

## Comments on Kasher and Yadlin

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I will omit the encomiums for Professor Kasher and General Yadlin's thoughtful, clear, and vigorously argued essay: I take this as a given. My many areas of agreement will also remain understated in order that I might concentrate on the presuppositions, contentions, and conclusions to which I take partial exception. In order to do this as crisply and coherently as possible, I will offer my comments in the form of eight areas of concern, with the final comment providing a conclusion.

First, it is at least a defensible proposition that we do not need, as the authors claim we do, a "fully fledged doctrine" of just war "within the sphere of Military Ethics." Just war is not so much a doctrine as an ethos, a form of *phronesis* or practical reason. Just war teaching emerged in the first instance as a way Christian theologians and philosophers reasoned about statescraft, this after Christianity had survived the early centuries of persecution and wound up being directly responsible for governing. As Christianity is not a set of Kantian rules, not a nomology, neither was just war teaching in its early and continuing formulations for many centuries. Nor, I believe, should just war teaching be codified in this way now. Attempts to codify invite an excess of legalisms and threatens to reduce the complexities of statescraft, including that part of statescraft known as "war," into a set of stipulations. This 'Kantian' approach, if I may call it that, is troubling, I believe, as the best way to approach and to flesh-out just war norms and reasoning.

Second, the authors' definition of an "act of terror" strikes me as problematic in two senses: first, it effaces 'state terrorism' by fiat and, second, it over-rationalizes terrorism as a generic category. As we have come to learn, terrorism can take a variety of forms. There is terrorism of the IRA sort, with violence against non-combatants one piece of a stated political program. That piece was horrific and

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unjustifiable on just war criteria, but it was, at least, linked to a cluster of political *desiderata* one could make sense of in the usual political ways. Not so with Islamist terrorism. Why not? Precisely because this terrorism is *not* tied to a coherent set of political goals and does not, in the final analysis, derive from what we usually think of as political concerns. Instead, it is driven by an eschatological urgency and a dark utopianism: to destroy utterly Judaism, Christianity, and Western culture, to restore the ancient caliphate, and to bring what is now the portion of the globe within which Christians and Jews can be found in significant numbers (at times a majority) under *dar al-Islam*, the house of Islam.

We had better learn to take this fanatical religiosity seriously. There is a reason for the cries of ‘Allah is great’ just as the suicide–homicide bomber sets off his or her explosive belt or sends an airplane into a suicidal dive. We ignore this at our peril. Attempting to pummel Islamism within ‘normal’ political understandings is a form of denial. I wish it were different and that we were up against something that made sense: they want X or Y or Z, or they want us to desist from X or Y or Z. There is some of this, of course, but the heart of the matter is the religious motivation articulated above. We could accede to all the recognizably ‘political’ demands, e.g., the US could abandon Israel altogether and open its coffers to Palestinians, and Islamist terrorism would not go away; indeed, one can well imagine that such imagined acts on America’s part would be construed as some devious Jewish plot to lull Muslims (of the Salafist or Wahabbist sort, the most likely terrorist cohorts) into a false state of reassurance. The authors’ articulate the ethical and military complexities of terrorist acts well, but more attention must be paid to acts and proclamations which escape the usual categories we assume and with which we work.

Third, however one fine tunes it, *jus in bello* norms remain clustered under the categories of discrimination and proportionality. One can pare the cheese thinner and thinner, of course, but such refinement may wind up overburdening commanders and ordinary combatants in the field by urging on them excessive legalization, together with governing assumptions that leave too little to the best judgment of officers and soldiers in the field. Their judgment is shaped and forged *within* the norms of just war, capaciously understood. But over-legalization prompts a temptation to repair to a fixed code on nearly every occasion. The statesmen and the military commander we find admirable do not work like that.

If, as Hannah Arendt insisted, judgment is the premier political capacity, it might also be said that it is the primary military quality as well: in this Machiavelli may just be right. (Although he meant in a direct hands-on sense and I have something rather more complex in mind.) I am concerned especially with those on whose shoulders the burden of fighting and sometimes dying falls. One of my graduate students a few years back, a career soldier, told me: “There I am in the field, fully loaded, carrying hundreds of pounds of equipment on my back, and it seems my rucksack also has to be jam-packed with hundreds of rules. That might tie me up in knots rather than help me do my job.” He has a point. That is one reason we say, of many human endeavors, that ‘he was within the letter of the law but he violated that spirit.’ This statement makes no sense unless we are clear about what the spirit of the law portends and how an excess of scrupulosity generates legalism that ignores the animating spirit of the law in the first place.

Fourth, there are points in the paper when the categories of ‘soldier’ and ‘terrorist’ were brought into rather closer proximity than is warranted. This was never done

explicitly – the distinction is there – but it sometimes fades in importance. The soldier, as we all know, fights under rules of engagement and under the banner of legitimacy: the war has been declared or authorized by appropriate public authority. The terrorist knows no limits to his or her reign of terror and heaps scorn on norms of the legitimacy or illegitimacy of the deployment of force. Given the lamentable tendency visible in many circles today of effacing utterly the distinction between ‘terrorist’ and ‘soldier,’ it is vital that those of us working within the just war tradition resist this sleight-of-hand.

For example: we do not know what the outcome will be in the investigation of alleged misconduct by a handful of American Marines in the fighting in Haditha. The *only* reason that is an adjudicable matter and that charges may be brought derives from the fact that the US military has internalized just war criteria in articulating its rules of engagement. Were there no such limits, a US soldier could use any level of violence anywhere and against anyone he chooses. Such is not the case and this separates the terrorist from the soldier. Any slogan that proclaims, in so many words, that one’s man terrorist is another’s freedom fighter is an act of antinomianism and cynicism. We have criteria and norms for distinguishing the one from the other. As I indicated, I would make this point even more forcefully than do the authors.

Fifth, the authors take on an important challenge in looking specifically at fighting terror “within the framework of a democratic state.” This is not a merely rhetorical imperative. Democratic states are notoriously susceptible to terrorism precisely because they are democratic and nourish a high level of individual freedom internally. There are those, past and present, who have or will use such freedoms and protections against the society that has welcomed them in or into which they were born – as was the case of the home-grown British-Muslim terrorists of 7/7. This fact stunned the British public. In recent weeks, we learned that a group of Canadian immigrants or children of immigrants are charged with multiple terrorist plots ranging from carnage in public places to kidnapping and beheading the Canadian prime minister.

A democratic society must protect itself against such palpable threats, but how? To the greatest extent possible, such protection, including infiltrating terrorist organizations and using other means (wire-taps, tracing phone calls, surveillance, etc.), must be undertaken within the letter of the law. There are, however, critical and exceptional emergencies when that might not suffice. At such moments, as one justice of the US Supreme Court once famously pronounced, “The Constitution is not a suicide pact.” A free, constitutional society must find means that are defensible, not deplorable, as it protects the commonweal. These means may, in extreme cases, depart temporarily from established legal norms. Any such departure must be defended, but this cannot be done prematurely lest plotters and terrorists evade apprehension and justice. In the American system, this has meant that the Courts frequently consider extra-legal measures after the fact. This is not entirely satisfactory, of course, but it at least indicates that extra-legality under the Presidential war powers, for example, should never be taken up lightly.

In the US, 9/11 reminded us of what governments are for. There cannot be a decent, orderly civil society in which people are free to go to work, raise their children, attend school, take vacations, if people are murdered en masse as they sit in their offices taking a second cup of coffee before the work day begins in earnest, or as they settle down in their airplane seats anticipating a trip to visit family or to

conduct business. There cannot be a civil society if people perish as they ride city busses or travel the underground, as in London on 7/7. We learned, to our shock, how vulnerable a democratic society can be and how we needed to undertake in earnest how best to defend ourselves consistent with our history and our constitutional principles. I know the American case best, of course, but I suspect a similar dynamic is at play in every democratic society. The “protection of human life,” first and foremost, is *sine qua non* for all the other goods made available through a settled way of life in common.

Sixth, where does this leaves us in the matter of universal human rights? Here matters get murkier. The authors note that every person has human rights a “state ought to respect,” e.g., “the right to raise a family.” Why these are not called “natural rights” I do not understand. They derive from some place. They find a foundation somewhere. Either they are given in the very nature of things or they become revocable privileges the state can take away. Too, when the authors note the human rights available only to citizens of a particular state, “e.g. the right to participate in general elections,” they cast these latter rights in a rather tepid fashion. Surely the generic natural rights the authors note are made robust *only* insofar as they are incorporated into the statutory armamentaria of particular states, making the human rights available *qua* citizen a more robust category than in the authors’ current formulations. Otherwise we have is a lot of free-floating “rights” cast universally but finding no home anywhere in particular. Such rights are impossible to enforce. They lack civic clout and robustness. It follows that the distinction between sorts of rights doesn’t work in quite the way the authors’ claim. It is also the case that some of the (putative) universal human rights advanced, say, by the European Union *may* have the unfortunate effect of supplanting or weakening rights forged over the centuries in the common law – the current situation in Great Britain according to a number of commentators and critics. (This is but one example of the danger I here note.) These matters must be further nuanced and addressed.

Seventh, I have already noted my wariness concerning over-stipulation of rights, duties, norms, etc. The reason I proffer this criticism is because such efforts suggest our ethical responsibilities and bearings are reducible to a code: I can flip through my code book and determine whether this is ethical conduct under part a.1 or a.4 or, instead, falls outside the stipulated code and may not be ethical conduct at all. I am no doubt overstating, but not I think by much. It is well and good to assess levels of culpability for participation in terrorist acts – was this involvement direct or indirect, central or peripheral, etc. We already have solid ways of doing that. I don’t think we need to fine tune this further; rather, what is needed is the *political will and judgment* to make the appropriate distinctions and to act accordingly. A society that keeps trimming and back-tracking along the lines of, “Well, preaching hatred of the Jews and destruction of Israel, showing videos on beheading, etc., isn’t my cup of tea but it is free speech,” is an example of the sort of thing I have in mind. The authors insist that praising suicide bombers and recruiting for such is culpable behavior of some sort. I agree. But this assertion doesn’t settle the matter. There must be general assent to the proposition that *this* democratic society, our own, is worth defending and is a way of life we cherish. If we cave in, first on this ‘small’ point, then on that, we will die by a thousand cuts as, over time, these many small cuts too easily pave the way for massive acts of terrorist destruction.

Eighth, I would surround those acts of prevention of terrorism involving targeting specific persons with great caution and an appropriate wariness. One does not target a terrorist if, at that moment, he is in his apartment and that apartment is in a crowded building filled with non-combatants: this as a general rule. The authors should be more specific as to how many bystanders they have in mind when they discuss “targeted prevention of terror” that results in such damage. There may be exceptions to the rough and ready norm I suggest above, but the means deployed for these acts should err on the side of caution: better ethically to miss the terrorist than to kill dozens and dozens of innocents. That is the risk a decent society whose military functions under just war norms must take. “Collateral damage” can never be treated casually. There is no “acceptable” level of collateral damage that can be stipulated. Any such damage is unacceptable but there are moments that may go beyond that to fall under condemnation as unethical and even reprehensible.

These are terrible matters and they involve harrowing decisions. I agree with the authors that the “grave confusion” that collapses domestic policing and a military dealing with terrorist acts and threats, muddies the waters and does political damage. Those geographic areas and persons guilty of terrorist acts or plotting such acts that are not effectively within the domestic jurisdiction of a particular state cannot be treated as one would a bank robbery or a homicide. There are regular rules and procedures for that. Terrorism outside the jurisdiction of one’s own state is, literally, in a kind of legal no-man’s land. Yet the state fighting under just war norms and attempting to abide by universal codes of military justice, brings a measure of rule-governing to a situation that would otherwise be pure anarchy, or close to it. This does not, however, make it identical to the ‘thickness’ of domestic jurisdiction, rendering risible suggestions one heard in the aftermath of 9/11 that the US deputize a posse to go find Usama bin-Laden and arrest him. Arguments along these lines are often pronounced from a putative stance of moral and legal superiority, as if the one making the argument inhabits an ethically refined zone shunned by the ‘war-mongers,’ etc., etc. Losing contact with the nitty-gritty realities of geo-politics and military, legal, and ethical dilemmas in this way is sad and damaging if taken seriously.

Finally, the authors should be clearer than they are that nearly *all* intelligence made available to political and military leaders comes with a built-in degree of uncertainty and unforeseeability. Dealing with intelligence always involves interpretation: on balance *this* rather than *that*. We know that intelligence can be flawed, as was all the pre-Iraq war intelligence, whether the UK’s, the US’, the U.N.’s, that of the Germans and the French, in the matter of Saddam’s weapons of mass destruction – apparently. (The story of whence the WMD remains incomplete and untold in full, I believe.) In the aftermath of failing to uncover WMD, when those involved, political and military, *fully* expected that coalition forces would face chemical weapons, certainly, and bacteriological weapons, quite possibly, we here in the US are daily treated to a diet of slogans shouted at vitriolic fever pitch that “Bush lied/people died.” This sort of inflammatory claim derives from a number of flawed presumptions. One of these is the tacit conviction that intelligence comes in the form of: “We know the following absolutely. So we must do the following certainly,” and the like. Once again *phronesis*, practical judgment, the world of statescraft and warcraft, past and present, is eschewed in favor of a tick list and automatic behavior. There is no

substitute for judgment, however. Just war helps us all – leaders and ordinary citizens – to take our bearings in such a world. Where would we be without it?

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