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### Conflict of Rights and the Outbreak of the First World War

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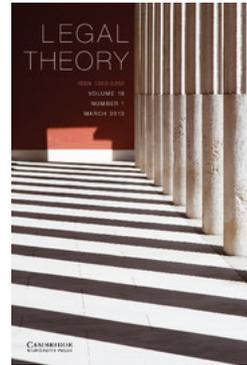
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# CONFLICTING RIGHTS AND THE OUTBREAK OF THE FIRST WORLD WAR

Leo Katz\*

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Austria was no more wrong in opposing our claims than we were  
in making them.

—Bismarck, on the Austro-Prussian War of 1866.<sup>1</sup>

Is it possible for good men to come to blows without anyone being to blame? And was World War I a real-life realization of that possibility? Those are the two questions this essay means to pursue.

My answer is “yes” to the first and “maybe” to the second of these questions. Conflicts in which all parties are within their rights turn out to be an everyday feature of our everyday morality.<sup>2</sup> On at least one reading of what happened, the outbreak of the First World War was such a conflict. There is more tragedy in that than in a conflict between right and wrong. Peace and Justice turn out to be strangely incompatible bedfellows.

## I. SOME HISTORY

I am not the first criminal law scholar to take a crack at this issue. In late August, 1923, the German Parliament approached one Hermann Kantorowicz, professor of criminal law at the University of Freiburg, with the specific request that he write them a memorandum settling once and for all who, if anyone, deserved to be held responsible for starting the Great War. What many members of the committee hoped he would tell them was that no one nation, least of all Germany, was responsible, that the war was akin

\* Professor of Law, University of Pennsylvania. Thanks are due Ramzi Nasser for research assistance, to my fellow symposiasts for their comments, and most especially to Claire Finkelstein for critiquing countless drafts.

1. ROBERT K. MASSIE, *DREADNOUGHT* 59 (Random House 1991).

2. By everyday morality I mean the kind of nonconsequentialist, deontological morality that is reflected most unambiguously in our criminal law and in our everyday judgments concerning praise and blame.

to a natural catastrophe, to be dealt with by regret, not recrimination, and certainly not reparation.<sup>3</sup>

This was not quite the odd request then as it appears now. The Versailles peace treaty had declared Germany to be the chief culprit, jointly, that is, with Austria-Hungary, and had imposed enormous burdens largely on the strength of this claim. As the treaty's infamous Article 231 put it: "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her Allies for all the loss to which the Allied and Associated governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her Allies." The Article instantly sparked a controversy whose embers even now have some glow left in them. Over the course of the next few years, Germany issued an unceasing stream of documents seeking to demonstrate the falsity of the "war guilt" thesis. Other nations followed suit with documents of their own, each anxious to exonerate itself of any part in the outbreak, with the notable exception of the Soviet Union, which was happy to publish documents laying ample blame at the doorstep of the Czarist government. Germany, however, retained the initiative in this war of words: The German Foreign Office created a special branch devoted exclusively to "The War Guilt Question," to which it later added a Working Committee of German Associations for Combating Lies concerning War Responsibility, and a Center for the Study of the Causes of the War. The government financed an entire journal, simply called *The War Guilt Question*, whose sturdy monthly issues were filled exclusively with the writings of prominent historians and journalists, shedding their avowedly partisan light on the topic. It was a Special War Guilt Subcommittee of the German Parliament which asked a number of scholars to address themselves to different aspects of the war's outbreak, and which asked Kantorowicz for a comprehensive assessment of the entire matter.

Kantorowicz wasn't actually such an obscure person to whom to entrust this issue. Aside from occupying the esteemed perch of a German professorship, he enjoyed considerable respect for his scholarly tomes on Albertus Gandinus and Diplovatatus, two medieval criminal law commentators, and had even achieved a measure of renown within the larger legal community for his polemical tracts inaugurating the German version of legal realism. Renown and respect had briefly turned to infamy when, in a book review, he had dared cast aspersion on Bismarck, greatest icon of recent German history. But so charming was Kantorowicz's personality that the very students who had tried to disrupt his lectures in protest changed their minds midway through and passed a resolution instead endorsing a professor's right to espouse whatever views he pleased. What had presumably attracted the attention of the parliamentary subcommittee were some occasional

3. See preface by Imanuel Geiss to HERMANN KANTOROWICZ, *GUTACHTEN ZUR KRIEGSSCHULD-FRAGE 1914* (Immanuel Geiss ed., Frankfurt am Main: Europaeische Verlagsanstalt 1967).

pieces of journalism he had done on the war guilt question, bringing to bear a legal framework on the issue that the legislators must have found particularly congenial. Equally important, however, was that he was known as a German patriot who had insisted on enlisting in the war even though he was already 37 years old at the time, and who could be expected to deliver himself of an impressively impartial-sounding but nevertheless favorable verdict.

Kantorowicz did not think there was anything at all strange about the Parliament turning to him for an answer to the war guilt question. He thought the question a vitally important one and thought himself better qualified to answer it than just about anyone else. In the preface to his memorandum he explains why. Historians, he points out, have had a near-monopoly on the issue but really have not been able to do more than tell us what happened. Assigning responsibility requires an ability to think normatively, he sententiously announces, which historians lack. Witness, he says, this typically ineffectual argument mounted by Germany's defenders: "Germany and Austria may have made the war possible, but France and Russia and Great Britain made it inevitable."<sup>4</sup> How, Kantorowicz sneeringly asks, is that supposed to illuminate anything? "If the wife seeks to rid herself of her husband, by pouring poison into his medicine, and handing the latter to his nurse, then the wife has made the husband's death 'possible' and the nurse has made it 'inevitable.' Yet the wife is guiltier than the nurse!"<sup>5</sup>

Historians are not the only ones Kantorowicz dismisses with a sneer. Philosophers do not fare much better, because, he observes, they are apt to be pisspots, likely to be blinded by irrelevant ethical considerations. "Presumably we should acquit of guilt the politician who has done everything to dissuade the enemy from going to war, even if he has done so for highly reprehensible reasons, perhaps because he is a coward, or because he is in the pay of a foreign power."<sup>6</sup> That is something a fastidious philosopher, he says, is unlikely to grasp. In a similar vein, he thinks, a philosopher is apt to falsely blame a country for starting a war if its justification, though a perfectly good one, was a mere pretext. That makes no sense to Kantorowicz: If a man thinks he is being attacked and shoots his attacker in self-defense, it does not matter that he had wanted to kill his victim all along and was only waiting for a pretext.

Finally, Kantorowicz dismisses the international law expert. By the lights of international law, it was, at least in 1914, no crime to start a war. What that means is that when we are debating the war guilt question, we are relying on an implicit code of values that simply had not been incorporated into international law and to which the expert's expertise has nothing to contribute.

4. KANTOROWICZ, *supra* note 3, at 108.

5. *Id.*, at 108.

6. *Id.*, at 100.

As Kantorowicz sees it, it is the criminal lawyer whose conceptual armamentarium uniquely equips him to settle the war guilt question. To drive that point home, he prefaces his memorandum by transposing the events leading to the outbreak of the war into the kind of common brawl which a criminal law judge, or at least a law student taking an exam, might easily find himself having to sort out. Neither that transposition, nor the rest of this essay, however, is going to make much sense to you unless you have an outline of the events of July 1914 at least loosely imprinted on your mind. Before proceeding any further, therefore, let me “remind” you of those events. Like most tragedies, they naturally divide themselves into five acts.<sup>7</sup>

### Act 1. The Assassination

On a military inspection tour in Bosnia, the Austrian heir to the throne, Francis Ferdinand, is assassinated by an Austrian subject of Serbian origin, Gavrilo Princip. There are other Serbians behind the assassination. Serbia has long been agitating against Austria and trying to lay claim to Bosnia and various other parts of the seemingly moribund Habsburg Empire. Some of the people behind Princip no doubt have some connections to the Serbian government, but probably not enough and not high enough for this to be an act “of” the Serbian government. Needless to say, none of this is very clear in the immediate aftermath of the assassination. All that Austria manages to determine for now—quite erroneously, as it later turns out—is that some of the plotters behind Princip belong to a secret Serbian society called Narodna Odbrana, which is openly tolerated by the Serbian government. The Austrians overlook the more intimate involvement of another secret society, the Black Hand, whose ties to the Serbian government are much closer.

### Act 2. Austria and Serbia

Austria’s position now is somewhat like that in which the United States would have found itself if Oswald had been found to be Cuban, and with shadowy, hard-to-fathom connections to the Cuban secret service to boot. What is Austria to do? Some kind of punitive action against Serbia—or Cuba—seems to be required. But any such action is going to be frowned on by Serbia’s—and Cuba’s—most powerful backer: Russia. Russia has always wanted to be regarded as the “savior and leader” of Slav communities the world over. Important balance-of-power considerations turn on being able

7. For two very readable, recent, and complete histories of the outbreak, *see* the final chapters of MASSIE, *supra* note 1; and WILLIAM JANNEN, JR. *THE LIONS OF JULY* (Presidio 1996). Their bibliographies are pretty good entries into the unfathomably rich literature about the subject. For a good compact historiographical survey concerning the debate about the war guilt question, *see* JOHN W. LANGDON, *JULY 1914: THE LONG DEBATE, 1918–1990* (St. Martin’s Press 1991). For a very recent revisitation of the debate, *see* NIALL FERGUSON, *THE PITY OF WAR* (Basic Books, 1999).

to maintain that posture. That makes it important to stand by Serbia now, even though regicide is not something the Czar would naturally find himself supporting. Faced with the possibility of conflict with Russia, Austria turns to its own most powerful backer, Germany. Wilhelm II promptly assures them that Germany would support Austria in whatever conflict it might find itself as a result of justified reaction to Serbia's aggression.

With that assurance in hand—it comes to be known as the German blank check—Austria sends an ultimatum to Serbia. The ultimatum asks that the Serbian government make it a crime to disseminate propaganda calling for the “liberation” of Austrian territories, that it immediately arrest one Major Voislav Tankovich and one Major Milan Ciganovich, suspected architects of the assassination, that it launch a judicial inquiry into the assassination under the direct supervision of Austrian officials, and more. It is in the words of the British Foreign Secretary, Sir Edward Grey, “the most formidable document ever sent by one sovereign nation to another.”<sup>8</sup> Austria does not expect, or hope for, Serbia to submit. Austria plans to seize this welcome opportunity to make war on Serbia and cut it down to a less dangerous size. But as it turns out, Serbia accepts nearly all of Austria's conditions—or appears to anyway; there are some trapdoors in even the most unconditional acceptance—except the one putting Austrians in charge of the Serbian inquiry into the assassination. That is enough for Austria to judge the ultimatum to have been rejected and to declare war on Serbia.

### Act 3. Germany and Russia

As Austria rightly feared, Russia steps up as Serbia's protector. Before the ultimatum, it had simply urged restraint on Austria. After the ultimatum, it decides more drastic action is needed. The Czar orders his army to mobilize. The mobilization is meant to give some reassurance to the Serbs, even though no precise pledges are made as to what exactly Russia is prepared to do in Serbia's behalf or how far it will go in the event of an Austrian attack on Serbia.

The Russian mobilization is bound to be extremely alarming to Germany. For Russia is allied with France. If Russia goes to war with Austria, and Germany rallies to Austria's side, it will find itself at war with both Russia and France. (In addition, Great Britain is loosely if not formally allied with France and might well join in a war against Germany.) To deal with the superior numbers of a French, Russian, and perhaps English army, Germany has adopted an audacious strategy known as the Schlieffen Plan, named for Count Alfred von Schlieffen, the “monocled, wasp-waisted”<sup>9</sup> German chief of staff who came up with it. The plan is designed to take advantage of the fact that whereas both Germany and France can mobilize

8. MASSIE, *supra*, note 1, at 866.

9. BARBARA W. TUCHMAN, *THE GUNS OF AUGUST 17* (Macmillan 1962).

quickly, Russia takes a much longer time to summon its citizens from its vast terrain via an inadequate network of railroads. In the time it takes for Russia to get its armies together, Germany means to concentrate most of its forces on France, inflict a crushing defeat, and then redeploy all of its might against Russia. Obviously, the plan depends crucially on not letting Russia complete its mobilization before launching an attack against its French ally.

No sooner does the Kaiser learn of the Russian mobilization, than he asks that it be terminated. But the Czar balks. The Kaiser returns with an ultimatum: Demobilization or war! Great Britain tries to mediate and signals to Germany that if it should go to war with Russia, it is likely to have to fight Great Britain as well. Hesitations ensue. There have been vaguely similar standoffs in the past (though not between Germany and Russia). Everyone thinks that one of these standoffs one of these days will lead to a major European war. As it happens, Germany thinks that it is in a better position to win such a war right now than it will be later. Russia thinks that if a major war should grow out of this conflict, it would be handicapping itself severely if it demobilized. And so Russia refuses to demobilize, and Germany declares war. Austria has little choice but to follow suit.

#### Act 4. Germany and France

Since France is Russia's official ally, Germany asks it to formally disavow its alliance—and to back up that disavowal by allowing German troops to temporarily occupy French fortresses at the French-German border. France reaffirms its ties with Russia, and Germany declares war. The Schlieffen Plan goes into effect: All forces are concentrated against France in hopes of a quick defeat, to be followed by redeployment against Russia.

#### Act 5. Germany, Belgium, Great Britain

To inflict a quick defeat on France requires catching its army from behind, where it does not expect it. "From behind" means not across the German border, along which the French army is arrayed, but across the Belgian border, whence no attack is feared. This is the essence of Germany's Schlieffen Plan. But to reach the French-Belgian border, German troops first have to cross the German-Belgian border! They have to invade Belgium, a neutral country, which offers no threat or offense to anyone. A treaty protects Belgium's independence, a treaty to which Germany, France, and Great Britain are all signatories and which obliges each of them to come to Belgium's aid if it is ever attacked, most especially if it is attacked by a signatory to the treaty. As German troops enter Belgium, Great Britain feels duly obliged to act. It might have acted anyway, given its ties to France and given its worries about a German-controlled Europe. The invasion of

Belgium, however, makes things inevitable. And so Germany, and in due course Austria, find themselves at war with Great Britain as well.

This, then, is the fact pattern which Kantorowicz is called on to evaluate and which he believes his schooling in criminal law uniquely equips him to evaluate. It is a complicated situation, he concedes, but how much more complicated, he asks, than, say, the following criminal law case:

In the strife-prone Mexican village of Eu, an old peasant named A has been living in long-smoldering enmity with his neighbor, the young S. The two of them have regularly made each other's life miserable, and have been constantly suspecting and accusing each other of all sorts of underhandedness. To put an end to this intolerable state, A decides to take the most recent piece of skulduggery by S as the perfect opportunity for beating S to pulp.

Fearing, however, that S's cousin, one R, might get involved, A asks one of R's enemies, a certain G, for assistance. G does not think R's involvement very likely and certainly does not hope for it to occur; G greatly values his friendship with A, and thinks the chance to intimidate S, and maybe even settle some old scores with R, is to be welcomed, and therefore assures A of all necessary help. A now assaults S, despite his abject apologies and attempted reassurances, heartily encouraged in all this by G.

S shouts for R's help and R comes running, gun raised, aimed not only at A, but also at G, whose intervention in behalf of A is certain. In addition, R's friend, GB, starts to get involved, first with pleas to G and A, which they ignore, then with threats, which cause G to balk and hesitate, while A continues to beat up S.

Trusting in GB's help, R's friend, F also enters the scene. He does not feel obligated to help R, but he fears losing his friendship if he does not, and wants to possibly use this opportunity to rid himself of his old enemy G. But before R and F can manage to get off a shot, G starts to fire, even though he has really only been expecting an attack by R and F for a later hour, but thinks this is the most opportune time to vanquish them both.

In order to better hit F, G has decided to enter the house of B, an uninvolved back-door neighbor of F. B is a ward of both F and G. B tries to resist the intruder and calls for help. This call for help brings on the scene a third guardian of B, GB, who in turn fires at G, who has been a long-standing annoyance to him. . . .<sup>10</sup>

If the criminal law has the resources to assign responsibility in the above case, says Kantorowicz, it should also have the resources to answer the War Guilt Question.

## II. PERMISSIBLE MUTUAL FRUSTRATION

My own motivation for investigating the War Guilt Question is of course quite different from Kantorowicz's. I am interested in the larger and largely

10. KANTOROWICZ, *supra* note 3, at 105-106. For the sake of readability, I have, in my translation, replaced the names Kantorowicz gives to the parties with initials, changed the paragraphing, and made some other analogous but equally inconsequential modifications.

philosophical puzzle of whether it is possible for all parties to a conflict to be justified, and whether the outbreak of the Great War exemplified, or at least came close to exemplifying, such a situation. Indeed, for the moment I would like to put the World War I aspect of the issue to the side and focus exclusively on the conceptual possibility of all parties to a conflict being in the right. Presumably we will first have to answer that question in the affirmative before it is even worth considering the claim of the German apologists that their conflict was such a one.

Many legal theorists, especially criminal law theorists, are likely to regard what I am claiming to be an impossibility. Most recently, Heidi Hurd has argued in her book *Moral Combat*,<sup>11</sup> that it simply cannot happen that both sides to a conflict will both be in the right, however temptingly large-minded it might seem to say so. If X has a right to do something, she insists, then it necessarily follows that Y, correspondingly, does not have a right to prevent X from doing it; and if Y does have a right to prevent X, well, then that means correspondingly that X did not really have a right in the first place to do whatever he was doing. And if there is a third-party bystander in the vicinity, then that bystander is entitled to help whichever of the two fighting parties is right and no one else. Hurd calls this the correspondence thesis. Here is her more complete statement of it:

Consider the following hypothetical. Smith is attacked by a hoodlum while walking her dog through the city park. Smith justifiably believes that her life is in peril, and she is thus forced to choose between killing the hoodlum and being killed or maimed herself. Jones is a jogger who witnesses the hoodlum's attack on Smith. Unable to affect the hoodlum's conduct, Jones must choose between permitting Smith to kill the hoodlum and intervening to prevent that killing. Long is a concession stand owner who also witnesses the event. Long is unable to affect the conduct of either the hoodlum or Smith, and so can only choose between restraining Jones from intervening to prevent the hoodlum's death or allowing that intervention.

The morality of each actor's choice appears to be determined by what I shall call the "correspondence thesis." The correspondence thesis asserts a moral claim about correspondent actions. It holds that the justifiability of an action determines the justifiability of permitting or preventing that action. According to the correspondence thesis, if Smith is justified in killing the hoodlum (as a means of self-defense), then Jones is not justified in intervening to prevent that killing, and hence, Long is justified in restraining Jones's intervention.<sup>12</sup>

The intuition behind the correspondence thesis is quite simply that morality cannot be gladiatorial: It cannot be that morality calls for interpersonal combat.

11. HEIDI HURD, *MORAL COMBAT* (Cambridge University Press 1999). The book is replete with insights, theses, and arguments bearing on the problem of "moral combat." In this essay, however, I shall be focusing on but one narrow sliver of the book.

12. *Id.* at 3.

Hurd believes the correspondence thesis is true of all plausible moral theories, whether they be consequentialist or deontological.<sup>13</sup> My own interest in this essay is solely in deontological morality, since a good chunk of law (especially criminal law) and of the everyday moral norms that guided the World War I debate seems deontological in character. My challenge to the correspondence thesis will therefore only concern its validity for deontological morality.

Hurd does not think the correspondence thesis is a logically necessary feature of deontological morality. (It is a logically necessary feature of consequentialist morality, she notes.) But although not logically necessary, no plausible version of morality can really do without it, she believes:

A deontological, or agent-relative, theory of morality does not share the characteristic that appears to make the correspondence thesis necessarily true for the consequentialist. It is logically possible that a (certain type of) deontological theory would render the correspondence thesis false. Suppose, for example, that morality contained an agent-relative permission (or obligation) to kill when necessary to preserve one's own life. Under such a moral directive, it would be right for Smith to defend herself by killing her attacker. But suppose that this morality also contained an agent-relative obligation (or permission) to prevent killings by others, even when those killings are in self-defense. Then it would be right for Jones to prevent Smith from (rightly) defending herself. In such a theory, there is no correspondence between what is right for Smith to do and what is right for Jones to do. . . . If morality were to combine such maxims . . . [i]t would make us moral gladiators in an arena in which one's moral success would depend on another's moral failure. On pain of condemning us to moral combat, it thus would seem that any plausible deontological moral theory would subscribe to the correspondence thesis.<sup>14</sup>

Hurd readily acknowledges a number of exceptions and qualifications to the correspondence thesis. There is, for instance, the case of the prisoner who breaks out of a jail because he is about to be killed by fellow inmates. What if a prison guard tries to shoot him? Should we not say that both the prisoner and the guard are free of blame? The prisoner has good reason to flee and the guard has a good reason to shoot, since he does not know why the prisoner is fleeing. This example calls for only a mild amendment to the correspondence thesis. It may perfectly easily happen that two actors in a conflict are both free of blame because one or both of them are excused. The correspondence thesis really only claims that the two parties to a conflict cannot both be right in the sense of being *justified*. The correspondence thesis is not contradicted if one of the parties to a conflict is acting

13. When I say deontological, I mean to refer, broadly speaking, to any view that does not seek to justify legal or moral rules in terms of their maximization of some external good. Libertarianism, rights-theory, and retributivism are the names by which several greatly overlapping versions of such a view go.

14. HURD, *supra* note 11, at 9.

wrongly but is nonetheless free of blame because of excusable ignorance, or insanity, or duress, or something else of that ilk. In the case of the escaping prisoner, the prisoner is acting rightly and the prison guard is acting wrongly but is nonetheless free of blame: He is excused for what he does because he does not know, and cannot be expected to know, that the prisoner is fleeing for good and justifying reasons.<sup>15</sup>

Then there are the “innocent shield” cases:

. . . [T]he innocent person who is forced to shield a culpable criminal in a shoot-out with an innocent police officer. In such a case, is it not right for the police officer to defend herself by shooting through the innocent shield in order to kill the criminal? And is it not simultaneously right for the innocent shield to defend herself by shooting the officer (assuming that she can do this, but cannot shoot the criminal who holds her hostage)?<sup>16</sup>

Does such a case not contradict the correspondence thesis? Hurd’s answer to it is that it is not true that both parties to this conflict are right. To be sure, both are free of blame, but only one of them (the police officer) is justified, whereas the other (the victim) is merely excused. She deals similarly with variations of the famous lifeboat scenario, that is, two mothers who “find themselves aboard a sinking ship that has only one life vest. If each mother cannot secure that life vest for her own baby, her baby will surely drown; is it not the case that each mother does the right thing in attempting to obtain the life vest for her own child, even when this amounts to preventing the other from saving her child?”<sup>17</sup> No, it is not the case that both mothers are doing the right thing. They are both excused, according to Hurd, but not both justified.

A boxing match, or sporting contests more generally, might look like a promising type of counterexample. This surely is a conflict in which all the combating parties are not merely excused, but justified. Touché, says Hurd, it is. We will have to make an exception for cases in which someone consents to what would otherwise be wrongful. But that is a pretty small concession. It leaves most of the correspondence thesis fully intact.<sup>18</sup>

When I first stated the correspondence thesis, I stated it in the language of rights: “If X has a right to do something, then Y does not have a right to hinder X’s doing so.” Hurd does not use the language of rights; the paraphrase is mine. Rights theorists are sure to wonder which, of the several kinds of rights that rights theory has come to distinguish, I am talking about. For instance, am I talking about what Bentham (filtered through H. L. A. Hart) calls a “right correlative to an obligation” and what Hohfeld (filtered through Judith Jarvis Thomson) calls a “claim-right,” that is, an

15. *Id.*, at 278.

16. *Id.*, at 278.

17. *Id.*, at 284.

18. *Id.*, at 273–277.

obligation on the part of others to do or not do certain things?<sup>19</sup> Or am I talking about a “liberty-right,” that is, a freedom from an obligation to do or not do certain things to others? The answer is that under the correspondence thesis the distinction does not much matter. The correspondence thesis asserts that in any plausible deontological morality, to have a liberty-right is to have a claim-right; to be entitled to do something (that is, to be free from an obligation not to do it) is to be the beneficiary of a correlative obligation by others not to mess with that entitlement.

If the correspondence thesis holds, conflicts between justified parties are impossible. If Germany was right to attack France and Russia, then France and Russia were wrong to defend themselves. And Great Britain was wrong to assist them in defending themselves. But does the thesis hold?

#### Pinpricks for the Correspondence Thesis

I think the correspondence thesis is false as far as deontological morality is concerned, or at least as far as our familiar, plausible version of deontological morality is concerned. I will begin my attack on the thesis with a series of pinpricks, some fairly familiar doctrines in the law that seem inconsistent with it. They are mere pinpricks because individually at least they will not seem to call for more than some minute refinements and qualifications of the thesis. Collectively, however, they may suggest that something more serious is going on. In the next subsection, “Body-Blows for the Thesis,” I will offer some more powerful counterexamples designed greatly to strengthen your sense that a fundamental defect, not curable by the addition of some further minor exceptions, plagues the thesis. In my final subsection, “The Nails in the Coffin,” I will try to lay bare the nature of that defect.

My claim, *contra* Hurd, is that law and morality are full of situations in which one party is entitled—in the sense of being justified, not merely excused—to do something while another is entitled to do his utmost to frustrate him. Perhaps the simplest example of what, from hereon out, I will call permissible mutual frustration is the holding of a case with which many law students begin their study of property law: *Pierson v. Post*.<sup>20</sup> A hunter, in hot pursuit of a fox, is brought up short when another hunter steps into the fray at the last minute and captures and kills the beast. The first hunter brings suit against the usurper. Has the usurper done anything wrong? Not in the least, says the court, for under the rule of capture, a fugitive resource belongs to the man who first captures it by reducing it to individual possession and control. Quaint though the facts of *Pierson v. Post* are, its principle extends far beyond them—to water, and oil, and gas. The landowner whose

19. H. L. A. HART, *ESSAYS ON BENTHAM* (Oxford University Press, Clarendon Press 1982); JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (Harvard University Press 1990).

20. *Pierson v. Post*, 3 Cal. R. 175, 1805 WL 781, 2 Am. Dec. 264 (N.Y. Sup. Ct., 1805).

property happens to sit atop a pool of water or oil or gas, which he shares with his neighbors, is treated exactly like the man whose property happens to “sit beneath” a roaming herd of foxes. He owns what he can capture, no more, no less. “The remedy of each against others alleged to be taking amounts beyond their own shares was to ‘go and do likewise.’”<sup>21</sup> But the principle of the case extends further yet. It embodies the essence of intellectual property law, which treats the inventor and the writer pretty much like the hunter or the miner, if we allow, that is, for the difficulty of determining when an idea has been “captured.”

The defender of the correspondence thesis is likely to feel nonplussed. “Why are these counterexamples?” she will ask. “They are cases of competition, not conflict. The thesis was never meant to apply to all instances of mutual frustration. It certainly was not intended to cover cases of competition. Your examples really are pretty easily distinguishable from those the thesis is about.”

But how easy is competition to distinguish from conflict? Consider the law of hostile takeovers. The CEO of company A wants to acquire control of company B. He proposes a merger to the board of company B, but the board is not interested. He decides instead to make a tender offer to B’s shareholders, offering to buy their shares at some very attractive price. Once he has acquired all those shares, he plans to vote the current board of directors out of office, replace the directors with his own nominees, and arrange for the two companies to merge. B’s board of directors, however, is likely to resist him in various highly frustrating ways. It might amend the corporate charter so that a merger cannot be effectuated without the consent of nearly all shareholders—which will, of course, deter the would-be acquirer from continuing to press his quest. Or it might amend the charter so as to require anyone who acquired a controlling block of the company’s shares to offer to buy all remaining shares at some astronomical price. Or it might quickly sell some freshly minted shares to an especially friendly party who is sure to oppose replacing the old board with a new one. Or it might try to launch a counter-tender offer against the would-be acquirer’s company and seek to oust him before he can carry out his plans. Or it might engage in a strategic merger with a third company so as to create an antitrust problem for the would-be acquirer. Or it might sell off its most attractive divisions. Or it might simply engage in prolonged litigation to hold up the transaction until the would-be acquirer’s financing arrangements fall through. The would-be acquirer, in turn, is going to resort to countermeasures of his own, which I won’t bother to describe. The point of the foregoing is simply to lead up to a rhetorical question: Is a takeover fight like this a case of conflict or competition? Does not our inability easily to answer that question suggest that the two categories are not truly distinct?

21. James E. Krier, *Capture and Counteraction: Self-Help by Environmental Zealots*, 30 U. RICH. L. REV. 1039 (1996).

Maybe the defender of the correspondence thesis has some other way—other, that is, than distinguishing between conflict and competition—of taking these examples of permissible mutual frustration outside the intended scope of the thesis, but it is not a trivial undertaking.

Let me turn to a different pinprick, an entirely different form of permissible mutual frustration that should trouble defenders of the thesis. Consider the law and morality of espionage. Although every state makes espionage against itself a crime, every state also practices it toward other, even friendly states. International law does not condemn it. Morality does not appear to condemn it either. And even the domestic law that officially condemns it steps very gingerly. A great deal of what is technically espionage, no one ever dreams of prosecuting: the spymasters, who do not actually practice their trade in the country on which they are spying but simply direct the network of agents who operate there, are usually exempt from the spied-upon country's efforts at prosecution, even when they happen to be easy to catch. The same holds for former spies who have risen to become high-level politicians in the country for which they used to spy, which is not true of other kinds of criminals who rise to high office. It also holds for wartime spies who join the army of the country for which they spied and later become prisoners-of-war. The Hague War Convention so requires it. It grants no such immunity for other crimes.

I fear, however, that the defender of the correspondence thesis is going to think of this example as just too *sui generis* to trouble her. Or perhaps she will simply deny the moral permissibility of spying.

My final pinprick is the First Amendment. Political protest is the consummate example of permissible mutual frustration. Permissible protest can go far beyond the mere expression of views. It includes a great deal of conduct: dances, parades, flag-burnings, cross-burnings, outright libel, begging, maybe even sleeping in the park. Strikes belong in the same category, although technically it is not the First Amendment but analogous statutory provisions that protect them.

I suspect a defender of the thesis might try to deal with this kind of permissible mutual frustration by invoking the distinction between (what Judith Jarvis Thomson calls) "distress-mediated harm" and physical harm. More likely, however, she will respond to it with a certain measure of impatience. All of these examples—hunting, mining, takeovers, espionage, political protest—are really not very bothersome because they are so clearly not what the correspondence thesis is intended to be about. It might require a good deal of fastidious draftsmanship to get the thesis stated in such a way as to be invulnerable to these counterexamples, but that's all it would require. The thesis was not meant to cover these cases; that is almost surely transparent from the start; and that in turn should tell us that it is just a matter of finagling to deal with them. That's what makes these counterexamples mere pinpricks.

## Body-Blows for the Thesis

My next and final set of counterexamples to the correspondence thesis seem to me ones which the thesis is clearly meant to cover. Their existence should therefore deal it an especially painful blow. What is more, several of these examples, it will later turn out, rather closely resemble certain features of the World War I scenario.

(1) My first example is the case of a wife who knows that if her husband should learn of a certain fact—an infidelity, say—he is going to kill her. Let us imagine that the husband has entered his study and is about to start playing his answering machine, on which is a message that, his wife knows, will tell him about an affair she has been having. She knows that this will send him into a homicidal rage. Right now he is still friendly and peaceable, but she knows to a statistical certainty that within seconds things are going to change. Her last chance to kill him is now, while he can still be caught unawares. If you would like, you can imagine her to be a paraplegic and confined to her bed, gun in hand, her only opportunity to kill him depending critically on the fact that he does not expect her attack. May she shoot him while she still can?

People differ on this. Criminal codes differ on this. The common law would have suggested that she could not. The common law conception of the right of self-defense is built on its view of criminal attempts. Just as the authorities are not entitled to arrest someone if he is still engaged in “mere preparation,” even if they are statistically certain that his preparations are going to eventuate in an actual attempt, so we are not entitled to use deadly force in self-defense against someone merely because we are statistically certain that he is eventually going to kill us. But many people think this is absurd and would allow use of self-defense once enough evidence has accumulated that an attack is going to occur.<sup>22</sup>

Let us assume that those who would permit the wife to use deadly force are right. Now let us ask a further question: What happens when the wife launches her justified attack against the as-yet-technically-innocent husband? He sees that he is being attacked and tries to defend himself. May he? Given that he has not yet formed any wrongful designs against his wife, it is hard to see how we can deny him his right to self-defense. This would then seem to be a case in which both the attacker and the defender are justified in their use of deadly force—a case of permissible mutual frustration.

Obviously Hurd can deny the various premises on which this example depends. She might deny, for instance, that the husband is fully justified in shooting back at his wife. She might say that he is merely excused. But is that plausible? Is he *merely* excused as opposed to fully justified? Do we really

22. Martin E. Veinreideris, *The Prospective Effects Of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women*, 149 U. PA. L. REV. 613 (2000); Sandra K. Lyons & David McCord, *Moral Reasoning and the Criminal Law: The Example of Self-Defense*, 30 AM. CRIM. L. REV. 97 (1992).

think the husband is not fully within his rights in shooting back at someone whom he finds shooting at him without any prior provocation? Hurd might take a different tack. She might just agree with the common law that the wife is unjustified because she was acting on the basis of a mere statistical forecast. That is more promising, but for reasons I will discuss in the next section (in which I discuss my general grounds for believing in the inevitability of conflicts between justified parties) implausible as well.

(2) My second counterexample involves a hiker who finds himself stranded in the mountains. He has no more food or water. He breaks into a cabin to scavenge for what he can find. According to the criminal law, and according to everyday morality, he is not guilty of a crime. He has a defense of necessity. Theft to avert starvation under these circumstances is alright.

Now suppose that the owner of the cabin barges in on him. And suppose that rather than just taking the food, the hiker asks for the owner's permission. Is the owner allowed to refuse? It seems hard to say that he is not. After all, no one is obligated to be a Good Samaritan. What if the hiker then simply tries to help himself to the property over the owner's objection? Can the owner resist? It is not easy to argue that he cannot. After all, if he is entitled to refuse, why not also to resist? But if the owner is entitled to resist while the hiker is entitled to do what he can to get hold of the stuff, then we have a conflict in which both sides appear to be justified.

I suppose Hurd might deal with this case by denying that the owner is entitled to prevent the hiker from helping himself to some food. She might even cite the law in support of that: There are some well-known tort cases that would seem to suggest that owners under these circumstances must yield to the victims of necessity.<sup>23</sup> But what will she do with the prescient owner who tries to frustrate the hiker not by refusing his request outright but by hiding or in some other way making his food inaccessible to him? Now, it really seems hard to deny that both the owner trying to frustrate the hiker and the hiker trying to overcome the efforts of the owner are acting within their rights.

(3) My third counterexample: It is often moral to threaten what you are not in fact entitled to do. If someone is about to steal my wallet, I cannot shoot him to prevent his theft, but it would seem I can threaten to shoot him. But what now if the person who is thus threatened proceeds to do the thing which my threat was designed to deter, and rightly fears that he is about to be killed by unjustified force? Suppose he decides to use deadly force of his own in defense against me? It seems hard to deny him this right. Here the threat and the preemptive force used in response to it seem yet again instances of permissible mutual frustration.

(4) Consider finally this last, quite elaborate case. It is much longer than

23. *Ploof v. Putnam*, 81 Vt. 471, 71 A.188, 20 L.R.A.N.S. 152, 130 Am. St. Rep. 1072, 15 Am. Ann. Cas. 1151 (Vt., Oct. 2, 1908). *Vincent v. Lake Erie*, 109 Minn. 456, 124 N.W.221, 27 L.R.A.N.S. 312 (Minn., Jan. 14, 1910).

the previous ones; on the other hand, it may well be my most potent, least controversial counterexample to the correspondence thesis.

A friend of mine has been charged with murder. The evidence against him is overwhelming. A death sentence looms. I know this friend of mine extremely well, and I am convinced he could not possibly be guilty. I believe this not because I have any tangible evidence but simply because I know him so very well. What is more, let us agree that any reasonable person who knew him as I know him would draw exactly the same conclusion. So notwithstanding the fact that I have no tangible evidence to prove his innocence, I really am perfectly sensible, perfectly rational in thinking him innocent. I am determined to get him off, but see no good way of doing so. If I simply testified as a character witness, that is not going to help much. I am known to be his friend and will be distrusted on that account alone, and all I have to offer by way of evidence is the sort of thing philosophers have come to call “tacit” knowledge, inherently incommunicable, unverifiable facts about the kind of person he is. Realizing all of this, I decide that the only way to save him is to perjure myself: I invent an alibi for him. So convincing is this fabricated alibi that I actually manage to get him acquitted. When the trial is over, more evidence about the murder surfaces. This evidence now makes two things unequivocally clear—first, that my friend really is innocent, and second, that I made up the alibi. In due course, I am charged with perjury. Should I be convicted?

I presented this case some years ago to a group of federal trial court judges. Concretely, what I asked them was whether I should be able to invoke the defense of necessity. I had committed what would ordinarily amount to the crime of perjury but I had done so to save an innocent man’s life. Moreover, I had been both reasonable and correct in my surmise that he was innocent. Is that not exactly what the necessity defense is about—acquitting someone of criminal misconduct when “the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged”?<sup>24</sup>

To my astonishment, the judges did not agree with me. They all felt that I should be convicted of perjury. They were willing to concede that I had acted decently when I perjured myself. Many went so far as to say they hoped they would have the courage to do what I had hypothetically done. They were willing to agree that a good prosecutor should exercise his discretion in my behalf and not press charges. But once charges were pressed, they very much felt I should be convicted. What is it that made them feel that way? One judge compared perjury to “peeing in the pool.” An apt comparison, but one that only heightens the dilemma. What is wrong with peeing in the pool when a man’s life is at stake? What these judges were in fact correctly sensing and not so inaptly expressing with that pool metaphor is that something quite ominous would happen if they did agree to acquit me of perjury.

24. MODEL PENAL CODE § 3.02(a).

Consider more closely the underlying logic of my position. I am saying that whenever I reasonably think that by lying to the court I am likely to prevent a miscarriage of justice, I am entitled to do so. Nothing about the logic of my position would limit it to murder. It would be a general license to lie whenever a witness reasonably thinks that the cause of justice is served thereby. The judges somehow felt that in giving out such a license, the cause of justice would in fact not be served. Were they correct in this surmise? I think they were, but it is a subtle point and requires some elaboration. It is by no means obvious.

What exactly would happen if we allowed everyone to lie if necessity so counseled? In a world in which “reasonable perjury” is legal, no judge, or jury, would ever know whether the testimony is offered because it is correct or because the witness (reasonably) believes that it would serve to bring about the right verdict. This is tantamount to asking every witness simply to testify about what he (reasonably) thinks the ultimate outcome of the trial should be. Indeed it would be tantamount to not letting him testify to anything else even if he wants to. (For even if he wants to, he is unable to. That is because we can never determine whether he is testifying as he is because he is being strategic. We could ask him, of course. But his answer would be meaningless. He could still be lying, and be able to defend his lie on the grounds of necessity.) If we did this, we would be throwing away a lot of evidence. The result would be tons of incorrect verdicts, incorrect acquittals, and incorrect convictions. Overall, there would thus be a lot less justice if “reasonable perjury” were allowed. This, I believe, the judges were correctly sensing and expressing by their unwillingness to let me off.<sup>25</sup>

That does not mean, however, that the judges were right. They wanted to see me convicted because they felt that overall justice would be maximized if they did so. In that assessment they were correct. But that does not change the fact that they would be convicting me for conduct which they conceded was perfectly moral: telling a lie in court to save an innocent man’s life. They simply felt that committing one injustice here and now—that of convicting me for my perfectly moral conduct—was justified because it prevented many more injustices down the road. I asked them how they would feel about the classic dilemma of the judge who is asked to order the execution of an innocent because a lynch mob outside the courthouse is threatening to erupt and to produce the deaths of many more innocents by its rioting. Here they had no reluctance, saying that the judge is not permitted to act even if in so doing he saves several more innocent lives. How then is this case different from that?

The perjury dilemma may seem highly specialized, but it is not. In fact, it is remarkably commonplace. Laws against euthanasia, marijuana, or nee-

25. See Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 1001 (1991).

dle exchanges raise the identical dilemma in very obvious ways. Many people would agree that in a variety of situations voluntary euthanasia is perfectly moral. They fear, however, that once we allow it, we will be sliding down a slippery slope in which the euthanasia exception will be abused, and patients who do not want to die, but are a burden on some others who could benefit from their deaths, will be cold-bloodedly killed off, their deaths disguised as voluntary euthanasia. In other words, many opponents of voluntary euthanasia concede that there are many cases of justifiable voluntary euthanasia (like the morally irreproachable husband who helps his pain-wracked wife escape the final stages of a terminal illness), and that a flat prohibition will have regrettable consequences in those cases. Nevertheless, they believe that those regrettable consequences are outweighed by desirable ones, the prevention of murders-disguised-as-euthanasia. The problem is that a judge who is asked to apply such a flat prohibition to a case of morally justifiable euthanasia is not much different from the judge who orders the execution of the innocent prisoners so as to appease the lynch mob. The argument parallels exactly the one about perjury and it can readily be extended to the prohibition of marijuana and needle exchanges.

*Notice now a crucial feature of these examples for our purposes:* Consider the lawmaker thinking about adopting a law prohibiting perjury, or euthanasia, or marijuana use, or needle exchanges. Even though it is morally right (deontologically speaking) for the lawmaker to adopt such a law and to try to make sure that it will be applied without fail, once the law has been passed, it will then also be morally right for the citizenry to try to undermine the law and prevent it from being applied where necessity so counsels. Even though it might be morally right to adopt a prohibition against perjury, euthanasia, marijuana, and needle exchanges, and to put in place a regime that will impose the prohibition regardless of specific sympathy-evoking circumstances, it will also be morally right, once the law is in place, to try to prevent it from being applied to the person who perjures himself to save an innocent from conviction, or who helps his ailing wife to die, or who uses marijuana for medicinal purposes, or who distributes needles to drug addicts who will get infected otherwise.<sup>26</sup>

To see that this is not as perverse as it sounds, think of the analogous problem posed by Gregory Kavka in connection with nuclear deterrence.

26. In *MORAL COMBAT*, Hurd actually discusses examples that are analytically equivalent to this one and acknowledges that they might be regarded as counterexamples to the correspondence thesis. But not very troubling counterexamples, argues the book. At most, it says, they constitute the kind of exception that proves the rule. The book points out that examples like these crucially depend on the fact that people make errors: The perjury example depends on the fact that judges and juries are apt occasionally to convict the innocent and acquit the guilty, and that this can be minimized by avoiding all perjury, however well justified. The euthanasia example depends on the fact that judges and juries are apt to mistake murder for voluntary euthanasia, and that this can be minimized by avoiding all euthanasia, however genuine and well justified. Hurd insists that such cases are unimportant exceptions to the correspondence thesis because they are of "pragmatic interest only." "If one's concern is with the content of

As Kavka plausibly argued, it is quite moral to adopt a system whereby disproportionate retaliation will be threatened against another country that might launch a nuclear attack against us. However, it is also the case that it would be immoral actually to launch such disproportionate force once we have been attacked. What this means is that it is moral to set up a system of disproportionate force and moral to undermine it once it is about to be used. The creator of a nuclear deterrence regime and its eventual user thus stand in a relationship of permissible mutual frustration, exactly like the creator of a prohibition on perjury, euthanasia, marijuana, and needle exchanges and the citizen who engages in perjury, euthanasia, marijuana use, or needle exchanges under justifiable circumstances.<sup>27</sup>

### The Nails in the Coffin

Having proceeded incrementally so far, I want to turn next to the larger claim which all of these examples were meant to soften you up to accept. The larger claim is that permissible mutual frustration is an essential and widespread feature of any deontological morality—so essential and so widespread as to leave the correspondence thesis eviscerated beyond repair.

The claim is an implication of something which will at first glance not seem to have anything to do with the problem at hand. Elsewhere I have developed what I think of as a theory of loopholes, that is, a theory that seeks to explain why laws have loopholes. It does not seek to explain all loopholes, just a significant number of them.<sup>28</sup> What I mean by a loophole in a law is a strategy whereby someone can ostensibly comply with the terms of a law while undercutting its purpose and doing what the law was intended to prevent. Now, there are different approaches that people have taken to try to account for why legislatures and judges do not just plug loopholes. One approach is to focus on the practical factors that make it impossible to produce rules that are completely strategy-proof.<sup>29</sup> I have no doubt that there are indeed factors that make the design of rules that are completely strategy-proof inherently impossible. But my own concern has been with loopholes that need to be explained in a different fashion. My conviction that there are a lot of loopholes that require a different account stems from

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morality, and not with the strategic methods necessary for its realization, one will find the [claim about conflicting rights] to be beside the point—at least if that [claim] is premised solely on the fact that actors make errors” at 201. In other words, the book argues that this too is a scenario which the correspondence thesis was really never meant to cover. That observation would have more force if there were not already so many other exceptions to the correspondence thesis, and if there were not the more general reasons for doubting it, which I set forth in “The Nails to the Coffin” section.

27. GREGORY KAVKA, *MORAL PARADOXES OF NUCLEAR DETERRENCE* 15–56 (Cambridge University Press 1987).

28. See LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD AND KINDRED PUZZLES OF THE LAW* (University of Chicago Press 1996).

29. Stephen Bundy and Einer Elauge have developed such an account in *Knowledge about Legal Solutions*, in 92 *MICHIGAN LAW REVIEW*, 261 (1993).

the fact that loophole exploitation is not exclusively a feature of the law. There is a lot of it going on outside of the law. Here is an example that might sound familiar to some. Take the Jewish prohibition against running a business on the Sabbath. Jews used to circumvent this prohibition routinely by selling their businesses to a Gentile the day before the Sabbath, having the Gentile keep them open during the Sabbath, and repurchasing the business on the day after.<sup>30</sup> I take it that whatever is going on here, it is not God's inability to come up with a strategy-proof rule that allows this kind of loophole exploitation. Or take the way in which many of us feel comfortable circumventing the ban against lying. We stay silent or we say something misleading but literally true. Again, whatever is going on here, whatever it is that allows us to get around the ban against lying by this kind of indirection, it does not seem to be the fact that someone failed to draft the ban against lying in a strategy-proof manner.

If there is something like loophole exploitation going on outside the law, in the world of everyday morality, that suggests that our everyday morality has loopholes too, just like the law. And since we know that a good deal of law, especially criminal law, mirrors everyday morality, it seems likely that whatever accounts for the loopholes of everyday morality should account for at least some of the law's loopholes as well. But what explains the loopholes of everyday morality, and what exactly does it mean to say that morality has loopholes?

For an explanation, it helps to focus on a feature of everyday morality and of criminal law that is both obvious and overlooked, striking and unappreciated. I call it path-dependence, a term I borrow from economics, but its meaning in this context may not be self-evident. Here is a hypothetical to show what I have in mind. Imagine a man standing in line for a movie ticket. A little way away, an assassin takes aim at him. The intended victim is a friend of mine and I would very much like to save him. So what I do is to seize another bystander, indeed the person standing right next to him in the movie queue, to quickly drag him into the path of the bullet. Thus using the bystander as a shield, I save my friend's life. What I have done pretty clearly would be murder. To be sure, I might try to plead the defense of necessity, or duress, but they almost surely would not apply. I will not dwell on why that is. Now suppose that I had tried to save my friend's life in a slightly different way. Suppose I had managed somehow just to shove my friend out of the way, with the result that the assassin's bullet hits the person standing next to him instead, that selfsame bystander whom I originally contemplated dragging into the path of the bullet and using as a shield. If I did that, I would be perfectly within my rights—no homicide; no crime whatsoever. Nevertheless, I would in a sense have done the very same thing as before. I would have sacrificed the life of a bystander so as to save my

30. JACOB KATZ, *THE SHABBS-GOY* (Yoel Lerner trans., Philadelphia: Jewish Publications Society, 1989).

friend, but I would have done so through a shoving maneuver rather than a shielding maneuver, and that makes all the difference in the world, morally and legally speaking. That is what I mean by path-dependence. The very same result achieved by an ever-so-slightly different path is evaluated radically differently by the lights of everyday morality and of criminal law.<sup>31</sup>

My earlier examples about keeping the Sabbath and about lying are also examples of path-dependence. Running a business on the Sabbath violates Jewish religion; running it by first selling it to a Gentile and then buying it back does not. Communicating a falsehood by a lie is immoral; doing it by silence or misleading but literally true statements arguably is not.

Everyday morality and criminal law are full of these kinds of contrasts between highly similar forms of conduct that are evaluated differently because of relatively minor nuances differentiating the paths which the actor took to his desired result. These path-dependencies turn into loopholes when you think of people as strategically exploiting them, that is, when you think of someone wanting to attain a goal that looks at first glance to be off limits, and then figuring out a path to that seemingly unattainable goal. My account of loopholes asserts that when we encounter what appear to be loopholes in law, a close investigation of the matter will frequently reveal that the law in question mirrors some underlying moral rule which happens to have an unappreciated path-dependence built into it, which clever lawyers are exploiting.

How is this theory of loopholes and path-dependencies related to my claim that everyday morality and criminal law is full of conflicts between justified parties? The fact that law and morality are full of these path-dependencies turns out to imply that there are likely to be lots of conflicts between justified actors. How does it imply that? Let us take another look at my stranded hiker hypothetical, because that will serve to bring out the connection.

Suppose an advocate of the correspondence thesis looks at this hiker example and says: "Well, I can see how it might seem as though both sides to this conflict are justified. What that tells me is that there is a problem with our rules. We should take the justification away from one of the parties, so that it doesn't happen that we have two parties to a conflict both being justified. In fact, I think that's what needs to be done with all of your examples of this kind of thing: strip one of the parties of their justification. Now, I guess I wouldn't want to strip the hiker of his justification because letting him help himself to someone's property when he is about to die seems morally totally unobjectionable. I would say let's deny the owner the right to stop the hiker from helping himself to food, and if he insists on taking the food away from the starving hiker, well, then he is guilty of homicide. Indeed, isn't this what the tort law already does with cases that greatly resemble your hiker hypothetical. Like the well-known torts case

31. Christopher Boorse and Roy Sorensen, *Ducking Harm*, 85 J. PHIL. 115 (1988).

*Ploof v. Putnam*,<sup>32</sup> about a dock owner who disconnects, and thereby damages, a sloop that has put in at his dock during a storm without his consent. The dock owner was held liable to the sloop owner." The problem with this proposal is that it does not eliminate the conflict. Suppose the cabin owner, having been told that he cannot take his food back from the hiker, tries to protect his property in some other way, say, by getting a spring gun. The advocate of the correspondence thesis might of course insist that he should not be allowed to do that either. In fact courts have frequently declared spring guns illegal. So what about a vicious guard dog? I suppose that if a court is prepared to strike down spring guns, it might also strike down vicious guard dogs. Well, then, what if the cabin owner puts the food into a cage where he keeps his poisonous pet snake? Would a court strike that down too? If so, what about putting it on a very high armoire, which the hiker is likely to fall off of and die if he tries to climb it? Or what about just hiding it? Or, for that matter, what about just not leaving any surplus food in the cabin at all? As long as any of these strategies for starving the hiker remain available, the conflict between the hiker and the cabin owner has not been laid to rest.

But what exactly prevents us from just prohibiting *all* of these strategies? Think of what it would mean to eliminate them. It would mean declaring it to be homicide not only if the owner takes food out of the hiker's hand, but also if he puts it in the cage with his pet snake, or if he puts it on a very high armoire, or if he hides it, or if he does not leave any of it in the cabin. Each of these are ways of causing death, but they are ways of causing death that we evaluate radically differently from causing death by taking the food out of the hiker's hands. We have here path-dependence at work. We evaluate these different ways of causing death quite differently. The only way to eliminate the conflict is to eliminate the path-dependence. But these path-dependencies appear to be an ineradicable part of our morality. It would strike us as unacceptable to live without them. This, then, is what I mean when I say that path-dependence makes conflicts between justified parties inevitable.

Let me state my point in a slightly different way as well, which is probably less illuminating than the example I just went through. Criminal law and morality by and large serve to eliminate conflict: They prevent us from committing the murders and assaults and thefts and other incursions on each other's welfare that constitute the conflict-ridden state of nature. We think that by adopting criminal laws and by subscribing to morality we have gotten rid of conflict. But the fact that there are these path-dependencies and loopholes right in the middle of our criminal law and our morality means that there are still selected islands of opportunity for conflict to occur, conflicts in which the parties are acting completely consistently with what criminal law and morality require, but conflicts nonetheless. That is

32. 81 Vt. 471, 71A. 188, 20 L.R.A.N.S. 152, 130 Am. St. Rep. 1072, 15 Am. Ann. Cas. 1151 (Vt., Oct. 02, 1908).

because the presence of loopholes means that you can still commit the functional equivalent of a killing or a wounding or a stealing without being guilty of a killing or a wounding or a stealing. But if two parties are free to perpetrate against each other the functional equivalents of some crimes without actually being guilty of those crimes, then we have a conflict between two parties both of whom are justified. In other words, as long as the criminal law and everyday morality exhibit these ineliminable path-dependencies, they are also going to exhibit conflicts between justified parties.

### III. THE WAR GUILT QUESTION

Does any of this apply to World War I?

Hermann Kantorowicz, to the chagrin of the German Parliament, decided that the Central Powers, Germany and Austria, did in fact bear the brunt of the blame for the Great War. My own assessment is rather different. But let me first offer a brief delineation of Kantorowicz's conclusions. Kantorowicz begins by suggesting that we carefully distinguish two kinds of "crimes" that the war's participants could be charged with starting: Endangerment of the Peace is the first; Breaking of the Peace is the second. The War Guilt Question really concerns the latter, but issues pertaining to the former are often confusingly injected into the debate. As he sees it, historians debating the War Guilt Question have spilled unnecessary ink over Germany's massive ship-building program, or over the belligerent pronouncements of some French politicians concerning the reconquest of Alsace-Lorraine, or over the ways in which various Russian politicians wanted to redesign Europe in the aftermath of a major war. All of those actions at most served to endanger the peace; none of them led to its actual outbreak in the event, at least not as proximately or directly as law and morality demand.

Turning to the crime at issue, the Breaking of the Peace in 1914, Kantorowicz puts most of the blame for the war on Austria. He doubts the Serbian government was behind the assassination of Francis Ferdinand: It would not have been in Serbia's interest, he notes, to give Austria such a convenient pretext for attack. Austria, in turn, had some advance warning, took woefully few precautions to protect Francis Ferdinand, and most important, stood to benefit in numerous ways from such an undertaking: Francis Ferdinand was thought to be syphilitic and his death was viewed by many government officials as a godsend. And then, of course, Austria had long been spoiling for just such an opportunity. Serbia thus not having given Austria cause for any action, Kantorowicz therefore views Austria's actions as being an outrageous attempt to redraw the map of Europe. To be sure, he mitigates its responsibility in the following way: Austria intentionally caused the war in the Balkans, he notes, but only recklessly caused the World War. (Actually he is more subtle than that: he carefully distinguishes

between the European war and the World War, thinks that Austria was guilty of an aggravated form of recklessness known as *dolus eventualis* vis-à-vis the European war but simple recklessness vis-à-vis the World War.) Germany in turn is blamed for encouraging Austria's misconduct, in other words, as an accomplice in the crime of Breaking the Peace. Kantorowicz adds extra blame to the Austrian and German ledger for refusing to take seriously Great Britain's last-ditch attempts to save the peace through negotiations.

Kantorowicz briefly investigates the possibility of justifications. Austria has at times argued that it was fighting to preserve the peace, in that a war against Serbia was meant to avert a greater conflict down the road. Kantorowicz finds no sense in that proposition, indeed does not believe that the preservation of the Austro-Hungarian Empire required a war on Serbia. Germany in turn has at times argued that France and Russia were likely to launch an attack when they had grown strong enough, which was likely to happen in about three years. Again, Kantorowicz is doubtful, but most of all does not think that a preemptive strike this far in advance can be counted as legitimate self-defense. Interestingly Kantorowicz does not blame Germany for anything it did after the Russian mobilization had occurred. It acted correctly in activating the Schlieffen Plan, in putting Russia to the choice of quickly demobilizing or going to war, in striking out at France once it had failed to dissociate itself from Russia, and in crossing into Belgian territory in order to defeat France. He finds fault only in the actions that led to that state of affairs.

So much for his assessment of the Central Powers. His assessment of the Entente Powers is kinder but hardly free of reproach. He blames neither for starting the war but both for *attempting* to start the war. The bulk of his criticism is directed at Russia for mobilizing. Russia had nothing at stake, as he sees it, that would have justified going to war: Its only concerns were distant balance-of-power considerations, its reputation among neighboring Slavic countries. No treaty obligations bound it to Serbia. On the other hand, he says, it is a measure of the slightness of Russia's guilt that if a treaty had existed between it and Serbia—which easily might have been the case—it would have been beyond reproach in mobilizing. France's guilt for its attempted Breaking of the Peace is less than Russia's because it acted under duress or necessity: Had it not stood by Russia in its moment of need, Russia would have in the long run abandoned the French-Russian alliance, and France would have been vulnerable to a successful German attack. Kantorowicz denies France the full weight of a duress or necessity defense because he blames a century of French policy for cultivating the German enmity that now put them in such a predicament.

Kantorowicz thus ends up assigning a lot of blame all around to both sides of the conflict, with the lion's share falling on the Central Powers. Some of the reasons he comes out as he does have to do with the peculiar way he applies some familiar criminal law doctrines. For instance, he counts it heavily against Germany and Austria that they spurned Great Britain's

last-minute efforts to preserve the peace. That seems strange. You can blame a murderer for his murder, but can you also blame him for not making last-minute efforts to save his victim's life when he lay bleeding on the ground? I can understand blaming the Central Powers for inaugurating the process by which the peace came to be broken; but then I just cannot understand also blaming them for not averting the catastrophe at the last minute. And why does he think Russia and France are guilty only of attempted Breaking of the Peace? Ostensibly because it was Germany which declared war on them while they were still getting ready to declare war on Germany. He does think they acted wrongly; it is evident that if they had not acted as they did, Germany would not have declared war on them. So why not blame them for the actual, as opposed to merely the attempted, version of the crime? Nevertheless, whatever disagreements one might have with him on minor points of criminal law doctrine, they do not affect the bottom-line conclusion he reaches. This was not a conflict in which good and blameless men came to blows.

If one wants to reach a fundamentally different conclusion from Kantorowicz's, one has to start by scuttling a crucial premise on which his analysis is built: that Serbia gave Austria no reason for some kind of retaliatory action. One has to believe that the assassination was somehow connected to the Serbian government, enough so as to call for some anti-Serbian measure by Austria. That is in fact how many have viewed the situation, and it is how I am going to view it from hereon. Because if one does, the issue becomes rather more interesting: The conflict then really does start to look like a form of gladiatorial combat, a conflict in which several of the wrestling parties on both sides are in the right, a bizarre case of permissible mutual frustration. At first blush, it might seem as though nothing of the sort would happen. It might seem that if we say that Austria was right to go against Serbia, then Germany was right to support Austria in this, then Russia was wrong to oppose them in this, then France was wrong to support Russia in its opposition, and England and Belgium were wrong to support France and Russia. That at least is what a firm believer in the correspondence thesis would be inclined to think. On closer inspection, however, some paradoxical features of the situation start to emerge that make the whole thing look much more like a case of permissible mutual frustration. Let me examine each of these features in turn.

#### A. The Preemption Problem

Consider again the case of a wife who knows that if her husband should learn of a certain fact—an infidelity, say—he is going to kill her. I suggested that she would be entitled to start shooting at her husband in preemptive self-defense even before he has learned the information that is going to

induce him to attack her, and that he in turn, as yet technically innocent, would be entitled to defend himself against her.

The opening constellation of World War I somewhat resembled this scenario. On one account of the matter, Russia was well prepared to concede that Austria's plans for Serbia were well justified and proportionate to the offense perpetrated upon them. What they feared, however, was that Austria's plans would expand with its opportunities. Once an Austrian army had occupied Serbia, it might well decide to dismember Serbia altogether, parceling pieces out to the other Balkan states. This was apt to be followed by a more general alliance between Austria and the remaining Balkan states, an alliance which was likely to make increasingly aggressive moves on Russia. These were not flimsy possibilities; the threat was genuine, but only as a statistical matter. As a matter of actual intent, it was not part of Austria's planning. That put Russia in the position of the prescient wife, using deadly force against the as-yet-technically-innocent husband (Austria), whose innocence entitles him to use deadly force on his attacker in turn.

At this point you may be ready to take issue with my original analysis of the husband-and-wife hypothetical. If allowing both the wife and the husband to fire at each other with impunity leads to having to approve of the actions of both sides in a war, maybe the analysis is not really that persuasive. But my guess is that as you start to rethink the husband-and-wife hypothetical, the main thing that will lead you to doubt my conclusions about it is that you still cannot let go of the correspondence thesis. The intuitive appeal of the thesis makes it very hard to accept that A can be justified in trying to kill B and B can be equally justified in trying to kill A. But despite its intuitive appeal, the thesis is wrong. Deontological morality, I tried to argue in the last section, is full of "moral combat."

## B. The Threat Problem

I noted earlier that it is often moral to threaten what you are not in fact entitled to do. (If someone is about to steal my wallet, I cannot shoot him to prevent his theft, but it would seem that I can threaten to shoot him.) I then suggested that if the person who is thus threatened (the thief) proceeds to do the thing which the threatener (the owner) tries to deter him from doing (namely, steal), then he might well be entitled to defend himself with deadly force. But the threatener might then well be entitled to reciprocate with the use of deadly force himself.

How does this map on to World War I? Russia arguably was bluffing, or at least uncertain, hoping to keep Austria's ambitions with respect to Serbia in check but not necessarily meaning to meddle. Even if the threatened intervention would have been wrongful, the threat of such an intervention is a different story. As far as Germany and Austria were concerned, however,

this was no bluff. And they acted accordingly, as much within their rights as Russia.

Once again, you will be tempted to try to tinker with the moral principles that give rise to this conflict. But your chief motivation, acknowledged or not, will be your belief in the correspondence thesis. Without it, you should be ready to accept that this is one of many instances of morally permissible mutual frustration.

### C. The Necessity Problem

Finally, let us revisit the case of the stranded hiker who tries to help himself to some food out of my cabin, and whose efforts I in turn try to hinder. This too, I claimed, is a case of permissible mutual frustration.

This case arguably maps onto the situation of Belgium at the outset of the war. Germany arguably was right to attack France once an attack from Russia was seemingly afoot and France had refused to disassociate itself from Russia. A successful war on both Russia and France required implementation of the Schlieffen Plan, which required marching through Belgium first to defeat France and then redeploying the German army to fight Russia. If Germany was in the right against Russia and France, marching through Belgium was rendered permissible by necessity. But since Belgium was in effect being asked to play the role of a Good Samaritan in volunteering its territory in support of Germany's defense, it could certainly refuse. And its friends—that is, Great Britain—could aid it in that refusal. To paraphrase Bismarck's dictum about the Austro-Prussian War of 1866, it may be that Belgium and England were no more wrong in resisting Germany's claim than Germany was in making them.

## IV. CONCLUSION

There are numerous appealing moral arguments that can be made in behalf of each of the warring parties of the Great War. One is tempted to think that not all of those arguments can be right if they end up exonerating both sides to the conflict. But that temptation is rooted in a false intuition, the correspondence thesis—the idea that there can be no such thing as “moral combat.” In the world of our everyday morality at least, such conflicts are a commonplace occurrence.