

Comments on Shlomo Zuckier's "A Halakhic-Philosophic Account of Justified Self-Defense"

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I have various short comments on different parts of Zuckier's illuminating essay, from which I have learned a lot.

There is little point in this context in noting areas of agreement. My comments, therefore, will be concerned with parts of the essay about which I am skeptical.

In summarizing his argument in section VIII, Zuckier distinguishes four types of case: (1) *rodef*, in which either self- or other-defense is justified against a culpable threatener on the ground that the threatener has forfeited his right not to be killed; (2) a second case of *rodef*, in which the same justification applies in the case of an active though nonresponsible threatener; (3) *ba ba-mahteret*, in which self-defense, though not third-party defense, is justified on grounds of personal partiality against one who poses a threat, though not through his agency (for example, one who blocks the exit from a cave or a baby in the process of birth that threatens the life of the mother); and (4) persons whose lives are in conflict though neither directly threatens the other. Zuckier also assumes that killing an innocent bystander as a side effect of defensive action is impermissible. I will focus primarily on the third kind of case.

Although Zuckier cites an earlier essay of mine in noting some of the strengths of the personal partiality justification for self-defense, I have become even more skeptical of that approach than I was when I wrote the essay. In Zuckier's presentation of the view, it has a theological dimension. He suggests that it is arguable that "an approach justifying self-defense based on personal partiality is, at least within Jewish law, itself a right, conferred by God, that allows a threatened person to use lethal measures against the person threatening his life, even if that person's right to life is not forfeited." He goes on to describe the right of self-preservation against a nonresponsible threatener as a "Divine right of attacked parties." But no reason is given to explain why God would prefer the life of the threatened person to that of the innocent, nonresponsible threatener. As the Jewish tradition might express it, is there any reason to suppose that the threatened person's blood is redder than that of the nonresponsible threatener? If not, why assume that God favors the former over the latter?

The challenge here is to explain why someone who threatens without either agency or responsibility is any different morally from an innocent bystander. Consider the person who, through no fault of his own, has become stuck in the mouth of the cave and whose presence there threatens the life of another person who will die from being trapped in the cave unless he removes the blocker, which he cannot do without killing him. Next consider an innocent bystander who, through no fault of his own, happens to be positioned next to a murderer and thus will be killed as a side effect if the murderer's victim kills the murderer in self-defense. According to the view defended by Zuckier, the person trapped in the cave may kill the blocker *as a means*, though the potential murder victim

may not kill the innocent bystander even as a *side effect*. Yet the bystander is an obstacle to the survival of the potential murder victim in much the way the blocker is an obstacle to the survival of the person in the cave. The only difference is that, as the late Norwegian philosopher Gerhard Øverland has put it, the bystander is a moral obstacle whereas the blocker is a physical obstacle.

Thomson has offered another example of a physical obstacle. Suppose a person is sitting on a narrow bridge admiring the view. Another innocent person is being pursued by a *rodef* and can survive only by running across the bridge, thereby toppling the person who is already there to her death. Because the person on the bridge seems no different from the man blocking the exit from the cave, it seems that Zuckier's personal partiality justification permits this killing. But to me that seems deeply counterintuitive.

This raises another question. On p. 39 Zuckier notes that both "intuition, as well as the implication of *Sanhedrin* 73a," oppose a certain conclusion. It is of course nice when intuition and the implication of a Talmudic text coincide. But what is to be done when they conflict, as they seem to do in the case of the innocent person sitting on the narrow bridge?

Another claim about the personal partiality justification that I find curious is that "the attacked party has a right to favor his own life over that of his fellow ... and this right to self-defense need not depend upon a particular degree of certainty." As Zuckier quotes the Talmud as saying of the *ba ba-mahteret*, "If it is as clear to you as the sun that he is at peace with you, do not kill him; if not, kill him." This degree of license apparently does not apply in the case of *rodef*. But this seems to me to get matters entirely backwards. The constraints that apply to a personal partiality justification should be more stringent than those that apply to a justification based on the forfeiture of rights. The person whose only justification for killing in self-defense is personal partiality acts, as Zuckier acknowledges, "from a position of (justified and sanctioned) self-interest, not a selfless, objective standpoint of justice." It seems to me wholly implausible to suppose that the constraints on harming others are weaker when the justification for harming them appeals to self-interest than when it appeals to objective justice.

A couple of final miscellaneous points. On p. 30 Zuckier notes that "in Jewish law, the *rodef* forfeits his life by committing certain acts that are generally punishable...and in this case condemn him to death." This (as well as the passage cited on the previous page from Enker and Frimer) suggests that the permissibility of defense, at least in the case of a *rodef*, is derivative from the permissibility of punishment. Over the past few decades, secular moral philosophy has been moving in the opposite direction, seeking a justification for punishment in the principles of self-defense. Key authors in the secular literature include Daniel Farrell, Warren Quinn, Philip Montague, and Victor Tadros.

I was surprised by the Talmud's support for what I take to be the arbitrary distinctions drawn in the 2003 legislation in the US prohibiting "partial birth abortion." That legislation too prohibits the killing of a human organism either when the head protrudes from the woman's body or, in the case of breech birth,

when any part of the abdomen above the navel is exposed. There is, of course, a problem here for those who distinguish morally between fetuses and infants, and between abortion and infanticide. The problem is that these distinctions are based entirely on whether a human being is inside a woman's body or outside it. If the individual is partly in and partly out, it seems to be neither a fetus nor an infant. This is a trivial problem of language but conventional moral views absurdly elevate it to the level of a deep moral problem. Nothing could be clearer than that the morality of killing a human being cannot depend in the slightest on the relative proportion of its body that is inside and that which is outside a woman's body.