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**“What’s Good for the Goose . . .”**

A paper presented to the SpheX Club of Lynchburg  
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# “WHAT'S GOOD FOR THE GOOSE...”

## SPHEX Club Presentation

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### INTRODUCTION

Years ago, when I supported myself by serving as a college professor and was often called upon to teach introductory level courses in philosophy, I was sometimes tempted to teach a beginning ethics course through the vehicle of fairy tales. I believe that the kernel of all great philosophy begins either with common sense insights into social behavior, or with the observation of normal daily human living. Most of the notable theories in ethics can be summed up with reference to a fairy tale, whether it be Grimm or not.

By way of example, let us begin with “The Little Red Hen”. As I am sure you will all recall, a mother hen once repeated the age-old tradition of asking for help with household chores. As common as the matriarch’s plea for assistance is, equally common is the response which the hen received from the cow, the horse, the dog and all the other assorted farmyard animals, save for the hero of our story – the little red hen herself. All of the other barnyarders were too busy to render aid. Pleas for support were repeated at each stage of the preparation, but the animals were all far too involved in their own personal projects to lend a hand. Only the little red hen was willing to plant the seed, gather the wheat, make the flour, roll out the dough and cook the bread. Finally, once the effort was complete and a warm, fresh, aromatic loaf emerged from the oven, the populace of this mythical farm rallied to assist in the eating of the bread. The little red hen protested, however. “Where were you when I gathered the wheat?” she asked. “Where were you when I ground the flour? “Where were you when I rolled out the dough and lit the fire and prepared the pan? “Oh no”, said the little red hen, “you could not trouble yourselves to help in the preparation of this bread, so you shall not share in its consumption.” “I was the only one who worked, so only I have mixed my labor with raw materials found in a state of nature and hitherto held in common, thereby increasing the

value of the product and gaining a property right over the bread which I may now defend with a level of force necessary not only to prevent this theft but also substantial enough to create a deterrent effect for possible future breaches of the natural rights to life, liberty, health and possessions which spring undeniably from the fact that all farm animals are born free, equal, rational and self-interested!”

OK, so the little red hen may not have said it in just that way, but you clearly get my point. The story of the little red hen is the perfect vehicle for introducing Locke’s theory of property, which yields from his notion of natural law and produces the most cogent formulation of the social contract theory of ethics ever devised.<sup>1</sup> Once Locke is on the table, we may then choose either to pursue an enquiry into the basis of liberal democratic thinking and the foundation of our own system of government, or to examine the development of concern for the proletariat’s right to control the means of production. Either the United State’s Declaration of Independence or Marx’s “Alienated Labour” are inevitable targets for discussion once we finish with “The Second Treatise of Government”. All this from The Little Red Hen.

Now consider at a second example. Please recall with me now the wonderful epic of the young girl with naturally blond hair who recklessly wandered into the Ursus den: Goldy Locks. While the mortgage bearing bears were out on their morning constitutional, the first item that our larcenous heroine encountered was a set of three bowels of porridge. The first was too hot, the second too cold, but the third was JUST RIGHT. After sating herself on the stolen victuals, Ms. Locks then decided to try her hand at rocking in a chair. The first chair was too large, the second was too small, but the third was JUST RIGHT. The third chair was so JUST RIGHT, in fact, that our young criminal rocked it into pieces. All of this breaking, entering, thieving and property destruction (which no doubt Locke and the Little Red Hen would soundly condemn) made the platinum-lidded perp so tired that she shuffled off to find a bed; first one that was too hard, then one that was too soft, and finally a third that was JUST RIGHT. While the fair-haired delinquent rested comfortably, her unwitting and unwilling hosts returned and found her fast asleep. They were dismayed at the state of their home, but their pigmently challenged guest

demonstrated yet another cat-burgling talent by slipping out the window before they could detain her.

Of all the fairy tales that we might tell our children, the moral message of this one is the most cryptic. This story does not glorify a life of crime, however, but to the contrary, it exemplifies an ancient philosophical doctrine: The Aristotelian Golden Mean. All virtues exist, says Aristotle, on a continuum between two vices; the vice of excess and the vice of deficiency. Courage, for instance, is a virtue that lies between Fool-heartiness and Cowardice. Cowards do not fight when they should. The fool hearty fight when they should not. Only the person with true courage is brave enough to face battle in order to defend an appropriate cause under the right conditions while being wise enough to retreat from unnecessary conflict. The list of virtues is nearly limitless, but whether we speak of Love, War, Honesty, or Financial Planning, they all rest as the mean between two extremes. Like the bears' porridge, chairs and beds, any value in the world can be expressed too much, too little, or JUST RIGHT.<sup>2</sup>

It is not my plan tonight to teach an introductory ethics course on the basis of fairy tales. The foregoing discussion has been something of a digression, based on the title of tonight's talk. It dawned on me while preparing this paper that in addition to fairy tales, nursery rhymes and idioms are often also fertile ground for insightful wisdom. I submit that the phrase "What's good for the goose is good for the gander" concisely communicates the basis of all ethical thinking.

The phrase "What's good for the goose is good for the gander", according to The New Dictionary of Cultural Literacy, Third Edition, is a modern version of an earlier proverb that states "What's sauce for the goose is sauce for the gander". The goose and gander are the female and male of the species respectively. The plain meaning of this saying is that what is fitting for a man is equally fitting for a woman. This short statement is a concise communication of our moral commitment not only to the principle of equality between the sexes, but more importantly to the notion that double standards are ethically unacceptable. This proverb is an anti-discrimination rallying cry. It applies not only to

gender, but also to any situation in which similarly situated individuals are subject to dissimilar treatment.

My introduction so far has been somewhat light-hearted, but our reliance upon children's stories and common quips should not veil the fact that we have clearly identified the core ethical commitment that transcends all theories of ethics, religious and secular, and that forms the basis for moral reasoning itself.

### MORAL REASONING

Ethics can, at its core, be understood as the value assumptions that are made, and the prescriptive expectations that are communicated, in social intercourse. Ethics begins with relationships. More than one being must engage in an interaction for ethics to emerge, and it emerges because we encounter conflicting claims. Whenever we act in a way that impacts someone else's life, it is fair for the subject of our activity to ask "why did you do that to me"? The stress in that sentence should be placed not only on the 'why', but also on the 'to me'. If you change my life, I can resist or acquiesce. My choice will depend upon the reasons that you have for acting as you do. If your behavior makes sense, I may support your choice. If it does not, I will question whether you are justified and alter my reaction accordingly. Make no mistake; this view of ethics begins with the assumption that we each have some base level autonomy right to control our own lives. More importantly, however, it asserts that ethics is by nature a project of reason. It rests on the view that each one of us must be able to explain to others the reasons for our behavior. If we cannot do this successfully, then we are ignored at best and overruled at worst.

Once we recognize that ethics is a function of reason that must be communicated, we demonstrate the value of our positions by applying those positions consistently. I cannot defend an action by appeal to a principle if I do not follow that principle in all similar circumstances. Consistency is necessary to demonstrate commitment. If I behave one way toward person A and another way toward person B, I can defend my actions when challenged by either A or B in only one of three ways. Either I must admit that my

behavior toward A is correct, and that I should change my behavior toward B, or I must admit that my behavior toward B is correct and change my behavior toward A, or I must show that A and B are different in morally relevant ways such that I can justify treating all A's as I treat this A and all B's as I treat this B.<sup>1</sup> These are the only three avenues available that allow me to demonstrate that my behavior makes sense, and that is imperative if I want to garner the respect and deference of my peers. One of the requirements for any theory for it to be an ethical theory is universalizability. I should be able to express my moral position without the use of proper nouns. Consistency is the heart of ethics, and it is captured by the simple proverb "What's good for the goose is good for the gander".

#### TONIGHT'S TOPIC

Over the past year I have been asked on a number of occasions in a professional capacity to discuss the ethical issues that emerge as a result of our confrontation with terrorist organizations around the world. This question has garnered significant attention, interestingly, not subsequent to the terrorist attacks of September 11, 2001, but more directly because of the response to those attacks in which our country has been, and is currently engaged. It is of significant ethical importance, and it will become a cornerstone of the argument that I present to you tonight, that our gravest ethical concerns and most serious moral debates have centered on the quality of our own actions and the treatment of our prisoners in the current conflict, rather than on the behaviors of others towards us.

May we torture prisoners in order to secure information that we feel is beneficial in prosecuting a "war on terror"? May we hold detainees for extended periods of time without charges, or hold them while we disregard standard judicial or military protocols? What moral constraints exist when we interface with an ill-defined, amorphous, yet clearly dangerous enemy?

These questions are very often posed in an environment of panic and uncertainty and they often assert the hidden assumption that we are operating in a new ethical reality that

is obviously and significantly different than previous contexts. The question, refined to its most concise formulation, examines the role and function of human rights in the age of terrorism.

Asked in this way, these questions posit more answers than they pose queries. The assumption that these questions belie is that 1) We are now in a new ethical context that is dissimilar from earlier epochs, 2) that terrorists occupy a different moral space than conventional adversaries, and 3) that standard rules of engagement or moral constraints on our actions do not apply --either entirely or in great part -- to our treatment of terrorists.

I intend, in my paper tonight, to dispel all three of these myths. I will argue that first, we are not in a new moral atmosphere that has hitherto been nonexistent. Second, terrorists do not exist in separate moral space from non-terrorists and our very ability to define certain types of individuals as terrorists demands that we jettison the concept that terrorists are fundamentally morally different than other enemies. Third, our normal approach to ethics and the standard modes of ethical reasoning apply equally well in the context of terrorism as they do in other areas of life. The stakes are surely higher in the modern world than they have been in other times, but the contemporary threat posed by terrorists is different only in degree, not in kind, from previous experiences in warfare. These are the theses that I will defend in this paper, and they concern themselves with the ethical underpinnings of a critical evaluation of Just War Theory and ethics in the time of conflict. I do not intend to discuss the legal aspects of these issues, as I believe that the law follows ethics in these areas and that a clear understanding of the ethics involved in this topic should causally determine the development of formal doctrine rather than the reverse. I look forward to the discussion portion of the evening to explicate the subtleties of my position that will, undoubtedly, be developed insufficiently in this formal presentation.

As a preliminary to our discussion of the ethical treatment of detained terrorists, it would be helpful to dispel another 'ethical myth'. Often, it is claimed, human beings have

natural rights that are "absolute" or "inalienable". This assertion, that particular rights exist from which we cannot be alienated, is the source of great intellectual confusion since, although the position is widely maintained and generally believed, it is also patently false. There is no such thing as an inalienable right. Even those rights that are delineated as inalienable in important national documents, such as the rights to life, liberty and the pursuit of happiness, are clearly not inalienable. Any of us who believe that criminals can be placed in jail must believe that the criminal can be alienated from his right to liberty and that the right to pursue happiness may be restricted. Those of us who support capital punishment or would kill in self-defense, or would accept physician assisted suicide, or would lay down our own lives to save our children's must also admit that the right to life has its limits. And thus, we see that even the most important rights that have been assumed absolute, are not.

I do not have the time this evening to articulate fully the philosophy of rights, but let me briefly point out that, regardless of the ultimate basis for rights, John Stuart Mill's statement, paraphrased, that 'a right is that thing which society ought to defend me in the possession of'<sup>1</sup> is probably an ample starting point. Although Mill argued that rights stem from the principle of general utility, others might argue for a deontological basis. Nevertheless, however we gain rights, it must be clear that there are circumstances under which people make claims against one another, and conflicts between these claims must be adjudicated in order for social living to commence. This is the basic concept of a right. Rights can generate correlative obligations, in which case we refer to them as power rights, or they may merely create a claim of non-interference, in which case we refer to them as liberty rights. In either event, we can possess important and powerful positive or negative rights, but none of them are absolute.

A person can be alienated from his or her rights in three specific ways. First, he can relinquish his rights. By giving a gift, for instance, a person transfers a property right to another, and loses his own claim over the object that was previously his. Rights can also be lost by forfeiture. When a criminal engages in a crime, for instance, she forfeits certain of her rights depending upon the circumstances of the activity. Finally, rights can

be overridden. While relinquishments involve voluntary self-alienation from rights and forfeitures involve the loss of rights secondary to volitional ethical infractions, overrides take place when a more important, higher priority right comes into conflict with a lesser right. When a man is drafted and sent to war, he is not chosen because he deserved punishment, and he does not go voluntarily. Rather, he is compelled to go because a greater value than his own life hangs in the balance. This description does not apply to all drafts, unfortunately, but only to those that are ethically justifiable.

The point of the last few paragraphs is not to provide a complete analysis of the concept of human rights. Rather, I mean only to defend the view that while rights do exist, no matter which theoretical position you adopt to support them, they cannot be absolute. They are routinely discarded, transferred, lost or overpowered. It would be wrong, then, to assume that the right not to be tortured or detained without charges is absolute. To the degree that these rights exist either ethically or legally, their bearers can be alienated from them under appropriate circumstances. Therefore, no simple answer to the question as to how terrorist prisoners may be treated obtains. A careful analysis is required.

Before we can begin to examine any specific moral topic, such as our ethical obligations in dealing with terrorists, it is necessary to discuss the basis of productive moral reasoning more completely than we have thus far. The very structure of ethical analysis itself will steer tonight's discussion in a profitable direction by clearly demonstrating the modes of discourse that fail as ethical explication -- and retain only the character of dogmatic assertion -- while simultaneously illustrating the deep agreement that I am confident we already share with regard to basic ethical assumptions.

If my argument to this point is reasonable, it should be clear that ethical discussion is a process by which conclusions are defended on the basis of rational evaluation. Ethical positions can be wrong, and they are demonstrated to be such when they fail the tests of rational explication. The 'whys' of ethics are often more important than the 'whats', and an understanding of this point will limit our selection of options in response to physical attacks from others, including terrorists.

Let us continue, therefore, with the project of describing the structure of moral reasoning.

## THEORY

If I were to ask this group to represent graphically the structure of morality, I have little doubt that the majority would develop a top-down picture. The schematic might look something like that indicated on the left side of your handout and in Appendix A. According to this view of ethics, which I term the theoretical model of moral reasoning, generalized theories of value exist at the very top of the structure with long, unidirectional lines causally impacting our behavior in specific cases depicted at the bottom of the diagram. This model of moral reasoning is the intuitively common conception, but it is fatally flawed.

According to the theoretical model, meta-ethical or normative theories drive our practical decision making, while our experience with practical ethical problems is incapable of impacting our theoretical commitments. This model fails for at least three reasons.

The first reason why the theoretical approach to ethics fails is that it completely disregards the fact that morality is a pragmatic science that admits to scientific-method-like reflective equilibrium. In other words, we must be open to the possibility that unintended consequences of specific ethical commitments could force us to reconsider the content of our assumed ethical premises. This process of recursive evaluation of the implications of our theoretical commitments, and adjustment to those commitments when we find that they conflict with acceptable pragmatic outcomes, is the source of moral progress. We might accept the implications of a particular moral position like slavery for instance, but then find later that continuation of the practice so conflicts with other of our ethical values that those other assumptions and slavery can no longer intellectually coexist. When this happens, we must decide which assumption is more dear, and adjust the other in order to bring our consciousness back into "reflective equilibrium". A

theoretical approach to ethics does not allow for this balancing to occur, and is thus flawed.

The second reason why the theoretical model of moral reasoning fails is that it is contingent upon an untrue and unrealistic assumption that theoretical unanimity is extant, possible, or even desirable. In order for the theoretical model to work, all people must begin with the same normative ethical values. Even if it were possible to generate agreement on this level of discourse, agreement does not currently exist. Nevertheless, we are capable of making progress in ethical discussions. Logically, therefore, this view of ethics must be incorrect. It asserts that practical agreement is contingent upon theoretical agreement, and yet we live in a world where practical agreement exists on many matters in the absence of theoretical agreement. The beginning assertion of this structure is flawed.

#### LOGICAL PROOF OF THE FALLACY OF THE THEORETICAL APPROACH (Appendix B)

P= practical agreement T= theoretical agreement

- |                          |   |                            |
|--------------------------|---|----------------------------|
| 1) $P \leftrightarrow T$ | P if and only if T  | Premise                    |
| 2) P                     | P is true   | Assumption                 |
| 3) $\sim T$              | T is not true   | Assumption                 |
| 4) $P \rightarrow T$     | If P then T   | 1 Law of the Biconditional |
| 5) $\sim P$              | P is not true   | 3,4 Modus Tolens           |
| 6) $P \& \sim P$         | P is true and P is not true   | 2,5 Conjunctive Property   |
| 7)                       | We have derived a contradiction, so premises 1,2 and 3 are inconsistent.<br>This theory is false. |                            |

The third problem with the theoretical model of moral reasoning is that it would be wildly unsuccessful even if we were to posit the counterfactual environment of theoretical consensus. We might, for instance, disregard the proof demonstrated in the previous paragraph that practical ethics must be driven by theoretical agreement, and either claim that although alternatives exist, theoretical agreement would be preferable to other avenues to moral consensus, or we might posit theoretical agreement for the sake of argument. Even if we were to make these counterfactual assumptions, however, this model of moral reasoning still fails.

Assume the counterfactual that we all, in this room now, are Christians. This assumption is false, but that discussion leads back to the previous refutation of the theoretical approach to ethics. For the sake of argument, assume that we all adopt the same theoretical view of ethics; we are all Christians. Do all Christians agree about what to do in all circumstances? Clearly not. Our history demonstrates without doubt that the lines running from theory to practice are very long and admit to wide varieties of interpretation. Even those who share the same faith base, one that posits a single source of moral value that is revealed in true form, cannot agree on what that theory demands in real life. It seems that theoretical agreement does not generate practical agreement, so this view of ethics is unable to assist in the project of moral living. Even if we grant the theoretical model every possible benefit, it still demonstrates its fallacious character.

#### CASUISTRY

Although I have now demonstrated that the most intuitively appealing structure for moral reasoning is inherently flawed, hope for ethical progress should not be lost. An alternative exists as depicted on the right side of your handout and in Appendix A. Unlike the top-down model of moral reasoning that I called the Theoretical Approach, the Casuistic Approach is a bottom-middle-down model of moral reasoning. It begins with experience, moves up to the level of pragmatic operational principles, and then goes back down to the level of action. This model of moral reasoning can either be considered a form of ethical invention or ethical discovery, depending upon the assumptions that one adopts on the subjectivity-objectivity debate, but its practical power remains intact in either event. This approach to ethics represents a much more accurate depiction of how we think ethically, solve ethical problems and teach ethics to our children. This model is practical and efficacious. It is, in fact, accurate.

Casuistic reasoning begins with the recognition of a difficult ethical problem. We usually know when we are facing an ethical problem, and the first step to success in resolving it is to recognize the need for rational evaluation. The method by which casuistry operates is to compare a difficult and unknown case with easy or known

analogues. Our wealth of experience in moral decision making should furnish us with a store of case examples that are similar enough to the current case to allow solid comparisons, but different enough to avoid the complexities of the difficult case. Based on our commitment to consistency, we examine our own behavior in paradigmatic circumstances where our moral intuition is clear in order to derive a set of operational principles to guide our behavior in cases where our moral intuitions are less clear.

For example, suppose that a doctor explains that my grandmother is very ill and is having trouble breathing. She is incapacitated, and as next of kin the physician needs my guidance as to whether or not my grandmother should be intubated (placed on a mechanical ventilator). I am ethically lost. I am emotional. I am not sure what do to in this case. In order to reason my way to an ethical conclusion, I need to compare and contrast my grandmother's case to that of known analogues. In order to engage casuistry productively, I will need a minimum of two examples. First, I need an example of ethical withholding or withdrawal of life prolonging care, then I need an example of unethical withholding and withdrawing of life prolonging care. Once I am armed with these two examples, I will be able to locate my grandmother's case on the continuum between these two paradigms and determine whether her situation is more like one or the other. I will have reasoned my way to an ethical conclusion.

To continue the example, the next step would involve describing a non-controversial choice to withhold ventilator support. This would most likely involve a patient in a terminal condition who suffers from intractable pain and has made a clear choice to avoid invasive supports. The last point, that the patient has chosen to avoid intubation, may be the most important of all, but we want to find the most obvious and least controversial version of the paradigm, so we should include all of these factors.

The next step requires that we locate a suitable contrary paradigm. Imagine that I consent to a DNR order for my grandmother because my financial situation is stressed. I am having trouble paying my own mortgage, and if my grandmother were to die now, I could inherit her money before the end of the month and pay off my house. Clearly, this should not form the basis of a choice to withhold life prolonging care. We are now

armed with all that we need to make an ethical decision for grandma. All I need to do is ask is whether she would want to be on a ventilator in her current state of affairs, and avoid making the decision based on my secondary gain. If grandma is more like the patient in my first hypothetical, then there is no ethical problem with securing a DNR order. If she is more like the unfortunate victim in my second hypothetical, then it would be wrong for me to consent to the DNR.

Let me explain casuistry again, in another way, by employing an analogy to orienteering. When lost in the wilderness it is possible to find your way home with a minimum of difficulty only if you are trained in the art of orienteering. The process of orienteering involves three basic tools: a map, a compass, and a clear view of the landscape. By orienting yourself on your map after viewing the landscape, it becomes an easy matter to use your compass to plot a course to safety. This goal, of finding our way through an unfamiliar wilderness into an area of known comfort and safety, is exactly the project of ethical decision making. Our goal, therefore, is to become expert in the activity of moral orienteering.

In order to make this analogy work it is necessary to provide more detail regarding the process of orienteering. When a person orienteers, his first job is to figure out his current location. In order to do this the lost person must find at least two clearly discernible landmarks. By using his compass, he must figure out where he presently sits in relation to those landmarks. If a mountain top is due west, for instance, then he can look on his map and see that on the map he must be standing somewhere on a line that is drawn from the mountain to the east. If he is due south of a bend in a river, then he knows that he must be standing somewhere on a line that is drawn on his map from that bend to the south. Knowing the location of these two landmarks and his orientation to them, he is sure that he can be nowhere in the world except at the intersection of the two drawn lines.

Orienteering in an ethical way is identical to orienteering in the physical way. If someone finds herself in a morally difficult situation, the first thing to do is to look for clearly definable features of the moral landscape. Next, she must determine how close her

present situation is to those features. Once she has located herself on her moral map, she is able to plot a course to safety.

As indicated above, we can apply this approach when making decisions about whether or not to engage life-prolonging care for a patient. First we must find some clear intuitions in this area. We need to find an example where allowing a client to die would be clearly wrong (murder). Then we must find an example of permissible death (a Do Not Resuscitate Order for a consenting terminally ill patient who is in pain). Next, we must determine whether the present case is more like the former or more like the latter. Finally, after comparing our present situation with the two intuitively clear cases, we must determine how the present case is similar and dissimilar to each of those examples. Armed with this information, we will be able to determine our moral location and generate an appropriate answer to our conundrum.

To complete this analogy, I should note that the basic tools of orienteering -- the map, compass, and clear view of the landscape - have counterparts in moral discourse. Our moral compass is reason. It is reason that can lead us through the confusing emotions and variation of viewpoints that are a perennial feature of ethics. Our moral map is based on intuitions that are derived from consideration of clear cases upon which most of us agree. Although each individual moral map may be slightly different from others, there are clear social landmarks that appear on all of our moral maps. Many social expectations are inescapable and obvious. These features form the basis of our common moral map. The clear view of the landscape which is so important to orienteering is often the most difficult ethical tool to secure. In the physical world, it might be necessary to climb a tree or hike up a hill to gain this perspective. In the ethical world, developing a clear view of the landscape can also require effort. Only by engaging in a careful discussion of issues among numerous people with distinct viewpoints can we develop a clear sense of the issues that surround us. In a hospital, the ethics committee is the source of our clear view of the surrounding terrain. Tonight, it is the SPHEX club membership.

To summarize: Casuistry is like reverse engineering. If I know how a system works under given conditions, I can design either software or hardware that behaves as

indicated. I can then apply this design to new scenarios and trust that the behavior it exhibits is consistent with intended parameters. This is precisely how we think about ethics on a daily basis. Today's challenges become tomorrow's precedents. We even teach our children about ethics by increasing their empathy when we ask them how they would feel if they were in their victim's shoes, and we expect them to extrapolate to behavioral principles from observance of common circumstances. Casuistry is context sensitive, but it is not radically subjective. It demands consistency, and is thus a powerful tool for generating ethical insight. Let us see now how it fairs in the realm of human rights in the age of terrorism.

#### THE DOMESTIC ANALOGY

To begin the casuistic process of moral orienteering with regard to our response to terrorists, we must first catalogue our ethical assumptions in the field of just warfare generally. Many argue that ethics does not apply when it comes to war, or that ethics does apply to warfare in a radically different way than anywhere else. I would like to argue that both of these assertions are false. Once we adopt a casuistic understanding of ethics, it becomes clear that ethics is, by its nature, context sensitive. Extreme circumstances may justify extreme response, but this is reasonable not because ethics is suspended in these circumstances, but precisely because it is not. The only way that we can justify an extreme response to an extreme threat is by reference to moral thinking. We endeavor to show both the similarities and differences between extreme and normal situations in an effort to explain how our current response is consistent with ethics and not a violation of it. Rather than merely rejecting the notion that our actions need to make sense, we refer to the extremity of the situation in order to justify our response. This fact shows that our commitment to consistency remains intact even in warfare, and that we naturally understand that warfare is significantly different enough from normal life to justify an alteration in our normal expectations, but not a suspension of our commitment to ethics.

In order to clarify the ethics of warfare, in a casuistic way, it is common to refer to another extreme situation that is close enough to everyday living to be familiar, but close

enough to warfare to be relevant. This line of reasoning is known in the literature as “the domestic analogy”.

Imagine that an aggressor enters your home and threatens your family. What may you do to defend yourself and your loved ones? What conditions must apply to justify the use of force? How much force can you use? As noted, this situation is clearly not the norm. It posits physical violence, and the need to respond to that violence. Nevertheless, none of us believe that the need to engage in an act of self-defense completely obliterates ethical obligation. In fact, our society has gone to great lengths to define how our normal concepts of ethics apply in this type of situation. If we were to spend the time now, in open discussion, to determine what is permissible to protect yourself and your family when threatened, we would probably generate a list that includes the following features.

First, it is likely that none of us would allow a person to respond violently unless there is a risk to begin with. The extreme nature of the situation is defined by the threat itself. If there is no threat, the situation is not extreme, and no special response is justified. The first requirement, therefore, for ethical violent activity is justification: it must be true that we engage in violence in order to defend ourselves, otherwise force is not indicated. A more complete explication of this criterion would involve a discussion not only of the fact that one person places another person at risk, but also an examination of the culpability of the parties involved. It seems obvious, for instance, that my justification for acting can be weakened if I am in some way responsible for the circumstances. The standard paradigm involves a guilty aggressor and an innocent victim. It is possible that victims may still defend themselves against innocent aggressors (such as those acting under compulsion), and that they may defend themselves even if they are not entirely innocent. These subtleties might best be left, however, for the question and answer period. The key point here is that, as a general rule, we must have a reason that justifies acting violently towards others in order to do so ethically.

The second requirement necessary for the ethical use of force is that the amount of force used must be commensurate with the level of harm threatened. It is clear that if I am at

risk of death or serious injury, I may use serious and potentially lethal force to defend myself. On the other hand, it is not clear that I may use lethal force to defend my property and it is certainly clear that I may not use lethal force to protect myself from minor inconvenience. There is no doubt that extreme response is only justified when there is extreme threat. The second factor that is necessary for justification of violent activity, therefore, is proportionality.

The third restriction on the use of force is based on the idea that the force must be directed toward an appropriate target. If a person unjustifiably threatens me, he has forfeited his own right to life and safety, and he no longer has an active claim that prohibits me from subjecting him to violence consistent with the first two requirements as defined above. The mere fact that I have been subjected to harm does not, however, release me of an obligation to respect everyone's right to avoid harm. Functionally, the fact that I am subjected to risk does not have direct ethical effect *on me*. It is the aggressor's actions that create ethical impact *on him* by rescinding his right to safety, which indirectly, results in an increased range of action on my part, only with regard to the aggressor. I may not, on this view, indiscriminately attack others. I must target those who subject me to harm and not to innocent third parties. This third requirement demands that I discriminate carefully in the use of violence.

The conclusion of this discussion is that while there are times in the course of life when I am ethically justified in using force to protect myself or others as their proxy, the use of such force is constrained by specific requirements including justification, proportionality and discrimination. When we engage in the casuistic activity of comparing this analogy based on domestic interactions with the international prosecution of a war effort, the same constraints seem to apply. Countries ought not to go to war unless A) they are justified in doing so on the basis of a threat that is posed, B) the amount of force that is used is commensurate with the level of harm that is threatened, and C) the selected recipients of attack are legitimate military targets.

Criteria (A) and (B) also combine to entail the proposition that warfare must be a last resort, as the existence any less devastating alternative would demonstrate either that the use of force is not justified or that it is excessive (i.e. non-proportional). Criterion (C) implies a fourth criterion when it comes to international conflict. On the domestic level, discrimination is the responsibility of the party who engages in defensive violence. It is necessary that the person who actually defends himself be convinced that justification, proportionality and discrimination are satisfied. When it comes to international conflict, however, few individuals are in a position to evaluate the applicability of these criteria. For that reason, a responsible party must be identified who can make the relevant judgments. Warfare will only be ethical, therefore, with the addition of a fourth criterion: authorization. No individual may act as a free agent in warfare without risk of failing to satisfy the requirements of the domestic analogy. War, as Clausewitz is famous for noting, is the continuation of diplomacy by other means.<sup>3</sup> As such, it still falls within the realm of national authority.

Our final list of conditions for just war therefore includes (Appendix C):  
JUSTIFICATION: A threat must exist, no other alternative for response  
PROPORTIONALITY: Amount of force commensurate to threat, last resort  
DISCRIMINATION: Legitimate target, protection of third parties  
AUTHORIZATION: Organizational discrimination

#### OUR RESPONSE TO TERRORIST ATTACK

It is now finally possible to turn our attention to the core of tonight's topic. What are the ethical constraints that apply when we respond to terrorist attack? To begin this discussion, we must ask two even more uncomfortable but basic questions. Was the September 11, 2001 attack on the World Trade Center wrong, and if so, why? I will leave aside the attack on the Pentagon, as one might argue that the Pentagon is a bona fide military objection, while a similar claim about the World Trade Center would be difficult to defend. Was 9/11 wrong?

I have no doubt that everyone in this room tonight believes that the 9/11 attack was wrong, but it would be interesting to know why you think so. It cannot simply be because so many people died. In warfare, this degree of asymmetrical loss is considered a "high kill ratio" and is exactly the goal of our military planners. Surely the hijackers did not do anything unethical simply because they were efficient and effective. There must be more to our answer about why the attack was unethical.

I submit that the reason why the September 11 attack was ethically objectionable is because it failed the tests of 'discrimination' and 'authorization'. There is also a questionable application of 'justification' and 'proportionality'. We condemn the 9/11 perpetrators because we believe that they were not directly threatened by the people working in the World Trade Center, that the attack was not necessary to dispel risk to them even if they were threatened, and that they did not have authorization as part of a diplomatic effort gone violent to initiate an act of war. In order to condemn the hijackers, we must rely on just war theory.

The only bases upon which negative ethical evaluation of terrorism is even possible, are the intuitively accepted concepts outlined in this paper, and the fact that terrorists routinely and intentionally violate them. Terrorism is designed to target non-combatants in order to generate fear in a populace. The terrorist seeks as his goal, the destruction of individuals who do not pose a threat to him. He attempts to remediate the asymmetry of force between himself and his enemy country by explicitly and volitionally transgressing the ethical bounds of the use of force. That is why the terrorist is unethical, and that is perhaps the most decisive proof that just war theory is accurate.

We cannot condemn terrorists without moral rules for warfare, and we want desperately to condemn terrorists. Therefore, we must accept the rules! However, what is good for the goose is good for the gander. If we do not maintain a commitment to consistency, then ethics itself is at risk. The argument is now complete. We feel correct in condemning terrorists, but we can only do so if there is morality in warfare. In order to have morality in warfare specifically, we need ethics generally. Ethics generally

demands consistency, so the rules we apply to others must also apply to ourselves. What then, is the implication of consistency for our own behavior toward terrorists?

As noted, rights are never absolute. Therefore, the right not to be tortured cannot be absolute. There are imaginable environments in which torture might meet the conditions set forth above. However, in practical application, those conditions are almost never met. Torture of prisoners is not absolutely wrong, but its current manifestation when applied to suspected Al-Qaeda operatives in U.S. detention fails the tests of 'justification' and 'proportionality'. We can see no ticking time bomb and we have no evidence that the use of torture is the least destructive means of achieving safety. In fact, the longer that people are held in detention, the weaker the justification for torture necessarily becomes, as its relevance to emergency situations erodes.

In its current context of secrecy and denial, torture also clearly violates the test of 'authorization', which calls into question 'discrimination'. Engaging torture while professing abstention is inconsistent with the authorization that is granted by our democratic system of government. In short, torture would only be ethically acceptable by our government in a time of extreme threat, where any delay in responding to the threat would be catastrophic, where no other less destructive means of generating information is available, where there is high confidence in the reliability of torture as a means to avert the specific known threat, and with full disclosure to the electorate. I do not believe that these conditions apply to our current circumstance.

## CONCLUSION

It is important for us to remember that terrorists view themselves as combatants. That places them within a moral context. We should not seek to marginalize their behavior and remove them from that context, but rather, to use their own self-identification as a basis of ethical evaluation. Failure to do so undercuts our own desire ethically to condemn their behavior. It is a mistake to characterize our current circumstances as being an "age of terrorism" as if this creates a new ethical epoch. Conventional ethics handles our current situation quite well, and actually make it possible for us to

differentiate between those whom we condemn and those whom we support. Terrorists are not different, they are wrong. They don't play outside the rules, they violate the rules. But they cannot violate rules that do not exist, so the rules are still in force. Terrorists are not different, they are wrong... and I don't want to join them.

## End Notes

- 1) It is important to note that not all discrimination is ethically questionable. Discrimination on the basis of morally relevant difference is not only defensible, but often preferable. Unethical discrimination only occurs when the distinctions are based on morally irrelevant characteristics, the content of which depends upon the circumstances and the practical intent of the categorization.
- 2) See Locke, John Second Treatise of Government, Hacket Publishing Co, Indianapolis, IN 1980.
- 3) See Aristotle Nicomachean Ethics, Bobbs-Merrill Educational Publishing, Indianapolis, IN 1981 especially book two
- 4) There are actually two relevant statements from J.S. Mill's essay "Utilitarianism" in Mill, J.S. Utilitarianism, On Liberty and Considerations on Representative Government, H.B. Acton ed., E.P. Dutton & Co, New York, NY 1972, p. 50.

"When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it."

"To have a right then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility."

- 5) This statement is actually the title of Chapter One Section 24 of Clausewitz, Carl Von On War, Princeton University Press, Princeton, NJ 1984, p. 87 This translation reads "War Is Merely The Continuation Of Policy By Other Means."

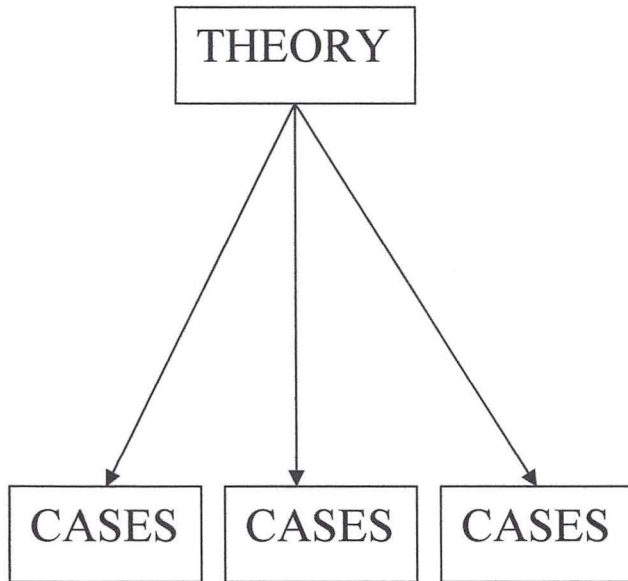
- Throughout this paper I have shifted between using the term 'moral' and 'ethical'. Although there is an important technical difference between these terms, it is often misunderstood and abused in common usage. In order to avoid such errors, I have conflated the terms and used them interchangeably. I can offer a more complete defense of this choice during the question and answer period if it becomes relevant.
- One of the landmark works in just war theory is Just and Unjust Wars by Michael Walzer, Basic Books Inc. New York, NY 1977
- Also see War and Moral Responsibility edited by Cohen, Nagel and Scanlon, Princeton University Press, Princeton, NJ 1974

# APPENDIX A: METHODS OF DOING ETHICS

## “Theory and Casuistry”

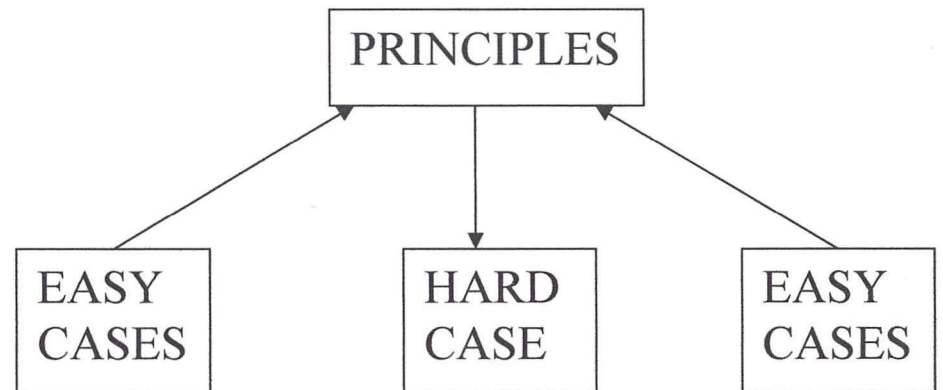
### Theory

Top-Down Reasoning



### Casuistry

Bottom-Middle-Down Reasoning



# APPENDIX B: FALLACY OF THE THEORETICAL APPROACH

## LOGICAL PROOF OF THE FALLACY OF THE THEORETICAL APPROACH

P= practical agreement T= theoretical agreement

- |   |                             |                            |
|---|-----------------------------|----------------------------|
| 1) $P \leftrightarrow T$  | P if and only if T          | Premise                    |
| 2) P  | P is true                   | Assumption                 |
| 3) $\sim T$   | T is not true               | Assumption                 |
| 4) $P \rightarrow T$  | If P then T                 | 1 Law of the Biconditional |
| 5) $\sim P$   | P is not true               | 3,4 Modus Tolens           |
| 6) $P \& \sim P$  | P is true and P is not true | 2,5 Conjunctive Property   |
| 7) We have derived a contradiction, so premises 1,2 and 3 are inconsistent. |                             | This theory is false.      |

# APPENDIX C: CONSTRAINTS ON JUST WAR

JUSTIFICATION: A threat must exist, no other alternative for response

PROPORTIONALITY: Amount of force commensurate to threat, last resort

DISCRIMINATION: Legitimate target, protection of third parties

AUTHORIZATION: Organizational discrimination