more unintended civilian casualties will be permissible under a proportionality test. Force protection cannot have absolute weight, however, and soldiers cannot do anything it takes to minimize risks to themselves; if force protection had absolute weight, what would be the point of a proportionality requirement? In Gary Solis's words, "an attacker with superior arms would be free to annihilate all opposition with overwhelming firepower and call any civilian casualties collateral."[12] It follows that soldiers cannot offload all the risks of warfare onto civilians. The law does not quantify how much risk soldiers can transfer to civilians. Because the legal details are not my principal concern, I place them in an appendix to the paper.

God's eyes" than you, I can prefer my life to yours, and vice-versa. Placing the decision in the hands of a third party takes the structurally built-in first personal reason out of the equation.

[11] I mean the usual by "collateral" casualties: casualties of attacks other than the intended target of those attacks. For the record, I dislike the euphemism "collateral damage," which seems like a linguistic obfuscation designed to make something tragic and terrible sound antiseptic, technical, and minor. But the lawyers' term "incidental" damage, used in the proportionality formula of Article 51(5)(b) of AP I, is even worse. The best usage, on grounds of precision as well as straight talk, would be "unintended" rather than "collateral" or "incidental."

For important discussions of the law concerning risk-taking to minimize civilian casualties, see Eyal Benvenisti, "Human Dignity in Combat: The Duty to Spare Civilians," *Israel Law Review* 39 (2006): 81-109, and Benvenisti, "The Law on Asymmetric Warfare," in Mahnoush Arsanjani et al., eds., *Looking to the Future: Essays on International Law in Honor of W. Michael Riesman* (Martinus Nijhoff, 20100, PP. 931-950.

[12] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010), p. 285.

A more straightforward legal question is whether the minimum necessary precautions soldiers take to spare civilians, including risks they assume, are different when the civilians are their own or their enemy's. Here, the answer is indisputably no: nothing in the laws of war distinguishes non-combatant civilians into different classes based on nationality, and to give the same legal words different meanings based on a nationality distinction the law does not recognize is dishonest interpretation.

I shall argue that these law of war answers are the right answers, and thus that Walzer's requirement that if necessary soldiers take risks to minimize civilian casualties—either sides' civilian casualties—is right.

The Basic Scenario

To fix ideas, let's assume a situation of urban warfare in which soldiers or their commanders are invading a city where enemy irregulars are scattered throughout civilian neighborhoods. The invaders are choosing between two tactics, which I will name Close Engagement and Distant Engagement. As the names suggest, Close Engagement requires soldiers to engage the enemy at relatively close quarters, perhaps going house to house, with ROEs requiring them to hold fire when innocent civilians are present, except in unmistakable cases of self-defense. Distant Engagement allows them to attack the enemy from a distance, through artillery, aircraft, drones or the like. Let's suppose what is almost certainly the case: that Distant Engagement is less discriminating than Close Engagement.[13] If the invaders choose Distant Engagement, entire buildings will be obliterated, and if innocent civilians are in or around them, they will be hurt even though that's not the intention. Call the situation I've just described the "Basic Scenario."

[13] Distant Engagement could theoretically be more discriminating than Close Engagement if the soldiers possess drones with science-fiction capabilities. But let's say no science fiction.

Obviously there are other scenarios that raise parallel questions, for example the Kosovo issue of whether bomber pilots should fly low (Close Engagement) or high (Distant Engagement).

Pause for a moment. In our Basic Scenario, soldiers or their officers confront a choice between two tactics. Of course those are never the only choices—the army could also withdraw, or stand pat. Perhaps a unit taking fire from a civilian building can detour around the building rather than engaging the enemy. We should not forget these options, because pretending that Close Engagement and Distant Engagement are the only possibilities imports a conception of military necessity that may be artificial.

If it fights, though, the army must do so either at close quarters or at a distance, and we are supposing that both are operationally feasible. How are we to describe this choice? Words matter. We can describe choosing Distant Engagement as soldiers offloading risk onto innocent civilians, as I have. But offloading risk onto innocent civilians sounds dishonorable and cowardly. Or we can describe choosing Close Engagement as soldiers braving extra risk to spare innocent civilians—as I also have. That sounds like exceptional courage. Both descriptions carry semantic freight that begs the moral question one way or the other. One makes the soldiers sound like cowards, the other like heroes. They are either above or below the line of duty. And yet these are the only choices. What's going on?

The problem is simply that we don't know which choice represents the baseline. Knowing that would solve the initial problem. If taking chances to protect the innocent represents our baseline expectation of soldiers, Distant Engagement discreditably offloads soldier risk onto the innocent. But if the baseline expectation is force protection,

Close Engagement goes above and beyond the line of duty. It seems as though we cannot even describe the problem without a solution.

Once we notice this difficulty, we can at least guard ourselves against the trap that language lays. Our discussion should not assume that either tactic represents the baseline. I will continue to talk about soldiers transferring risks to civilians or assuming risks to spare civilians, but without meaning to suggest that the former is automatically dishonorable or the latter automatically heroic. I would ask the reader to refrain from reading value-judgments into these descriptions that I explicitly want to bracket while we examine the problem of risk transfer and force protection.

For the record, two questions are on the table:

1. Must soldiers take on avoidable personal risks in order to minimize civilian casualties? In the Basic Scenario, this means choosing Close Engagement over Distant Engagement (other things being equal).
2. May soldiers take fewer risks to minimize enemy civilian casualties than morality requires for "friendly" civilians? That is the question debated by Kasher/Yadlin and Margalit/Walzer.

To keep the questions distinct, it will be useful to think about question 1 in cases where the civilians are "friendlies"—so the question becomes whether soldiers must take on avoidable personal risks to minimize casualties to *their own* civilians. Suppose that morality requires soldiers to take a certain level of risk to spare their own civilians who, for whatever reason, are caught in the battle space. Call this the *minimally acceptable care soldiers owe to their own civilians*. Question 2 can then be rephrased as whether

they must take that same minimally acceptable care to spare enemy civilians in the battle space.

Of course, soldiers or their commanders might choose to take even more care, at even greater risk to themselves, than the minimally acceptable standard of care they owe their own civilians. And they might do so only when the endangered civilians are their own. In one sense, that creates a double standard: supererogatory, heroic risk-taking to spare their own civilians, and only minimally acceptable risk-taking to spare the enemy's. Superficially, that looks like Kasher and Yadlin's answer to question 2, rather than Margalit and Walzer's: it acknowledges that it may be acceptable for soldiers to take more risks to spare friendly civilians than enemy civilians. But that is a mistake. Question 2 is not about how much risk soldiers are *permitted* to take over and above the moral minimum—it is about the minimum itself, that is, how much risk they are *required* to take. It asks whether the minimally acceptable standard depends on who the civilians are. I believe this is Margalit and Walzer's question as well, and it is that question that they, and I, answer no.[14]

This point is crucial. The most powerful objection to Margalit and Walzer's view is not philosophical at all. It is the gut-level sense that they must be wrong. *Of course* our soldiers can take greater risks for our own people than for the enemy's. Anyone who thinks otherwise is living in a fantasy world where loyalties no longer matter.[15] But to

---

[14] I am grateful to Tami Meisels for clarifying this crucial point for me. As she put it in an email, "of course in practice we will treat our own people with extra care (be more prepared to sacrifice, etc.), just as long as we treat civilians on the other side in a way that would be minimally acceptable even if they were our own."

[15] Azar Gat and Marty Lederman have pressed this point. A graphic illustration is a conversation I had with a stranger I happened to meet, who after finding out what I do for a living asked me what I was writing about. I answered: whether soldiers have to take the same risks for enemy civilians as their own civilians. His immediate response, *before I said anything else*: "I see what you're saying, but I don't agree." Apparently, he thought it was preposterous even to ask the question.

repeat: taking heroic risks out of loyalty to your own people is not the issue. Rightly put, question 2 asks whether the minimally acceptable standard of care for enemy civilians is the same as the standard for our own civilians. It does not ask whether soldiers can selectively take greater risk than the minimally acceptable standard. This is not a merely verbal distinction. Recall that Kasher and Yadlin rank-order military priorities so that soldiers must place higher value on their own civilians than on themselves, but higher value on themselves than on enemy civilians. If the minimal standard of acceptable care soldiers owe enemy civilians is the same as for their own civilians, this rank-ordering is no longer possible.

In what follows, I address both these questions. The arguments elaborate on the following main ideas:

In response to the first question, I emphasize two chief points. First is the equal worth of military and civilian lives, which implies what might be called "risk egalitarianism": that even if morality often permits people to transfer risk from themselves to others, transferring large risks to others in order to spare oneself from smaller risks is morally wrong, because indirectly it treats oneself as more valuable than the other. Second, I explore the possibility that soldiers belong to a profession in which honor may require them to take risks for civilians. This is particularly true when the risks to civilians come from the soldiers' own violence. Kasher and Yadlin themselves think honorable soldiers must place the safety of their civilians above their own safety.

In response to the second question—whether the minimally acceptable standard is different for friendly civilians and enemy civilians—I consider whether soldiers' special obligation to protect their own people (not other people) creates a higher minimum

standard of care for their own people (and not other people). I answer no, because the special obligation is to protect their people from enemy violence, while the dilemma in the Basic Scenario is whether to protect civilians from the soldiers' own violence. The responsibility to protect the innocent from violence of one's own making is a universal, not a special, obligation. Thus, in both questions 1 and 2, the fact that soldiers themselves create the violence that endangers civilians plays a crucial role in my answers.

In the concluding sections, I address two crucial loose ends. First is the question of whether soldiers might in fact be more valuable than civilians (including their own civilians) because they are not only human beings, but also "military assets." I answer no, because this way of thinking involves illegitimate double counting of the soldier's value, coupled with a refusal to double count the value of anyone else. Second is the related question of whether minimizing military casualties might turn out to be a military necessity because the civilian population is deeply casualty-averse, and the war effort requires their political support. Again I answer no.

Who is entitled to talk about the issue?

Before saying anything further, I must confront the threshold question of whether I am entitled to say it. I am a civilian. I never served in the military, never witnessed combat, and in fact never came within a thousand miles of combat. Writing about warfare is always a perilous matter for civilians, and this issue is especially perilous. What could possibly give anyone sitting home in safety the right to opine on how much risk "morality" requires soldiers to assume? How can anyone who has never witnessed combat presume to write about it or even to think about it?

Philosophers might invoke the term "epistemic privilege," a concept that refers to who has the authority to enter knowledge claims and who does not. It might be argued that a civilian lacks that authority, that only a fighter has the epistemic privilege to say anything about the risks of fighting.

In a famous and angry essay titled "Thank God for the Atom Bomb," Paul Fussell writes sarcastically about "the intellectual difficulties involved in imposing *ex post facto* a rational and even a genteel ethics on this event."[16] Nobody ignorant of "the unspeakable savagery of the Pacific war"[17] has the epistemic privilege of debating whether ending it with the bomb was worth it. Here is how Fussell—an infantryman in the Pacific war—dismisses J. Glenn Gray's respected book *The Warriors*:

> During the war in Europe Gray was an interrogator in the Army Counterintelligence Corps, and in that capacity he experienced the war at Division level. There's no denying that Gray's outlook on everything was admirably noble, elevated, and responsible. After the war he became a much-admired professor of philosophy at Colorado College and an esteemed editor of Heidegger. But *The Warriors*, his meditation on the moral and psychological dimensions of modern soldiering, gives every sign of error occasioned by remoteness from experience. Division headquarters is miles—*miles*—behind the line where soldiers experience terror and madness and relieve those pressures by crazy brutality and sadism.

---

[16] Paul Fussell, "Thank God for the Atom Bomb," in *Thank God for the Atom Bomb and Other Essays* (New York: Summit Books, 1988); available at http://crossroads.alexanderpiela.com/files/Fussell_Thank_God_AB.pdf, p. 21.
[17] Ibid., p. 25.

> Indeed, unless they actually encountered the enemy during the war, most "soldiers" have very little idea what "combat" was like.[18]

So even a military man lacks the epistemic privilege to philosophize about combat unless he has seen it at its worst. Gray, on Fussell's view, was little better than the scorned "chateau generals" of World War I, signing orders that sent millions to their deaths without ever changing out of their slippers.

There is much to Fussell's outrage, and I agree wholeheartedly about the need for respectful humility on the part of myself or any other civilian who writes about war. But I don't accept the conclusion that non-warriors are barred from discussing the moral dilemmas of warfare. That is for several reasons, some specific to the topic of risk and others more general.

1. The question before us is whether soldiers should assume risks they could avoid in order to minimize civilian casualties. Clearly that is not a matter of interest to soldiers alone. If they choose to take less risk, more civilians will lose their homes, their possessions, their loved ones, and their lives and limbs. Those civilians would be equally justified (or not) in protesting that nobody who isn't a civilian caught in a battle space has the right to opine on the subject. That might exclude the soldiers, who from the civilian point of view are saving themselves in an event of their own making, at the expense of innocents.

2. The claim of epistemic privilege to discuss soldiers' duty rightfully applies only to experience-based moral claims. If, for example, the question before us is "what would it be reasonable to expect a soldier to do in a firefight?" civilians must listen

---

[18] Ibid., pp. 29-30.

respectfully, even deferentially, to those who have experienced the circumstances. How else would a civilian know what is reasonable in a firefight?

But arguments based on the rights of civilians don't depend solely on the experience of those who jeopardize those rights. There is a delicate dialectical balance: we determine the rights of civilians in part by examining whether the correlative duties on soldiers are too much to ask; but we determine whether those duties are too much to ask—in other words, whether soldiers have a right not to have such asserted duties imposed on them—in part by examining whether relieving them of those duties would excessively imperil the rights of innocent civilians.

3. Most basically, the claim of epistemic privilege wrongly supposes that we lack the essential capacity to imagine another human being's situation. That capacity is the basis of morality, and the consequence of accepting the claim of epistemic privilege would be the abolition of moral judgment.

Now Fussell's point of view accepts that consequence, and his response seems to be that talking about combat in moral terms is, at bottom, absurd. In fact, no-one who hasn't done it can imagine going on three hours of sleep a night for weeks, carrying a 90 pound pack on your back, with your system in high alert, surrounded by near misses and the smell of dead bodies. These are circumstances so extreme that "the moral point of view" is, quite literally, words without meaning.

If that were true, however, no society would be entitled to go to war. Soldiers are *our* soldiers, and when they transgress they do so in our name. We must independently take stock of what morality allows them to do because that determines what we are entitled to ask them to do. If morality cannot constrain our soldiers, it must constrain our

entitlement to send them into combat. Otherwise nobody—not the soldiers and not the civilians—could be held accountable for whatever "crazy brutality and sadism" takes place in wartime. The soldiers would be unaccountable because warfare is a morality-free pastime, and the civilians would be unaccountable because they haven't asked the soldiers to do anything morality forbids. We would not even be entitled to call what the soldiers did brutality and sadism, for those are moral evaluations.

The fact is that both soldiers and civilians largely accept that they can be held to account, morally and legally, for what they do. We have a moral vocabulary of excuses—duress, heat of passion, mistake, mental incapacity—to acknowledge circumstances like those Fussell describes and mitigate harsh judgment. But importantly, we—soldiers as well as civilians—understand that none of these are blanket excuses that apply everywhere that soldiers fight.

A first cut at the first question

Of course it is important to know how soldiers think about our two questions in the Basic Scenario of Close Engagement versus Distant Engagement. During Israel's 2008 Gaza campaign (Operation Cast Lead), the *New York Times* reported that some Israeli units were "going in heavy" in response to hostile fire—meaning, in effect, choosing Distant Engagement by calling in air strikes in response to mortar fire. Without assuming that the reports were true—this is a matter of controversy—I asked some military ethicists at the U.S. Military Academy at West Point what they thought of "going in heavy" for the sake of force protection. I got the following responses, all from U.S. Army majors who fought in Iraq:[19]

[19] All these responses came via e-mail, Feb. 9, 2009. When I sent the inquiries, I told the officers that I would not mention their names, and I will respect that although I doubt that any of them would mind.

1. “I am inclined to think that all soldiers (but especially volunteers) must be prepared to shoulder an increased risk to their own force protection when the situation is similar to what is happening in this fight. I am not comfortable with continually sending our fighting men and women into harm’s way without giving them the liberty to complete their mission. However, I am also leery of a policy that dictates ‘going in heavy’ and the associated tactics that are being reported knowing that there will be an increase in civilian harm.”

2. “I think we are misguided in making force protection such a high priority. I feel it violates (or simply ignores?) the very essence of soldiering. The moral basis for soldiering is the protection of the innocent. ... While our legal contract is specifically with the American people, our moral justification for harming is in order to protect innocents from being harmed…. I am not willing to privilege military lives above civilian lives…. I am not sure that the soldier needs to treat his own life as any less valuable than that of a civilian, but I insist that he must not treat his own life as more valuable.”

3. “I believe that force protection counts in JIB proportionality calculations provided that the force being protected is fighting for a just cause…. But I’m in agreement with [the previous respondent] that the lives of the IDF soldiers should not be weighted any more heavily than those of the civilians. If this is right, then it seems very unlikely that ‘going in heavy’ would ever be proportionate.”

One response, from a U.S. Army colonel, was more hesitant, but only because of the separate issue that Hamas or Gazan civilians may have been responsible for the proximity of fighters and civilians:

4. “Soldiers take on that risk when they put on the uniform and join the military. But I don’t think anyone has worked out what to do when civilians do take on certain risks by assisting the enemy, or what to do when soldiers and civilians are indistinguishable and the enemy exploits that fact.”

Obviously, this is a small and unrepresentative sample: all these respondents are career military officers with philosophical training who teach ethics. Despite their combat experience they might be targets for Paul Fussell’s sarcasms. They are not conscripts and not enlisted men.

Yet their common themes don’t strike me as eccentric. All of them think soldiers must take on some risks to spare civilians. Two of them emphasize that soldier lives are worth neither more nor less than civilian lives. The first and second respondents evidently take higher-risk tactics as the moral baseline—the first refers to “an increase in civilian harm” using the lower-risk strategy, and the second believes that privileging force protection over non-combatant protection violates “the essence of soldiering.”

These strike me as crucial points: first, that all lives are created equal and have equal worth; second, that accepting *some* extra risk to save civilians belongs to the vocational core of the soldier—in old fashioned but still relevant language, part of the soldier’s code of honor.

Risk transfer ratios

Let me try to flesh out these ideas. Recall that soldiers in the Basic Scenario, or those writing their ROEs, must choose between Close Engagement and Distant Engagement (“going in heavy”). Each tactic involves risks to soldiers and to civilians, which will only coincidentally be of the same magnitude: four risk levels in total. As I

argue below, the risk will normally be greater for civilians in the battle space than soldiers even under higher-risk tactics like Close Engagement, because soldiers are better equipped than civilians to safeguard themselves under either chosen tactic.

Switching from one tactic to another affects both civilian and military risk. For the moment, let us set aside the absolute magnitude of the risks and consider how many units of risk soldiers are transferring to or from civilians for every unit they transfer from or to themselves. The difference between the risks to soldiers of Close Engagement compared with Distant Engagement is the *marginal risk* to soldiers; the difference between the risks to civilians of the two tactics is the marginal risk to civilians. The ratio of civilian marginal risk to military marginal risk is what I shall call the *risk transfer ratio*.[20] This ratio seems relevant to the choice between Close Engagement and Distant Engagement.

If the risk transfer ratio is greater than one it means that picking Distant Engagement transfers marginal risk to civilians at a greater than one-to-one ratio: soldiers are offloading larger risks to civilians in order to spare themselves smaller risks. And, conversely, a small risk transfer ratio means that soldiers choosing Close Engagement are

---

[20] More precisely: Let's say Distant Engagement imposes risk C_{DE} on civilians ('C' for 'civilian', 'DE' for Distant Engagement), whereas Close Engagement imposes risk C_{CE}. Because Close Engagement is more discriminating than Distant Engagement, it imposes less risk on civilians, so C_{CE} is less than C_{DE}. The difference between them, ΔC, is the *marginal risk* that soldiers impose on civilians by choosing Distant Engagement rather than Close Engagement.

In precisely parallel fashion we can define S, the risk to soldiers (rather than civilians) of Close Engagement and Distant Engagement. Here, S_{CE} is greater than S_{DE}, just as for civilians C_{CE} is less than C_{DE}. ΔS is the marginal risk soldiers spare themselves by choosing Distant Engagement. Where the mathematical sign of ΔC is positive, that of ΔS is negative: by choosing Distant Engagement, soldiers up the risk to civilians and reduce the risk to themselves. Let's use the letters 'C' and 'S' to refer to the magnitude of the marginal risks to civilians and soldiers, without worrying about the sign. That is, we'll let C and S stand for $|\Delta C|$ and $|\Delta S|$. The *risk transfer ratio*, C/S, is the ratio of civilian to military risk that soldiers transfer by choosing Distant Engagement. As for *risk ratios*, these consist of the ratio of civilian to military risk in each tactic. The risk ratio under Close Engagement is C_{CE}/S_{CE}. The risk ratio under Distant Engagement is C_{DE}/S_{DE}.

braving extra risks in order to spare civilians lesser risks. A risk transfer ratio of one-half means that if the military chooses Close Engagement, soldiers take on extra risk in order to spare civilians from marginal risk half as large.

I am not supposing that numbers like these can actually be calculated in real-world cases. Obviously the real-life judgments of military and civilian risk will mostly be intuitive, qualitative, and context-dependent. To be sure, sometimes precise data may be available: a modern army very likely knows exactly how many casualties its troops have suffered in house-to-house fighting in recent weeks, exactly how often they have engaged an adversary going house-to-house as opposed to finding nothing more than a family of frightened civilians, and exactly how many civilians they have inadvertently harmed. Sometimes, therefore, it may be possible to quantify the risk troops face searching house-to-house for weapons or enemy fighters—say, that the risk of death or serious injury to U.S. Marines was *x*% per house searched in Fallujah in November 2004, meaning that *x* Marines suffered injury per hundred houses searched. But in other situations, risk estimates will be imprecise and qualitative—"really dangerous," "pretty risky," "not much danger," and in those cases numerical risk ratios are merely an expository device.

Why bother? First, talking about risk transfer highlights the point that the military ethics problem—how much risk should soldiers assume to minimize civilian casualties?—is an instance of a more general question about risk trade-offs: when must one person assume risk to lower risk to another? Second, risk transfer ratios focus us not only on the direction of risk transfer—soldiers shifting risks from themselves to civilians or from civilians to themselves—but also on the exchange rate. Intuitively, the risk transfer ratio matters: it seems wrong for a soldier to expose innocent civilians to near-

certain injury to spare himself a low probability risk. An exchange rate so lopsided suggests a radical and unjustified devaluation of enemy civilian life. Posing the problem as an issue about risk transfer highlights this central intuition—the intuition of the U.S. Army major who wrote "I am not sure that the soldier needs to treat his own life as any less valuable than that of a civilian, but I insist that he must not treat his own life as more valuable."

To illustrate thinking with risk transfer ratios, let's revisit Walzer's example of Frank Richards, filling in some plausible, if imaginary and schematic, details. Richards must decide whether to call out his warning before dropping a hand grenade into a cellar. If the cellar contains French civilians, we will suppose that the situation is this: if Richards calls out the warning, they respond and survive; if he does not, they die or suffer injuries.

Matters are more complicated if there are German soldiers in the cellar. They may surrender when they hear his warning, being frightened and not knowing how many British soldiers are standing outside. Or they may freeze with fear, and perish from his hand grenade. Even if they come out with guns blazing, Richards may win the firefight; or he may emerge unscathed because they fire blindly and flee. Taking all these possibilities into account, Richards may guess that his odds if he calls out the warning when German soldiers are hiding in the cellar are roughly fifty-fifty. If he calls out no warning, his odds of death or injury are (let's say to keep matters simple) zero: the Germans will have no shot at him and the grenade will incapacitate them all.

To summarize: By calling out the warning, Richards has increased his own chances of injury from zero to fifty percent, so the marginal risk is 0.5. Without calling

out the warning, he increases the chance of injury to civilians in the cellar from zero to one hundred percent, a marginal risk of 1. The risk transfer ratio is 2:1.

But we haven't yet considered the odds that the people in the cellar are German soldiers rather than French civilians.[21] If only one in ten of the occupied cellars have German soldiers in them, the remainder being cellars of French civilians, Richards's odds of injury if he calls out the warning are much more favorable than fifty-fifty. In fact the odds of injury are only five percent (50% x 0.1). But the marginal risk to any civilian in the cellar if Richards calls out no warning remains one hundred percent. The real risk transfer ratio is not 2:1 but 20:1. We err if we think about risk solely by asking "What are my odds if the enemy is in there?" without also asking how often the enemy troops hide in cellars. It is a well-known fallacy of risk perception that people overestimate small risks because we focus on what would happen if the risk materializes, and lose focus on how improbable it is.

Richards may know from past experience the odds that there are enemies in the cellar; it isn't always the wisdom of hindsight. He may know, for example, that in the previous villages the Germans had invariably fled, and only one or two cellars had "orphan" soldiers hiding in them. Alternatively, he may know that in the previous villages the civilians had almost all evacuated, and the few who stayed behind never hid in their cellars—so the odds are overwhelming that anyone hiding in the cellar is a German soldier.

Two points emerge from this example. First is one I mentioned above: a high risk transfer ratio suggests a radical and unjustified devaluation of enemy civilian life. This, it

[21] We can make the simplifying assumption that all the cellars have people in them. If a cellar is empty, it doesn't matter whether Richards calls out a warning or not.

seems to me, supports Walzer's judgment that Frank Richards "was acting as a moral man ought to act."

Second, however, the example also cautions that risk transfer ratios alone tell us too little. If the odds of death or injury are fifty-fifty, it might be wrong to criticize Frank Richards for deciding against warnings, because running a fifty-fifty chance of death or injury is too much to ask of a soldier. A five percent chance of death or injury, while surely significant, may not be too much to ask of a soldier if it saves innocent civilians. This observation leads to an important qualification to Walzer's conclusion that Frank Richards's conduct "is not an example of fighting heroically, above and beyond the call of duty, but simply of fighting well." Whether Richards was fighting well or heroically depends on the absolute magnitude of the risk he was running as well as the risk transfer ratio. Walzer's conclusion would not follow if the risk is too great; surely Richards would be acting above and beyond the call of duty if the marginal risk in calling out the warning is really as high as fifty percent.[22]

How much risk?

Let us turn to our first question. What level of risk must soldiers assume to minimize casualties among their own civilians? Margalit and Walzer admit that they

> can't answer that question with any precision. They don't have to take suicidal risks, certainly; nor do they have to take risks that make the [mission] impossibly difficult. … But merely "not intending" the civilian deaths, while knowing that they will occur, is not a position that can be vindicated …. [The army's] soldiers must, by contrast with its enemies, *intend not* to kill civilians, and that active

[22] Walzer agrees that the level of risk matters (private communication), and adds that he was assuming that the risk to Richards in the actual example was minimal.

> intention can be made manifest only through the risks the soldiers themselves accept in order to reduce the risks to civilians.[23]

I agree that no precise answer can be given to the "how much risk" question, as well as the point that the risks needn't be suicidal or make the mission impossibly difficult. In the Basic Scenario, though, I take it that neither of these extreme conditions obtains even if the army chooses Close Engagement over Distant Engagement. If so, is there anything more we can say about the question of risk?

In ordinary civilian life, we seldom insist that people take on personal risk to reduce risk to others. If I buy the largest SUV I can find because I think (correctly) that it offers more safety in a collision, I diminish my own danger but increase the danger to people in small cars, who are more likely to be crushed in a collision with my Toyota Leviathan than if I were driving a smaller car. But no one suggests that I shouldn't buy the Leviathan for that reason. People cannot transfer risk to others by wrongful means—grabbing another pedestrian to shield yourself from gunfire on a city street—but buying a big car is not wrongful.[24] Unfortunately, such thoughts will not get us far in the military cases. In the Basic Scenario the question is precisely whether choosing Distant Engagement over Close Engagement is wrongful.

A better civilian analogy would be to people engaged in ultra-hazardous activities like blasting or shipping dangerous chemicals. If something goes amiss, and the person imposing the hazard must choose between taking risks on herself to control the danger she has caused or fleeing the scene and letting the risks fall on innocent bystanders, the

---

[23] Margalit and Walzer, "Israel: Civilians and Combatants."

[24] Eric Orts has pointed out to me that this conclusion is controversial: there have been proposals to tax large vehicles as a way to discourage people from buying them because of the safety externalities they impose on other people (as well as other externalities: environmental, road maintenance, traffic congestion). I will ignore this complication.

latter seems pretty clearly immoral. Even if the accident was not her fault, she is responsible for creating the situation in which either she or the bystander must run risks. She caused the danger, and causation matters. This is the deeply embedded intuition in historical cases about strict liability, like the 1868 tort chestnut *Rylands v. Fletcher*: "When one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."[25] In Oliver Wendell Holmes's words, "In the cases put, the plaintiff has done nothing; the defendant, on the other hand, has chosen to act. As between the two, the party whose voluntary conduct has caused the damage should suffer, rather than the one who has had no share in producing it."[26] The tort analogy is imperfect, because our subject is who must bear risk, not who must bear the cost of damage. But they are closely connected—exposure to risk *is* a kind of damage. Notice that both Holmes and Lord Cranswell put their point in terms of who should suffer, not merely who should pay. Causation matters especially when it involves physical battery. Cross-cultural survey studies of problems in which an agent must choose whether to save five innocent lives at the cost of one reveal that the manner in which the chooser causes the one innocent person to die matters immensely in people's moral evaluation of the choice: the more counts of battery the chooser commits in rescuing the five, the more hesitant subjects are to agree that it is morally permissible, even though the numbers (five saved, one killed) are the same in all the cases. The intuition that causation matters seems to be part of human nature, perhaps innately so.[27]

---

[25] Rylands v. Fletcher, L.R. 3 H.L. 330 (1868)(Cranswell, L.).
[26] Oliver Wendell Holmes, Jr., The Common Law (1881), p. 84. It is also true that in common law, a defendant can escape liability by showing that was justified in the course of action that caused the harm. But this does not affect the line of argument I present here, because the very issue on the table is whether fighting in a way that fobs off soldier risk onto innocent civilians is justified.
[27] John Mikhail, *The Elements of Moral Cognition* (Cambridge UP: 2011).

Causation is not the only way a person can acquire responsibility to accept risks rather than transferring them. Some professions include risk taking in their vocational core—think of police, firefighters, and emergency medical personnel treating contagious diseases. Of course, nobody is drafted to become a policeman or firefighter, but it seems to me that something more than consent explains why firefighters carry out their obligations. The reason is that it is what honorable firefighters do, and I am confident that their sense of honor, and not their contract with the fire department, is what motivates them. A dramatic illustration is the heroism of the "Fukushima 50"—the Japanese nuclear workers fighting to prevent the tsunami-damaged nuclear reactor from melting down. The mother of one worker tearfully told reporters: "My son and his colleagues have discussed it at length and they have committed themselves to die if necessary to save the nation. He told me they have all accepted that they will all probably die from radiation sickness in the short term or cancer in the long-term."[28] This level of heroism surely transcends moral obligation; but their sense of professional honor will be recognizable to anyone in a high-risk public profession, including soldiers.

Translating these thoughts into the more antiseptic language I introduced earlier in the paper, we should regard the choice of tactics as a form of risk transfer between soldiers and non-combatants—a kind of trade-off between lives and lives. If so, the admonition that all lives are created equal suggests that soldiers must not choose tactics with a risk transfer ratio greater than one, nor need they accept a choice with a risk transfer ratio less than one. That would be the simplest form of risk egalitarianism.

---

[28] Dominic Di-Natale, "Japan's Nuclear Rescuers: 'Inevitable Some of Them May Die Within Weeks," Fox News.com, March 31, 2011, viewed at http://www.foxnews.com/world/2011/03/31/japans-nuclear-rescuers-inevitable-die-weeks/?test=latestnews (May 8, 2011).

But the vocational core of soldiering ("the very essence of soldiering," in the words of one of the officers to whom I posed my question) suggests something different: that, to protect a civilian from their own violence, soldiers must accept risk transfer ratios less than one, perhaps significantly less than one. And that is as true for enemy civilians as their own.

How much extra risk soldiers must shoulder is, as Margalit and Walzer insist, not a question susceptible to precise answers, or for that matter general answers. More importantly, it seems to me that this *is* an experienced-based question in which knowledge of the conditions of combat will play a role.[29] But it does seem to me that we can say something about the Basic Scenario.

One conclusion is that neither Close Engagement nor Distant Engagement necessarily represents the baseline or default position. The baseline risk, representing the quantum of extra risk that a nation's soldiers can be expected to take on to minimize casualties to their own civilians, may be less than Close Engagement in some especially desperate circumstances, for example, when an embattled and surrounded unit is fighting for its life; it will almost always be more than Distant Engagement. A state's army, dedicated to the protection of its own civilians, would not obliterate entire "friendly" buildings containing co-nationals from a distance in order to safeguard its soldiers.

The decisive fact is that even in Close Engagement, soldiers' risks are far less than those of non-combatants. Professional soldiers are better armed and armored, better trained, better disciplined, better conditioned, better able to function in coordinated teams, and better supported than their adversaries, including in the crucial matter of

---

[29] See Dakota S. Rudesill, "Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War," *Yale Journal of International Law* 32 (2007): 531-38 for discussion of the difference modern military technology might make for the combatant's duty of care.

medical care if they are wounded. Everyone in their units is pledged never to leave them fallen on the field; their buddies have their backs. In every respect, they are simply better able to protect themselves than are non-combatants (or even irregular adversaries). Almost certainly, the risk transfer ratio in choosing Distant Engagement is greater than one, probably far greater, because the systematic advantages of trained modern armies guarantee that the marginal risk they assume by choosing Close Engagement is small relative to the risk they spare civilians.[30]

Their civilians and ours

Whatever the minimal acceptable care soldiers must take to spare "friendly" civilians, we can take it as a baseline for addressing the question of risk transfer to enemy civilians. Is the risk transfer ratio different when the civilians are "theirs" rather than "ours"? That is: can an army endanger "their" civilians more than "ours" to achieve force protection? Margalit and Walzer answer no: what matters is not who the civilians are, but only the fact that they are civilians, that is, non-combatants. Kasher and Yadlin disagree. For them, sparing "our" citizens, including soldiers, is more important than sparing "their" civilians.

The obvious reason for this view is that citizens have special obligations to fellow-citizens that they don't have to others—what philosophers call "associative obligations." For example, Iddo Porat (in a fine recent paper on preferring one's own civilians), argues that I am entitled to take extra risks to save people with whom I have a

[30] The insight that trained militaries' systematic advantages matters to the Principle of Noncombatant Immunity is central to recent papers by Seth Lazar. See, e.g., "Asymmetric Warfare and Noncombatant Immunity" (unpublished).

special relationship: "people you hold dear, such as family members."[31] He asks: "How far can this justification be extended? Should it apply also to second degree relatives, friends, countrymen?...[T]here seems to be an intuitive pull towards the view that preferring along the lines of one's co-civilians is not simply discriminating at whim." Porat quotes Thomas Hurka for a similar position: "The relations among citizens of a nation are not as close as between parents and children, and the partiality they justify is not as strong. But common sense still calls for some partiality toward fellow citizens and certainly demands that partiality of governments."[32]

Porat starts with our justifiable preference for "people you hold dear," and draws conclusions about co-citizens from intuitions about these cases. However, natural as the analogy feels, it is too hasty. Most of my co-citizens are not people I hold dear, certainly not in the sense that I hold my wife, son, and daughter dear. I know nothing about 99.99% of them, I am relatively sure that even if I knew them I wouldn't hold most of them dear, and in fact I am sure that there are many I would dislike or fear. Nothing about co-citizens follows from anything we might say about "people you hold dear."[33]

What about Hurka's assertion that "common sense...calls for some partiality toward fellow citizens"? The answer is that common sense is slippery. Suppose I agree that common sense justifies partiality toward fellow citizens in some things. For example, as an American tourist I might feel a special impetus to help out a fellow-American in

---

[31] Iddo Porat, "Preferring One's Own Civilians: Can Soldiers Endanger Enemy Civilians More Than They Would Endanger Their Own Civilians?" University of San Diego School of Law, Public Law and Legal Theory Working Paper, Aug. 7, 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1445509 (visited Nov. 1, 2010), p. 13.

[32] Thomas Hurka, "Proportionality and the Laws of War," *Philosophy and Public Affairs* 33 (2005): 59-60, quoted in Porat, p. 14.

[33] Porat himself recognizes the difficulty, adding that the question of whether analogy is a good one "is beyond the scope of this paper."

distress in a foreign city where I am traveling; a greater sense of obligation to rebuild New Orleans than Port au Prince; and, more relevant to the topic, a greater sense of obligation to send U.S. troops to rescue captured Americans than captured Belgians.

On the other hand, I don't feel any partiality toward fellow citizens in many other respects. If, for example, a U.S. national and a foreign national rob a bank, I don't think the U.S. national should get a shorter jail sentence. In a lawsuit between a U.S. national and a foreign national, I have no a priori partiality toward the U.S. national. If I donate blood at my local hospital, I have no preference that it be given to a U.S. citizen rather than a foreign citizen being treated in the hospital—indeed, *my* common sense concludes that any American who donates blood insisting that it be given only to a U.S. national is a creepy jingoist if not a racist. I would be surprised and disappointed if Porat and Hurka disagree. Any plausible theory of associative obligation must concede that preferences for fellow citizens do not exist across the board in human interactions. Associative obligations do not translate to generalized nepotism.

What is true for personal obligations is true as well for governments. If a U.S. statute assigned different criminal sentences to bank robbers based on nationality, or declared that the burden-of-proof rules in a civil lawsuit should always favor U.S. nationals over foreign nationals, or legislated that donated blood be given only to U.S. nationals, *my* common sense declares all those laws immoral, and my "intuitive pull" is disgust that anyone would favor such legislation.

Assuming that my intuitions are not eccentric on these matters—that my "sense" is indeed "common"— it appears that "common sense" favors partiality for co-civilians

on some issues and not others. Which is which? Proponents of associative obligations seem to presume the risk issue is one favoring partiality for co-civilians. But why?

One answer is that institutions like those administering criminal punishment, civil trials, and medical care have well-recognized obligations of impartiality; and perhaps that is what drives our "impartialist" intuitions in the examples, not any sense of egalitarianism between countrymen and strangers. Courts of law are morally required to administer justice impartially, and hospitals work under a parallel obligation to treat the sick no matter who they are. Armies, one might object, are entirely different.[34] Protecting their own citizens is why armies exist, and that obligation has nothing impartial about it. As Porat writes, "a soldier's job is not to protect any civilian, qua civilian, but only to protect his co-civilians."[35]

However, this equivocates on two senses of "protect": to protect civilians against enemy violence, and to protect civilians from one's own violence. Of course the soldier's job exists to protect co-civilians, not foreign civilians, against their enemies (leaving

---

[34] Indeed, intuitions may change in the military context. Suppose a military physician or medic confronts a triage situation: he has only one treatment kit for two wounded soldiers, one his own comrade and the other an enemy or an allied soldier. Ethicist Michael Gross reports that U.S. medical officers at Walter Reed military hospital to whom he presented the conundrum overwhelmingly answered: Treat the American first. Asked why, they answered "Because he's our brother". Michael Gross, "The Limits of Medical Neutrality during Armed Conflict" (unpublished; cited with permission), p. 14. Ten out of nineteen Israeli medics gave the same response, even if their comrade is less seriously injured than the other patient; one-third of U.S. military physicians deployed in Operation Desert Storm disagreed that medical need is the only criterion for triage; and 22% of the same group said that wounded enemy POWs should be treated only after allied forces are treated, no matter how serious their wounds. Ibid. On the other hand, it is striking that two-thirds of the U.S. physicians thought that medical need *is* the only criterion for triage, while more than three-fourths of the physicians and almost half of the Israeli medics give equal regard to the non-comrades. The fair conclusion is that the principle of medical impartiality remains remarkably robust even in military situations. Equally noteworthy is the reason that the Walter Reed officers proffered: not "Because he's our fellow citizen," but the militarily-specific "Because he's our brother." Military training inculcates fierce personal loyalty to comrades in arms; U.S. general Stanley McChrystal has remarked that the Army Ranger's oath never to abandon a fallen comrade may be stronger than marriage vows. Yet this cannot be the morally decisive factor—otherwise, armies could diminish obligations to enemies and civilians merely by indoctrinating their fighters to care about comrades first. Presumably, the military medical officers recognize that in civilian life, medical ethics would not accept "Because he's my brother" as a justification for treating a biological brother first in the emergency room.

[35] Porat, p. 17.

aside humanitarian interventions). But it would completely beg the question to assert that the soldier's obligation to protect civilians against the soldier's own violence runs only to fellow citizens. The question on the table is whether soldiers must take added risks to avoid becoming "innocent" killers of civilians. The idea that one has a greater obligation to avoid killing co-nationals than to avoid killing foreigners seems akin to the examples I gave above where nationality preference is morally objectionable—on a par with asserting that you don't have to drive as carefully in a foreign country as you do at home because the pedestrians aren't your own countrymen.[36]

The universal negative duty not to inflict violence on the innocent is equivalent to the positive duty to take at least some baseline level of precaution against inflicting violence unintentionally on the innocent, and is therefore also universal and impartial. If the baseline level of precaution—the minimally acceptable care soldiers owe their own civilians—involves risk, then that same level of risk-taking is what they owe enemy civilians. Notably, the impartial character of the obligation to avoid unintended harm to civilians is the conventional understanding of the principle of distinction, as well as the understanding embedded in the law of war.

A skeptic may respond that this argument proves too much. If the universal negative obligation to avoid harming innocent enemy civilians really trumps the special obligation of soldiers to protect their own countrymen, protecting countrymen by waging war would be impossible: war inevitably violates rights and harms the innocent. We

---

[36] Margalit and Walzer offer a version of the same argument in an exchange with Kasher and Yadlin. "Avishai Margalit and Michael Walzer reply" in "'Israel and the Rules of War': An Exchange," *New York Review of Books*, June 11, 2009. Menahem Yaari makes the argument more explicitly in "Israel: The Code of Combat," letter to the editor, *New York Review of Books*, Oct. 8, 2009.

should be wary of an argument about how soldiers may wage just war that yields pacifism as its conclusion.

Pressing this point, Seth Lazar identifies a dubious premise of the argument: that universal negative obligations automatically outweigh special obligations. If that were true, Lazar argues, we would have to give up too much, for example humanitarian military intervention to halt massive human rights violations. Many people advocate a general responsibility to protect ("R2P", in the current jargon of international law) that might permit humanitarian interventions. If so, general obligations to protect can sometimes outweigh negative obligations not to harm. And surely a special obligation to protect one's own fellows may outweigh a general obligation to protect strangers. It follows that the special obligation to protect one's own fellows can outweigh negative obligations not to harm.[37] Perhaps, then, the negative universal duty not to inflict violence on the innocent is not as powerful as I have suggested. Perhaps, in fact, it is weaker than the soldier's obligation to protect his or her fellow citizens.

Remember, however, that we are not talking about a choice between risk-taking to spare enemy civilians and protecting one's own citizens. In the Basic Scenario, the choice is not a stark either-or between Distant Engagement or pacifism. There is a third alternative: Close Engagement. Close Engagement, we may suppose, represents the minimally acceptable standard of care soldiers must take for their own civilians; and no associative obligation prevents them from taking the same standard of care for enemy civilians. Lazar's argument, forceful as it may be against pacifism and the premises that imply it, has little bearing on the question of whether soldiers may take fewer risks to

[37] Seth Lazar, *War and Associative Duties* (Ph.D. dissertation, Oxford University, 2009), pp. 274-89. Lazar offers a defense of associative duties as sometimes more powerful than general duties in ibid., pp. 249-70.

minimize casualties among enemy civilians than morality requires them to take for their own civilians. To that question, the answer remains no.

This entire line of argument will seem perverse to those to whom it's obvious that we can take more risks to protect those we care about than those we don't. If soldiers take heroic risks for their countrymen, can it really be that they are required to brave the same risks for enemy civilians? If parents take heroic risks for their own children, must they take the same risks for all children?

The answer is "of course not." Frank Richards could permissibly go to even more extraordinary lengths of risk-taking if he feared that his own children might be in the cellars. But, as I argued earlier, this double standard applies only to risks above the baseline of minimally acceptable care—supererogatory, heroic, risks. I am not arguing that heroes must be equal-opportunity heroes. That would be ridiculous. The argument is that the minimally acceptable level of risk taking to minimize civilian casualties—the risks that, in Walzer's words, come under the heading not of fighting heroically but of fighting well—is the same regardless who those civilians are.

Soldiers as "assets" and as citizens

A different objection to this line of thought comes from the idea that in an important sense soldiers' lives *are* more important than civilians': not only does a soldier have the same fundamental personal interest as the civilian in surviving, the soldier's survival is also crucial to the mission. As soldiers sometimes put it, they are "assets." Of course, they are assets only to their own side, and whether being a military asset is an overall moral plus or a minus depends on the justice of their cause.[38] But even waiving

[38] See Thomas Hurka, "Proportionality in the Morality of War," *Philosophy & Public Affairs* 33 (2005): 44-45; and, generally, Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).

this hesitation and supposing that their fight is a just one, the objection fails. It amounts to a kind of double counting: according to this objection, not only is the soldier's life as valuable as the civilian's, the soldier automatically gets extra credit for being an asset. But to precisely the extent that a soldier is an "asset," that personal interest is set to one side. As a military asset, the soldier can be required to die in the line of duty if necessary. If, for example, choosing Close Engagement over Distant Engagement would help the cause (as under counterinsurgency doctrine, where minimizing enemy civilian casualties is central to the strategy), the soldier would be duty-bound to carry out the orders for Close Engagement, even if it increases personal risk for the soldier. That is precisely what it means to be an asset. Conversely, to give full sway to the soldier's personal interest in survival is to regard him or her as something different in kind from a military asset. To borrow Kant's distinction: as a human being, soldiers are ends in themselves, possessing a dignity not a price; they are intrinsic sources of value. As an asset, a soldier is merely a means, whose life could be the price paid for victory, and whose value is instrumental, not intrinsic.

A consequentialist might be unmoved by the Kantian distinction and reply that to be an "asset" means, concretely, to be in a position to save even more lives, including civilian lives. Doesn't that make the soldier worth more than a civilian, without the fallacy of double counting?[39] The answer is no. The assumption itself is incurably speculative, and once we travel down the road of speculation we cannot do it only for the soldier. We must also do it for the civilians who the soldier unintentionally kills or injures. The soldier may save additional lives—but of course he may not. He may never

[39] I am grateful to Azar Gat, Yossi Shain, and other participants in the Tel Aviv workshop for pressing me on this point.

fight in another battle, if the war or his term of service ends. In reality, few soldiers can claim to have personally saved even one human life. On the other side of the ledger, the civilian casualty may be a surgeon who, over his or her career, would have saved thousands. Or a child who would have grown up to cure cancer, or negotiate a lasting peace. Or a mother, whose incapacitating brain injury ruins the lives of her eight children. Or none of the above. My own view is that we mustn't go down this road at all, because it is all make-believe.

Viewed purely as human beings, ends-in-themselves not "assets," soldier's lives are obviously as worth fighting for as anyone else's. This may lead to the view that force protection is an autonomous goal of warfare; Kasher and Yadlin argue this way when they point out that the Israeli Defense Forces are charged with protecting Israeli citizens, and these include the IDF soldiers themselves.[40] But this does not make the soldier more important than the civilian, and in proportionality calculations it can never justify actions with a risk transfer ratio greater than one. Nor, of course, can the proportionality calculus add protecting soldiers viewed purely as human beings to the military importance of protecting assets—that would again commit the fallacy of double counting, where the soldier counts once as a military asset and once as a citizen.

Those persuaded by Kasher and Yadlin that the soldier's citizenship matters decisively may try again. If a soldier faces an unavoidable tragic choice between unintentionally harming two people, one a fellow citizen and the other an enemy citizen, can't the soldier—indeed, *mustn't* the soldier—harm the latter rather than the former? To say otherwise would mean that fellow citizenship counts for nothing. Suppose, then, that the answer is yes. A fortiori, the answer will be yes if the citizen the soldier saves

[40] Kasher & Yadlin, pp. 49-50.

happens to be herself. It follows that the soldier can justifiably rank self-protection above protection of the enemy civilian, and for just the reason Kasher and Yadlin state: the soldier is a citizen of the state, and their own citizens rightly matter more to the military than other peoples' citizens.

Stated more carefully, though, the argument dissolves. It turns on an example in which that the only difference between the two people is their nationality. If so, the correct formulation would run along the following lines: “If a soldier faces an unavoidable choice between unintentionally harming two *civilians*, one a fellow citizen and the other an enemy civilian, can’t the soldier—indeed, *mustn’t* the soldier—harm the latter rather than the former?” The catch lies in the word “civilian,” which the first formulation of the argument left out. By leaving it out, the first formulation invites us to consider the soldier solely as a citizen, no different than a civilian citizen; it glosses over the fact that the citizen-soldier is a soldier. But that ignores precisely the decisive difference: the soldier, not the civilian, is engaged in violence, and the soldier's violence is what forces the deadly risk trade-off.

To be sure, a soldier who fights justly in a just war is doing nothing wrong, or so we should assume. But the question on the table is whether exposing innocent enemy civilians to more risk than the minimally acceptable care for friendly civilians *is* fighting justly. It would simply beg the question to assume that the answer is yes, and if we make no such assumption, the argument collapses.

Kasher and Yadlin’s argument that soldiers may safeguard themselves over enemy civilians because they are citizens, and therefore they belong to the group they are charged with protecting, is a bizarre one in any event. It yields the implication that

citizen-soldiers have lesser *in bello* obligations than non-citizens in their own army. Many states permit non-nationals to serve in their militaries; others hire mercenaries or other private security contractors, not all of whom are fellow citizens. It would be odd indeed if the citizen-soldier has lesser duties of care to innocent enemy civilians than mercenaries have—but that is what Kasher and Yadlin's argument about citizen preference would imply.

None of the above denies that soldier lives count fully in the proportionality calculus; on the contrary, I accept force protection as a "concrete and direct military advantage" (to use the law-of-war phrase). What I deny is that protecting a soldier matters more than protecting an enemy civilian.

Political necessity as military necessity

Further difficult questions are whether the political need for force protection can make it an independent strategic goal of military operations, and whether that confers extra weight to the "concrete and definite military advantage" of reducing your own side's casualties. Governments sometimes face intense casualty-aversion in their electorates. It seems clear that President Bill Clinton would not have intervened in Kosovo if doing so required boots on the ground rather than an air campaign. There was simply no political stomach for boots on the ground after the "Blackhawk Down" debacle in the U.S. Operation Gothic Serpent in Somalia, particularly because after the first Gulf War the American public expected easy victories with very few casualties. For Clinton, maximum force protection was not simply incidental to the Kosovo intervention: it was one of the goals of the intervention. Reportedly, force protection was also an important political goal in the Israeli Operation Cast Lead, because of the twin traumas of the 2006

Lebanon war and the kidnapping of Gilad Shalit. Force protection becomes a goal when a military must not only win a war, but win it without the enemy laying a glove on us, to placate an uneasy public that might otherwise not support the war. The question is whether this goal can be satisfied at the price of greater damage to enemy civilians.

Legally, the answer is clearly no: proportionality doctrines weigh unintended civilian damage against the importance of military goals, not political goals. But that is not the end of the story, because of a classic argument that political goals can be military goals as well. From Clausewitz on, we have understood that military victory means breaking the adversary's political will to fight, and losing your own will to fight means military defeat. Rome won the Second Punic War because the Senate stubbornly refused to negotiate even after Hannibal annihilated Rome's legions in the biggest one-day loss of life in military history. North Vietnam prevailed over the United States because its will remained unbroken while the U.S. public lost its stomach to continue. In this sense, political will *is* a military necessity, and if keeping casualties very low is essential to maintaining political will, the Clausewitzian will draw the obvious conclusion about the military necessity of keeping casualties low.

One rejoinder might be that a nation unwilling to accept casualties has no moral right to demand military victory; but that is wrong, because the justice of the cause bears no necessary connection to people's willingness to die for it. In fact, the people might argue that precisely because their cause is just—they are the invaded, not the invaders—they have every right to keep their casualties as low as possible.

However, this way of thinking ignores the other half of the problem, namely that in order to keep up the public's own morale in a just war, enemy civilians must die in

greater numbers. For this reason, the answer to the question whether the political need for low casualties matters in the morality of war must be no. Otherwise, the more faint-hearted the public, the more their soldiers would be entitled to inflict collateral damage on enemy civilians. The moral hazard and perverse incentives would be intolerable; hence the rule is intolerable. This is why the legal test for proportionality weighs civilian damage against "concrete and direct military advantage," not the indirect and intangible military advantage grounded in civilian morale. To make the law or morality of war hostage to political will, so that the less will to fight a country has, the less moral and legal obligation it has to fight well, would mean the end of the law and morality of war.

APPENDIX: HOW THE PROBLEM IS REPRESENTED IN THE LAW OF WAR

The problem of how much risk soldiers must take to minimize civilian casualties is not one that the law of war speaks to directly, but it receives indirect representation in the law of *in bello* proportionality. Civilians may never be directly targeted by militaries, but it is inevitable that in wartime civilians and civilian objects will be harmed, sometimes by accident but sometimes in full knowledge that lawful military targets are in close enough proximity to civilians that they will become—in the familiar euphemism—collateral damage. The law of war deems this permissible if the unintended damage is not "excessive in relation to the concrete and direct military advantage" gained by the attack. Call this phrase the *proportionality formula*. The specific standards appear in two articles of Additional Protocol I to the Geneva Conventions (Articles 51 and 57). These articles declare attacks that violate the proportionality formula to be indiscriminate, and enjoin that "constant care shall be taken to spare the civilian population, civilians and civilian

objects." Planners must "do everything feasible" to ensure that targets are military not civilian. They must "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." Planners must refrain from attacks that "may be expected" to cause disproportionate civilian damage, and they must discontinue an attack if it "becomes apparent" that the targets are not military or that the attack will cause disproportionate civilian damage. Finally, planners must warn civilians in advance of attacks that may affect them, "unless circumstances do not permit."[41]

Notice two points about these standards. First, Article 57 requires militaries to take all "feasible" precautions to verify the nature of the targets, and then to take "all feasible precautions" in the choice of means and methods of attack to minimize civilian damage. The requirement of minimizing civilian damage seems on its face to forbid tactics that raise civilian risk when it is feasible not to.

However, the word "feasible" can be understood in more than one way, and its ambiguity means that the law yields no determinate answer to the question of risk. Presumably "feasible" does not mean "technologically feasible, regardless of how much risk the precautions require soldiers to take and how damaging those precautions are to their military mission." Feasibility must mean something more than technological feasibility. But it also cannot mean that precautions are infeasible if taking them might ever-so-slightly increase soldiers' risk or risk to their mission. That interpretation would hollow out the prohibition and leave it nearly empty. The problem lies in the wide space

[41] AP I, Articles 51, paragraph 5, and Article 57, paragraphs 1 and 2. Notice that the proportionality standards protect civilian objects as well as civilian lives. That is an important point for philosophers to keep in mind. Philosophical discussions of warfare sometimes focus on killing as the sole topic of interest. But possessions matter to us: a missile that destroys my home and all my personal possessions is a catastrophe even if it leaves me physically uninjured.

between the extremes of requiring armies to do everything technologically feasible to avoid civilian damage and requiring nothing that might increase the risk to the mission even slightly.

During the treaty negotiations, some delegations asserted that "feasibility" meant "everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations."[42] The ICRC's commentary on Article 57 rejects this interpretation: "The last-mentioned criterion seems too broad….There might be reason to fear that by invoking the success of military operations in general, one might end up by neglecting the humanitarian obligations prescribed here."[43] The "feasibility" standard offers no concrete guidance about what level of risk soldiers must take to verify that their targets are not civilians, or to choose more discriminate but less reliably lethal means and methods of attack. Presumably, the drafters left matters vague because the parties never agreed how feasible a precaution must be.

Second, the rules repeatedly use the proportionality formula, prohibiting damage that is "excessive in relation to the concrete and definite military advantage anticipated." Obviously, the words "concrete and direct" are there to do some work. Including them rules out arguments that weigh damage to enemy civilians against the value of the entire war effort, in which case civilian damage, even on a vast scale, might not be deemed disproportionate. In the words of the ICRC commentary, "The expression 'concrete and direct' was intended to show that the advantage concerned should be substantial and

---

[42] Pictet, ¶2198, pp. 681-82.
[43] Pictet, ¶2198, p. 682.

relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded."[44]

So too with the adjective "military" in "military advantage." As discussed above, it may be politically crucial to governments that casualties be kept as low as possible, because the public is casualty averse and might oppose a military operation with more than a handful of casualties, or vote out a government that launches a controversial war unless it is nearly casualty-free. These considerations could require nearly absolute force protection—a zero-risk policy—justifying massive casualties among enemy civilians. But they are considerations of political, not military advantage.

These points lead to my main proposition about how the law of war represents the issue of risk-taking to protect civilians: it maps the issue into the question of what level of force protection counts as a "concrete and direct military advantage" in the proportionality formula.

Obviously, force protection has military salience, and Additional Protocol I was not a suicide pact. But the treaty language indicates (though not in so many words) that the anticipated risk transfer ratio can never be greater than one-to-one—that is why it is a proportionality standard. If the concrete and direct military advantage anticipated by choosing one tactic over another (like Distant Engagement over Close Engagement) is saving *x* soldier lives, it cannot be pursued by causing more than *x* anticipated but unintended additional civilian deaths. In the usual situation, where military organizations are exposing civilians to greater risk than they are sparing themselves, they must protect their forces by abstaining from operations that force existential tradeoffs, not by forging

[44] Pictet, ¶2209, p. 684.

ahead with the operation but placing more weight on military lives than the lives of civilians.

A risk transfer ratio of one-to-one is clearly the upper bound permitted by the proportionality formula. The other treaty language quoted above—about taking constant care to spare civilians, doing everything feasible to spare civilians, and warning civilians—strongly suggests, without explicitly requiring, that military organizations should do better than that, erring on the side of lower rather than higher risk transfer ratios; and military honor may require more. But the law does not require military honor.

Regrettably, the International Criminal Court's version of the "concrete and direct" standard muddies the standard by weakening it dramatically. The Rome Statute of the ICC prohibits:

> [i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be *clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated.[45]

I have italicized two words that significantly change the standard from that in AP I. First, the ICC substitutes "clearly excessive" for "excessive." The ICC version is no longer a proportionality standard at all: in effect, it permits disproportionate (i.e., excessive) civilian damage so long as it is not "*clearly* excessive." Second, the added word "overall" in the phrase "overall military advantage" weakens the force of "concrete and direct." The most natural construction of AP I's "concrete and direct" standard is that those doing

[45] Rome Statute of the International Criminal Court, art. 8(b)(iv).

the proportionality assessment can balance civilian damage in an operation only against the military value of that specific operation. If you are shelling an apartment building because an enemy mortar shell came from its courtyard, the possible civilian casualties can be weighed only against the military advantage of taking out the mortar. The ICC's phrasing says that civilian damage in an operation can be weighed against the overall military advantage of the plan of which the operation is a part—and that seems to permit more dead civilians. Thus, in two ways the ICC has weakened the protection of civilians against collateral damage and strengthened the value of force protection.

The reason the Rome Statute changed the proportionality formula is that it is defining a criminal offense, and drafters apparently thought that fairness to the accused requires a less stringent standard.[46] It follows, however, that the Rome Statute's standard should not be taken to represent the standard of rightful conduct; to think otherwise would be to commit what Henry Shue and I have labeled the *forensic fallacy* of mistaking the extra margin of safety for defendants' rights that criminal statutes must provide for accurate definitions of right and wrong conduct.[47]

At present, this discrepancy between AP I and the Rome Statute has minimal legal effect. AP I has more than 160 states-parties, and they include all but two of the hundred-plus members of the ICC—and those two have no militaries.[48] Any state that is party to both AP I and the Rome Treaty must follow the more exacting standard of AP I, unless the ICC standard supersedes that of AP I. But it doesn't: nothing in the Rome Statute's

---

[46] So I have been informed by observers at the negotiations.

[47] David Luban and Henry Shue, "Mental Torture: A Critique of Erasures in U.S. Law," *Georgetown Law Journal* (forthcoming).

[48] These are Andorra and the Marshall Islands. According to the CIA Factbook, Andorra's defense is the responsibility of France and Spain, while the United States bears responsibility for defending the Marshall Islands.

definition of crimes "shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[49] The wide acceptance of the AP I proportionality standard, including by states that did not ratify AP I, means that it has become customary international law. Thus, it seems fair to say that the ICC's standard has not changed the basic AP I standard in international law. On the other hand, the ICC's standard, not that of AP I, governs ICC prosecutions, so the Rome Statute unquestionably weakens accountability for the war crime of knowingly causing disproportionate civilian damage. And if state practice ever begins to evolve in the direction of a more permissive standard, the ICC's statute might be retroactively interpreted as evidence that the customary law of war is changing.

[49] Rome Statute of the ICC, article 10.