

What counts as a philosophical account?

In what is a very interesting paper Zuckier sets out to identify the rationale, or rationales, within Jewish law for the permission to kill in self-defence. He does so by reference to the discussion of similar issues in Philosophy of law. Zuckier presents a new and more subtle reading of Jewish sources to identify two, rather than one, distinct rationales that correspond to two distinct categories: the first rationale governs defence-of-self, which Zuckier titles "*mahteret*", and the second rationale governs defence-of-others, which he titles "*Rodef*". Situations of "*mahteret*" are justified by the Rabbis by reference to the idea of *im ba lehorgekha hashkem lehorgo*, which he reads as a "license or right, based on an independent principle authorizing the use of force within ... the law in [order to serve] the interest of self-preservation in the face of a threat".¹ Situations of "*Rodef*", on the other hand, are justified on a rights based theory. This more nuanced reading allows him to explain a wide range of Jewish sources and account for apparent contradictions that stem from the different limitations imposed in different scenarios discussed in various Jewish sources. Thus, for example, he can explain the more permissive rules that allow the killing of an attacker even where one is not sure that his or her life is in danger as compared to the strict certainty of threat-to-life requirement that is imposed on a person who comes to the help of another. Defence-of-self is wider, so the argument goes, because it relies on self-preservation, whereas defence others is limited because it is justified by a rights based theory and therefore it is limited by the forfeiture of the right to life of the attacker.

But Zuckier attempts to take his argument one step further and suggests the self-preservation rationale he identifies in Jewish law overcomes the difficulties that the parallel personal partiality justification faces in Philosophy of law discussions. The problem with the personal partiality approach is that it fails to provide us with a clear rationale for limiting this principle to the killing of only those who pose a direct threat to the defender. Presumably, if I am permitted to prefer my own life, then I should also be permitted to prefer my life over the life of an innocent by-stander, thus allowing me to use him, or her, in order to save myself (by using the person as a shield, or killing the person for his, or her, organs etc.). Zuckier argued that he can overcome this difficulty by recognizing self-preservation as a divinity granted right, but so granted only where another person attacks you.² Except, that this explanation does not really resolve this difficulty.

¹ Shlomo Zuckier, "A Halakhic-Philosophic Account of Justified Self-Defense", *The Torah u-Madda Journal* (16/ 2012-13) 21, 33.

² See, p. 35 and 48.

First, it is unclear what is the additional value added by the use of a terminology of "rights". The rights-based justification of self-defense is based on the correlative duty (not to kill) that the right to life creates and on the asymmetry between the rights to life of the attacker and the defender created when the attacker breaches his duty not to kill the defender. Zuckier, however, recognizes that his right of self-preservation does not create corresponding duties, and that there is no asymmetry between the rights of the attacker and the defender.

Thus, the terminology of "rights" simply tells us that we are permitted to preserve our lives in certain situations but not in other. But the questions remain unanswered – why is this right limited only to cases of an attacker? And who is regarded as an "attacker" for the purposes of this right (an innocent attacker, an person who poses a threat without any agency)? Simply stating that the limitations of self-preservation are defined in a certain way because God said so is not the type of answer that philosophical debates aspire to. What is missing is a logical moral reasoning. A logical answer to these questions, and such an explanation was not provided.

Finally, it should be noted, that contrary to Zuckier's assumptions,³ this right of self-preservation does not necessarily correspond to our intuitions. Bearing in mind that self-preservation is not about punishment of the wrong-dower but simply about preserving one's life, my intuitions, for example, are very uncomfortable with the use of lethal force where a person is uncertain that his life is being threatened, especially in circumstances where options, other than killing, are available (e.g. calling the police etc.). But in any case, though intuitions are a useful tool to examine our theories, their usefulness is limited, and cannot be a sole justification, or explanation, of an account.

³ See p. 2.