

Proportionality in Warfare

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The last two times Israel went to war, international commentators criticized the country's use of force as "disproportionate." During the Israel-Hezbollah war in 2006, officials from the United Nations, the European Union, and several countries used that word to describe Israel's military actions in Lebanon. Coverage in the press was similar—one newspaper columnist, for example, criticized the "utterly disproportionate... carnage." Two and a half years later, during the Gaza War of 2008-09, the same charge was leveled against Israel by some of the same institutions and individuals; it also appeared throughout the controversial U.N. report about the conflict (the "Goldstone Report").

This criticism reveals an important moral misunderstanding. In everyday usage, the word "proportional" implies numerical comparability, and that seems to be what most of Israel's critics have in mind: the ethics of war, they suggest, requires something like a tit-for-tat response. So if the number of losses suffered by Hezbollah or Hamas greatly exceeds the number of casualties among the Israel Defense Forces (IDF), then Israel is morally and perhaps legally culpable for the "disproportionate" casualties.

But these critics seem largely unaware that "proportionality" has a technical meaning connected to the ethics of war. The long tradition of just war theory distinguishes between the principles governing the justice of going to war (*jus ad bellum*) and those governing just conduct in warfare (*jus in bello*). There are two main *jus in bello* criteria. The criterion of *discrimination* prohibits direct and intentional attacks on noncombatants, although neither international law nor the just war tradition that has morally informed it requires that a legitimate military target must be spared from attack simply because its destruction may unintentionally injure or kill noncombatants or damage civilian property and infrastructure. International law and just war theory only insist that the anticipated collateral damage—the "merely foreseen" secondary effects—must be "proportionate" to the military advantage sought in attacking the legitimate military target. This sense of *proportionality* is the second *jus in bello* criterion; it has to do almost entirely with the

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foreseen but unintended harm done to noncombatants and to noncombatant infrastructure.

Paul Ramsey, the great twentieth-century ethicist, summarized the meaning and relation of these two criteria with characteristic bluntness in his book *The Just War* (1968):

One does not calculate a prudent number of babies to be murdered (directly killed) for the sake of any good consequences (such as getting at the government); but one may and must calculate the prudent number that will and may be killed as an unavoidable side or collateral effect of military operations targeted upon the force to be repelled and whose goal and other consequence is expected to be the saving of many more from slaughter or from an oppressive tyranny, or in order to preserve in the international system accepted patterns in the actions of states on which grave consequences depend. Direct attacks on a civil population can never be justified; but unfortunately—in this world to date—a good many incidental deaths and extensive collateral damage to civil society may still be knowingly done lest worse befall.

All the loose talk about proportionality during the last two Israeli wars provoked the prominent just war theorist and political philosopher Michael Walzer to jump into the fray. In an essay in *Parameters*, the professional journal of the U.S. Army, he noted the “anger over the ratio of deaths in the recent Gaza war—100 to one, Gazan to Israeli, according to figures accepted by the *New York Times*.” If those deaths “were all soldiers (fighters or militants) on either side,” Walzer wrote, “a ratio like that would simply be a sign of military victory, the deaths regrettable but probably not immoral.”

Walzer was perhaps being too charitable. The notion that a lopsided casualty ratio between the IDF and Hezbollah or Hamas militants is sufficient evidence of some moral failing on the part of the IDF so radically departs from any recognizable understanding of the requirements of proportionality and so evidences a lack of moral seriousness that one cannot help but wonder whether something even more pernicious was involved. Even some liberal political pundits were led to question the critics’ motivations. In the *Washington Post*, for example, columnist Richard Cohen argued that the critics’ appeals to proportionality were little more than “a fig leaf for anti-Israel sentiment in general.” Lanny Davis, the liberal lawyer and pro-Israel activist, called the appeal to proportionality a “double standard that is hypocritically applied to Israel.”

Proportionality and the Combatant

Although the *jus in bello* principle of proportionality has to do almost entirely with the foreseen but unintended harm to noncombatants, there is one exception—although even that exception does not give Israel’s critics a leg to stand on. Scholarly discussions of proportionality often mention the avoidance of *gratuitous harm*. For example, Sheldon M. Cohen notes in his book *Arms and Judgment* (1989) that the law of war requires that gratuitous harm against enemy combatants be avoided. This principle, explains Cohen, rests on the fundamental premise that “it is not the destruction of enemy forces, but the imposition of the nation’s will on the enemy that is the ultimate goal in warfare, and this can sometimes be accomplished by neutralizing enemy forces without destroying them.”

However, two points must be emphasized with regard to the avoidance of gratuitous harm to enemy combatants. First, to avoid causing gratuitous harm a combatant merely needs to stipulate that there is some military gain to be attained by the harm directed at enemy forces. That there should be no *gratuitous* harm does not specify the *proportion* between the military objective and the harm, much less a prescribed ratio between opposing combatants. Second, in some cases it may be possible for a combatant to avoid gratuitous harm by striving to achieve an objective without imposing significant casualties—for example, by isolating, ignoring, or bypassing an enemy defensive position or fortification. But, as Cohen is quick to add, “the law of war does not require this gentility.” It is not, Cohen writes, “morally incumbent upon the attacker to pursue these alternatives (and it is never legally incumbent on the attacker to do so).”

Why should we be wary of insisting that combatants have a moral obligation to isolate, ignore, or bypass an attack on an enemy position or stronghold, even though an attack may appear gratuitous? How can there be no moral obligation on the part of an attacker to pursue tactics that might decrease the number of enemy combatant casualties? Put simply, the law defers to the decision of competent military authority, since only someone in the command position is capable of making the requisite complex and interrelated strategic, tactical, and moral judgments.

Suppose, Cohen asks, that a combatant is contemplating an attack on a town where the enemy’s present position is hopeless. If attacked, it would certainly fall. Abstractly considered, one might think that a combatant has a moral obligation to avoid the gratuitous harm that an attack on the position would occasion, and offer terms of surrender. But then again, “in the

time it would take to get a response to a request for surrender the town could be reinforced, or perhaps it is vital that the objective be secured in short order. It is thus not morally incumbent on the attacker to offer terms to the defender, even if the defender's position is hopeless." The same line of reasoning would apply to bypassing or isolating rather than destroying a military target. Enemy soldiers occupying a bypassed or isolated target may live to fight another day. For these reasons, with regard to legitimate military targets, the law (always) and morality (almost always) defers to the tactical and strategic judgment of military commanders.

The War Against Just War

So the genuine legal and moral question of proportionality relates to non-combatants, a fact that was badly muddied by the critics of Israel's military actions in 2006 and 2009. For example, consider the comments made by Kofi Annan, then Secretary General of the United Nations, in July 2006. Briefing the U.N. Security Council, Annan began by conceding that Israel had a right to defend itself, that it had been attacked and so was fighting a just war. But in short order Annan proclaimed that Israel's response had been "disproportionate" and "excessive" so that Israel was not fighting justly. However, as Michael Walzer notes in his *Parameters* article, "Annan never provided a measure for proportionality or gave any indication of what number of dead civilians would not have been disproportionate and excessive—presumably the number in his mind was very low."

Ten days later, Annan acknowledged that Hezbollah was firing rockets into northern Israel "from positions apparently located in the midst of the civilian population." A few days after that, Annan dropped the qualifying term "apparently." So, comments Walzer,

Hezbollah was itself putting large numbers of civilians at risk. Did Annan consider those numbers to be disproportionate and excessive? He did not say. His politic position—that Israel had a right to fight, but only within the limits of an undefined proportionality—demonstrates the dilemma of justice in war very clearly, but not very helpfully. What is the appropriate measure? And once we know the answer to that question, how many deaths would it allow? What number of civilian deaths is "not disproportionate to" the value of destroying, say, a Hezbollah base in Lebanon, a Taliban base in Afghanistan, or a Hamas missile launching site?

Walzer's remarks here raise two distinct issues. The first has to do with the ultimate source of the appeal to an undefined "proportionality."

While anti-Israel sentiment surely accounts for some of the criticism, the abuse of the concept of proportionality has deeper intellectual roots. Walzer notes that when we argue about aggression, military intervention, and the conduct of battle, we now regularly use the language of just war; in 2002, he called this the “triumph of just war theory.” His critics responded by insisting that this did nothing more than provide new ways to justify war, to which Walzer now replies (in his *Parameters* article) that just war theory has more often than not been used the way it should be used: “to call for military action in a particular case and to reject military action in other cases.” Those who have followed the debate over just war and pacifism for the past several decades will recognize the pattern. But then Walzer gets to the crux of the matter:

Many clerics, journalists, and professors, however, have invented a wholly different interpretation and use, making the theory more and more stringent, particularly with regard to civilian deaths. In fact, they have reinterpreted it to a point where it is pretty much impossible to find a war or conflict that can be justified. Historically, just war theory was meant to be an alternative to Christian pacifism; now, for some of its advocates, it is pacifism’s functional equivalent—a kind of cover for people who are not prepared to admit that there are no wars they will support.

Walzer is not the first to notice what has variously been called a “crypto-pacifist” or “functional pacifist” reinterpretation of just war theory. As early as the 1960s, Paul Ramsey identified the problem, labeling it a *bellum contra bellum justum* (war against just war). Its fundamental line of reasoning is that all modern warfare—supposedly unlike pre-modern warfare—is inherently both indiscriminate and disproportionate. Therefore, since no war can meet the *jus in bello* tests of discrimination and proportionality, no war can be fought justly. And if no war can be fought justly, then the only moral option for a vast cohort of “clerics, journalists, and professors” has been pacifism—less the principled theological pacifism of the so-called “peace churches” than a modern “functional” pacifism. Among the most important and influential contemporary critics of this revisionist view of the just war tradition are James Turner Johnson of Rutgers University, who has conclusively demonstrated that such functional pacifism and moral confusion have no place within the just war tradition, and George Weigel of the Ethics and Public Policy Center, who for the past two decades has challenged such revisionist interpretations of the tradition among American Roman Catholics in particular.

While Walzer's remarks on the tendency toward functional pacifism are not particularly novel, they are nonetheless important for two reasons. For one thing, Walzer is arguably the most influential public intellectual in the fields of military ethics and just war theory. His *Just and Unjust Wars* (1977) is rightly considered a classic not merely in academia, but also throughout the U.S. military's formal education system, including the military academies, the command and staff colleges, and the war colleges. Second, Walzer is most decidedly a man of the left, so his reflections on this particular point cannot be dismissed as special pleading for conservative or neoconservative ends. He is an editor of the political quarterly *Dissent*, he is a contributing editor to *The New Republic*, and he regularly writes for that magazine as well as the *New York Review of Books* and other prominent outlets. It is not insignificant that Walzer, as an eminent left-wing academic, has acknowledged this fundamental distortion of the just war tradition and that he explicitly locates the recent charges of Israeli "disproportionality" within the context of that more fundamental controversy over how to understand the just war tradition. Indeed, Walzer acknowledges that the tendency toward thinking of the just war tradition as functional pacifism "is especially strong on the left," adding that this is why "it is stronger in Europe than in the United States."

Neglecting Responsibility and Discrimination

Walzer's question for Annan—did the Secretary General, who was so quick to charge the IDF with disproportionality, also consider Hezbollah's endangerment of civilians to be "disproportionate" and "excessive"?—could be put even more pointedly. Why didn't Annan and the other critics who claimed that Israel's actions were not proportionate explicitly condemn with at least as much vigor Hezbollah's systematic endangerment of civilians? Or do Annan and company believe that the hostage-shield tactics of terrorists and insurgents are required by "military necessity"?

Walzer is right to suggest that before discussing issues of proportionality we should ask questions about responsibility; the matter of just who put noncombatants at risk in the first place is logically and morally prior to questions of proportionality. That is just another way of saying that any morally informed discussion of the *jus in bello* proportionality criterion must first be considered in proper relation to the principle of discrimination. Walzer notes, for instance, that when Hamas or Hezbollah

fighters choose to fire rockets from heavily populated areas, when they deliberately choose to make a response to their rocket attacks morally difficult by hiding among civilians, or seek to ensure that a response will be condemned throughout the world, or decide to use civilians as human shields, “the primary responsibility for [civilian] deaths then falls on the Hezbollah or Hamas militants who were using them.”

Yet in any discussion of civilian deaths in warfare—not just in Lebanon and Gaza, but also in the U.S. operations in Afghanistan and elsewhere—the argument from proportionality is nowadays given priority over the argument from discrimination and responsibility. As Walzer puts it, “given our natural aversion to civilian deaths, it makes for an easy critique.” Claims of disproportionality are “simple and compelling,” Walzer writes, explaining that

proportionality without responsibility makes it possible for critics to condemn the military force that *causes* civilian deaths, whether or not it is *responsible* for them. When non-state organizations fight against state-organized armies, responsibility may lie on either side, probably on both sides, but it is almost always the army that will cause the greater number of deaths. Proportionality arguments are, therefore, favorable to the non-state actor, while responsibility arguments are necessarily discriminating. [Emphasis added.]

The belief that there is a bias against non-state actors has long been a complaint of leftist critics of the just war tradition and of the laws of war. This belief has led some extreme critics to reject entirely the idea of just war and to explicitly justify terrorism—as in this 1970 statement by George Habash, then leader of the Popular Front for the Liberation of Palestine: “There can be no geographical or political boundaries or moral limits to the operations of the people’s camp. In today’s world no one is ‘innocent,’ and no one is a ‘neutral.’” The more politically palatable and common version of this complaint is somewhat subtler: Because it would be a serious military liability for irregular forces—guerrillas and insurgents—to abide by the laws of war, particularly the civilian-protective requirement that combatants wear uniforms to distinguish them from noncombatants, it is licit for them to flout those legal requirements of the Geneva Conventions. Hence, Sheldon Cohen finds leftist academics like Princeton’s Richard A. Falk arguing that the Geneva requirements “seem to be weighed heavily in favor of the constituted powers of government and to carry over into the laws of war the statist bias of the overall system of the world order.” The first thing to go is the “dress requirement”

(as Cohen calls it) because it reflects a bias favoring regular troops, or, as Walzer puts it, a bias for “state-organized armies” over non-state actors. This insistence on clearly distinguishing between combatants and non-combatants, the argument goes, is unfair to guerrillas, insurgents, and non-state actors generally.

This challenge to the laws of war on behalf of irregulars connects back to the issue of proportionality. The same argument that “military necessity” permits irregulars to eschew uniforms can be extended to operational behavior; perhaps it also allows irregulars to use babies and noncombatants as shields. By this topsy-turvy reasoning, a non-state actor would escape moral censure even though he completely disregards the principle of discrimination, but a military force that abides by the principle of discrimination both in refusing to target civilians and in refusing to use civilians as hostage shields would be subject to censure because its collateral damage is deemed disproportionate. As Cohen remarked two decades ago:

It is one of the striking oddities of contemporary politics and values that military necessity, so indignantly and unanimously rejected when it is brought in to justify the behavior of regular troops, should be so timidly readmitted through the back door when it is guerrillas who have come to call.

Walzer’s New Doctrine

At first glance, Michael Walzer would seem to have little sympathy for such justificatory gymnastics. Earlier we saw that he rather quickly disposes of the notion that a lopsided ratio of combatant deaths—even “100 to one, Gazan to Israeli”—is inherently immoral. He notes, quite correctly, that even if many of the victims were civilians, “to take this asymmetry as proof of a crime is not a serious moral engagement with these wars. When non-state fighters and militants hide among civilians, they may well bear a greater responsibility for civilian deaths.”

If this were all that Walzer had to say about proportionality and non-combatant casualties then it would comport quite well with traditional just war theory. But at least since the publication of *Just and Unjust Wars*, Walzer has proposed a modification to the traditional understanding of discrimination and proportionality. Traditionally, the two *jus in bello* principles of discrimination and proportionality are understood to be related through the doctrine of *double effect*: An attack that harms civilians can be morally licit so long as, first, harming civilians is neither the goal nor the

means of the attack but a side effect (that is, a “double effect”), and second, the harm done is not disproportionate to the good sought through the attack. The proportionality principle governs the extent to which collateral damage is permissible.

But Walzer argued in 1977 and he continues to maintain that the traditional doctrine of double effect is too lenient. The traditional doctrine of proportionality “makes things too easy for the attackers,” he writes in his *Parameters* article. “For the most part,” proportionality has been a “darkly permissive principle.”

As a corrective, Walzer has proposed a revision that has been called the doctrine of *double intention*. It is not enough, he argues, for a belligerent to merely not intend to strike noncombatants; the belligerent must also positively intend to reduce the risk of harm to noncombatants. There must be, Walzer writes in *Just and Unjust Wars*, “a positive commitment to save civilian lives,” reducing the foreseeable evil “as far as possible.” To put it another way, not only should combatants *not attempt* to harm civilians; combatants should *attempt not* to harm them. An attacker has a moral obligation to “take positive measures to avoid or minimize injury to civilians in the target area,” he argues in *Parameters*, “even if it appears likely that the number of deaths caused by the attack would not be ‘disproportionate to’ whatever the relevant measure might be.” It is not enough to warn noncombatants in a combat zone that an attack is imminent, or to plead with them to leave. In Walzer’s view, soldiers have a moral obligation to place themselves at an increased risk of harm even for the sake of enemy noncombatants.

Walzer’s proposed doctrine of double intention has been criticized by adherents of the more traditional understanding of double effect. Cohen, for instance, in *Arms and Judgment* defends the traditional view as reflected in the moral reasoning behind the 1907 Hague Conventions. “The law of war implies that soldiers are not obligated to raise their already high stakes to even higher levels in order to lower further the risk to innocents in combat zones. This seems particularly reasonable in tactical combat, where civilians are usually free to leave the combat zone.” Cohen suggests that a simple moral guideline was the basis for the traditional understanding, namely “that the attacker may, given the presence of innocents in a combat zone, do anything that it would be permissible to do if there were no innocents there—subject to the restrictions entailed by the principle of proportionality.”

J.G. Fleury, a colonel in the Canadian military, also defended the traditional understanding in a 1998 research paper written for the

Canadian Forces College. Fleury argues that Walzer's conviction that combatants should assume greater risk "conflicts with military logic and the psychology of command." The traditional principle of double effect, Fleury writes, "provides the moral guidance necessary in such circumstances." What's more, "soldiers do not have the same positive duty to protect innocents among the enemy population, as they have to protect their own population, although they have an obligation not to harm innocents intentionally regardless of their nationality."

Rising to defend Walzer's revised doctrine, Steven Lee, a professor at Hobart and William Smith Colleges, claims that Fleury's arguments wrongly assume "that the moral status of civilians results from their being *enemy* civilians. Rather, their moral status, their right not to be attacked, results from their status as human beings, irrespective of their nationality." Lee here cites Walzer's own justification from *Just and Unjust Wars*: "The structure of rights stands independently of political allegiance; it establishes obligations that are owed, so to speak, to humanity itself and to particular human beings and not merely to one's fellow citizens."

Well, yes, of course the traditional doctrine of double effect does not deny that there are universal human rights; indeed, it asserts that enemy civilians and friendly civilians alike have the right not to be attacked *intentionally*. In the traditional view, the moral status of enemy civilians already does derive from "their status as human beings, irrespective of their nationality" (to use Lee's words). What the traditional view tends to resist is Walzer's suggestion that a soldier's obligation to put himself at greater risk for enemy civilians is identical to his obligation to his fellow citizens or to his civilian allies in a time of war.

Walzer is notoriously ambiguous on just how much additional risk a soldier must assume to prevent unintended harm to civilians and just how much the risk to civilians should be reduced. Even his defender Lee notes that Walzer's original formulation ("the foreseeable evil [must] be reduced as far as possible") is simply unworkable because "reducing the risk to civilians as far as possible would involve an open-ended increase in the risk to combatants or an abandonment of the military objective." This problem is not remedied in Walzer's *Parameters* article. He argues, for instance, that the Israelis must do "*everything they can*, including putting their own soldiers at risk" to avoid hitting innocent civilians in apartments when attacking a rocket launcher and its operators. Those responsible for selecting the target "*need to do the best they can* to discover how many civilians are in the building." Even if it appears that the number of civilian deaths would not be "disproportionate to" whatever the relevant measure

might be, says Walzer, the attacking force “must protect civilians as *best they can*—period.” (Emphases added throughout.)

The Perversity of ‘Double Intention’

Walzer’s proposed new doctrine is not merely a matter of academic dispute, as evidenced by a 2009 exchange in the *New York Review of Books* between, on one hand, Walzer and his Institute for Advanced Study colleague Avishai Margalit, and on the other, Tel Aviv University professor Asa Kasher and IDF Major General Amos Yadlin. In a previous academic article, Kasher and Yadlin had noted that “a highly important and sensitive issue is what priority should be given to the duty to minimize casualties among the combatants of the state when they are engaged in combat acts against terror.” In puzzling through this problem, Kasher and Yadlin insist that the fact that terrorists “reside and act in the vicinity of persons not involved in terror is not a reason for jeopardizing the combatant’s life in their pursuit. . . . The terrorists shoulder the responsibility for their encounter with the combatant and should therefore bear the consequences.” And they add: “Where the state does not have effective control of the vicinity, it does not have to shoulder responsibility for the fact that persons who are involved in terror operate in the vicinity of persons who are not.”

Walzer and Margalit completely reject this argument. They offer instead this guideline: “Conduct your war in the presence of non-combatants on the other side with the same care *as if* your citizens were the noncombatants” (emphasis in original). Walzer and Margalit invite us to consider four distinct hypothetical scenarios in which Hezbollah might attack and take over a kibbutz in northern Israel:

1. Hezbollah captured Manara and held all its members, Israeli citizens, as hostages. Hezbollah combatants mingle with the kibbutz members so as to be shielded by them from any counterattack.
2. Hezbollah captured only the outskirts of Manara, and a group of pro-Israeli, noncombatant volunteers from outside Israel—not Israeli citizens—who worked in Manara and lived near the border were seized and used as human shields.
3. Instead of well-wishing volunteers as in scenario 2, we now have a group of protesters from abroad, who traveled to the northern border of Israel to raise their voices against Israel’s policy toward Lebanon. As it happened, Hezbollah did not pay much attention to their protest, but seized and used them as its human shields.

4. Before Hezbollah captured Manara, the kibbutz was evacuated, and now Hezbollah brings in civilian villagers from South Lebanon, in order to claim that the kibbutz land belongs to them, but also to use them as human shields.

“We claim,” say Walzer and Margalit, that “Israel is morally required to behave in all those cases the way it would behave in the first case, when its citizens are held by Hezbollah in ‘a mixed vicinity.’”

The radicalism of Walzer and Margalit’s proposed guideline is evident in their insistence that it should apply even when noncombatants voluntarily intermingle with the terrorists. For the sake of argument, let us concede that the IDF (or any other military in an analogous situation) has a moral obligation to behave in the same way in the first three scenarios. But what about the fourth scenario? Are we really to say that whatever personal risks Israeli soldiers assume in the first scenario, they must also assume in the fourth scenario—even if the noncombatants *voluntarily* intermingle with the Hezbollah combatants, and even if other positive measures short of increased risk to the lives of IDF soldiers have been pursued? Here, Walzer and his coauthor reiterate his longstanding critique of the traditional principle of double effect. Israeli soldiers, he writes, are

fighting against enemies who try to kill Israeli civilians and intentionally put civilians at risk by using them as cover. Israel condemns those practices; at the same time, however, it kills far more civilians than its enemies do, though without intending the deaths as a matter of policy. . . . But merely “not intending” the civilian deaths, while knowing that they will occur, is not a position that can be vindicated by Israel’s condemnation of terrorism. So how can Israel prove its opposition to the practices of its enemies? Its soldiers must, by contrast with its enemies, *intend not* to kill civilians, and that active intention can be made manifest only through the risks the soldiers themselves accept in order to reduce the risks to civilians.

Walzer and Margalit’s intentions are admirable. They rightly insist that “the crucial means for limiting the scope of warfare is to draw a sharp line between combatants and noncombatants.” They rightly observe that terrorism is “a concerted effort to blur this distinction so as to turn civilians into legitimate targets.” And they rightly say that “when fighting against terrorism, we should not imitate it.”

But Walzer and Margalit are plainly wrong to claim that the only way to demonstrate opposition to terrorist tactics is “through the risks the

soldiers themselves accept in order to reduce the risks to civilians.” Israel or any other country’s opposition to terrorist tactics can be vindicated by not engaging in terrorism. It can be vindicated by condemning without equivocation those who do. It can be vindicated by not using civilians as shields.

Moreover, Israel’s intentions not to harm civilians can be manifest by other efforts to minimize collateral damage. As Kasher and Yadlin mention in their *New York Review* reply, Israel’s military actions in Gaza were preceded by “widely distributed warning leaflets, more than 150,000 warning phone calls to terrorists’ neighbors, and nonlethal warning fire—unprecedented efforts in every respect.”

Walzer and Margalit, in their final rejoinder, complain that these efforts are morally insufficient. It is not enough, they say, to warn civilians; an army must “try to find out whether civilians have in fact left—and any effort to collect that kind of information will probably put soldiers at risk.” But it is radical—indeed, morally perverse—to claim that an army that strives to forewarn civilians fails, like terrorists hiding behind civilians, to behave morally.

There is an obvious practical downside to the Walzer position. Kasher and Yadlin mistakenly impute to Walzer and Margalit the claim that collateral damage is “never morally acceptable.” They don’t quite go that far: their actual claim is that responsibility for collateral damage is transferred from regular combatants to irregular combatants only when the regulars significantly put themselves at risk to decrease the collateral damage. Still, Kasher and Yadlin are correct to assert that by supplanting the doctrine of double effect with the doctrine of double intention, Walzer “encourages and enhances terrorism” in a practical sense by insisting that moral state actors assume new operational obligations to protect civilians; by providing a greater incentive for terrorists and insurgents to hide among civilians; and by even providing an incentive for terrorist sympathizers to offer themselves up as hostage shields.

All this is not to suggest that counterinsurgency and counterterrorist military forces should *not* put their soldiers at greater risk in order to minimize collateral damage. In many counterinsurgency efforts, such risk-taking and heightened standards of civilian protection will be an essential part of a larger strategy to win the trust of the local population and to separate civilians from insurgents. But that increased risk stems from strategic calculation—from the fact that counterinsurgency operations require boots on the ground instead of just precision-guided munitions—not from a moral or legal obligation. *Pace* Michael Walzer,

the moral and legal obligation to enemy civilians, including those who willingly offer themselves to terrorists and insurgents as human shields, remains exactly where the traditional doctrine of double effect locates it: Never attack them directly. Never attack them as means to get at the enemy. And limit the unintended harm likely to fall upon them to that which is proportional to the just tactical and strategic objective. For the law of war to seek more than this is to incentivize what Paul Ramsey called the “wickedness” of using noncombatants as shields—and even the wickedness of terrorism itself.