HIJACKED AIRPLANES: MAY THEY BE SHOT DOWN?

*Tatjana Hörnle**

The article examines whether force against a hijacked airplane is permissible if uninvolved passengers are killed. It takes a recent ruling by the German Federal Constitutional Court as its starting point, but addresses the relevant issues on a more general level with arguments drawn from moral philosophy, criminal law theory and constitutional theory, and political philosophy. The author concludes that a private individual who applies deadly force against the plane would commit a criminal wrong but should be excused. If, however, state officials act to protect the lives of other citizens, protective rights stand against defensive rights. Because such conflicts cannot be resolved within a discourse about rights, it is legitimate to save the greater number of persons.

I. INTRODUCTION: THE GERMAN DISCUSSION

In the aftermath of September 11, 2001, and an incident in 2003, when a mentally disturbed man in a small airplane flew over the city of Frankfurt threatening to crash himself into a skyscraper, the German parliament (in addition to other provisions)[1] passed a law to tighten security measures with respect to air traffic. This law, which became effective on January 15, 2005, was called *Luftsicherheitsgesetz*. Among other measures, it contained a highly controversial provision, allowing "the use of weapons against an airplane, if under the given circumstances one could presume that this airplane was going to be used against the lives of other human beings, and if the use

*Professor of Criminal Law, Criminal Procedure, and Legal Philosophy, Ruhr-Universität Bochum, Germany.

1. For previous security measures, see Oliver Lepsius, Liberty, Security, and Terrorism: The Legal Position in Germany, 5 German L.J. 435 (2004).

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of weapons was the only means against this present danger."[2] The president of the republic, Horst Köhler, had, when signing the law, expressed doubts whether it was compatible with the German constitution, and soon it was brought before the Federal Constitutional Court. On February 15, 2006, the court declared section 14 III to be unconstitutional.[3]

The ruling contains *two different chains of reasoning*. The first concerns the relationship between the state governments and the federal government in Germany. The states are responsible for averting dangers to public security and, so argued the court, it is not permissible to use the federal air force for this purpose. The army's primary task is defense in war, and, in addition, the German constitution permits using military personnel if serious natural and other disasters require their help. But the exceptions for disasters do not, according to the Federal Constitutional Court, allow using military weapons.[4] I will not dwell on the question of federal versus state responsibility. The constitution would have to be changed to widen the operational area of the air force before a new version of the Air-Transport Security Act could comply with it.[5] The second chain of arguments is probably more noteworthy for observers outside Germany: the Federal Constitutional Court stated that human rights provisions prohibit shooting down an airplane if it is carrying passengers and crew members. The judges had no objections against deadly action if terrorists were to get hold of a plane and fly it *without* crew or passengers.[6] However, if persons other than the offenders are aboard, the court tells us that their right to life and their human dignity would be violated if missiles were fired at the plane.

2. LuftSiG [Air-Transport Security Act] § 14 III.

3. 115 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (2006). For an English description of the LuftSiG and the court ruling, see Oliver Lepsius, Human Dignity and the Downing of an Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act, 7 German L.J. 761 (2006); see also Manuel Ladiges, Comment—Oliver Lepsius' Human Dignity and the Downing of an Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act, 8 German L.J. 307 (2007).

4. See art. 35 II, III Grundgesetz [GG] [German Federal Constitution]; 115 BVerfGE at 140–51.

5. This is under discussion. See Christian Pestalozza, Inlandstötungen durch die Streitkräfte—Reformvorschläge aus ministeriellem Hause, 60 Neue Juristische Wochenschrift 492 (2007).

6. 115 BVerfGE at 160–65 I use the term "terrorists" to describe potential offenders in a succinct way, being aware of the problems defining it and the fact that, as the Frankfurt case shows, the spectrum of offenders is wider.

When analysing the circumstances, there are two possible scenarios. In scenario 1, the Secretary of Defense has reliable information about what is going to happen. This could be the case if the crew obtains instructions about the destination and manages to forward this information. However, if the kidnappers keep their plans to themselves or suppress communication (scenario 2), this means that those who have to react need to do so very quickly while lacking a solid factual base for their judgment. They can only guess the kidnappers' target and know nothing about the chances for resistance by crew and passengers. In the worst case, it will not even be known whether intermittent communication with a certain plane is due to an instance of hijacking or due to technical difficulties. The Federal Constitutional Court cites the possibility of a scenario 2 case to support its decision. However, reading the reasons, one has to conclude that this description of a scenario 2 situation is superfluous. Prior to mentioning it, the court has already declared that article 1 I and article 2 II GG (human dignity and right to life) preclude killing crew and passengers. Thus, even if reliable information were at hand, the court finds that it would be unconstitutional to shoot at them.

In the German literature, the ruling has found approval as criticism against section 14 III prevailed.[7] However, in its crucial sections, the decision is rather short. The court proclaims that human dignity and the right to life preclude the kind of action the legislature wanted to make possible. This is done by way of declaration, without an extensive discussion of the theoretical issues at stake—which is appropriate for court decisions, but does not

7. Karsten Baumann, Das Grundrecht auf Leben unter Quantifizierungsvorbehalt, 57 Die öffentliche Verwaltung 853 (2004); Wolfram Höfling & Steffen Augsberg, Luftsicherheit, Grundrechtsregime und Ausnahmezustand, 60 Juristenzeitung 1080 (2005); Torsten Hartleb, Der neue § 14 III LuftSiG und das Grundrecht auf Leben, 58 Neue Juristische Wochenschrift 1397 (2005); Burkhard Hirsch, Verfassungsbeschwerde gegen das Gesetz zur Neuregelung von Luftsicherheitsaufgaben, 89 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 3 (2006); Wolf-Rüdiger Schenke, 59 Neue Juristische Wochenschrift 736 (2006); Lepsius, supra note 3; Wolfgang Hecker, Die Entscheidung des Bundesverfassungsgerichts zum Luftsicherheitsgesetz, 39 Kritische Justiz 179 (2006); Reinhard Merkel, § 14 Abs. 3 Luftsicherheitsgesetz: Wann und warum darf der Staat töten?, 62 Juristenzeitung 373 (2007). For a critical evaluation of the outcome, see Josef Isensee, Menschenwürde: Die säkulare Gesellschaft auf der Suche nach dem Absoluten, 131 Archiv des öffentlichen Rechts, 173, 191–93 (2006); Christian Hillgruber, Der Staat des Grundgesetzes—nur "bedingt abwehrbereit"?, 62 Juristenzeitung 209 (2007); Ladiges, supra note 3, at 309–10.

solve all questions. The aim of this article is to examine the matter more comprehensively, neither restricted to the German court's view nor to specific details of German law, but with an eye to the general principles which play a role in such difficult cases. In part II, I will discuss whether an *individual* who chooses to shoot down a hijacked plane does wrong. This discussion applies arguments from practical moral philosophy, but also from the criminal law. In part III, the analysis shifts to the question whether it could be a proper task *for the state* to have the airplane shot down. This leads to issues discussed in political philosophy and constitutional theory.

II. IS IT WRONGDOING IF AN INDIVIDUAL SHOOTS DOWN A HIJACKED AIRPLANE?

The Federal Constitutional Court has not taken a stance with respect to criminal law. The ruling states that it decides about constitutional matters and not about penal consequences.[8] It left open what should happen to pilots or other individuals who use weapons against a hijacked airplane.[9] Suppose that a pilot, Miller, who is not a state official, is in the position to attack a hijacked plane in order to prevent a terrorist attack on, let's say, a major airport. He is aware of the fact that there are several dozens of uninvolved persons (passengers and crew members) on board. He also knows that everybody in the plane will die when it crashes in a stretch of woods twenty miles away from the terrorists' target. However, knowing that a crash at the airport would kill thousands of persons, he chooses to act.[10] Did pilot Miller commit a moral wrong, and should he be punished for his action?

The starting point of my analysis is the assumption that judgments about wrongdoing should, both in moral philosophy as well as in criminal law, examine the offender's conduct *and the perspective of the victim.*[11] This assumption is, of course, not beyond debate. An alternative approach

8. 115 BVerfGE at 157.

9. For the sake of convenience, I will continue talking about pilots, but this includes other individuals as well.

10. Granted, it is highly unlikely that a private citizen has the means to shoot down an airborne passenger plane. The argument would, however, also apply to an air force pilot who ignores instructions.

11. See also Adil Ahmad Haque, Torture, Terrorism, and the Inversion of Moral Principles, 10 New Crim. L. Rev. 613 (2007).

does not pay attention to the victim because it sees the wrongdoing in the offender's lack of obedience towards moral norms and/or the criminal law and thus solely in the disobedience towards the community or the state. As it is not possible to discuss this issue here, I beg the reader's pardon for simply claiming the first approach as adequate.[12] According to this view, wrongdoing presupposes that Miller treated crew members and passengers in the plane wrongly. The evaluation should not just take the offender's duties, but also the victims' obligations into account. Miller's prima facie wrong is not difficult to describe: causing the death of another person through one's action, knowing that this action will result in this death, is prohibited. Different legal systems have different names for knowingly killing another person, but it is not disputed that it is a crime. The pertinent question is whether this killing is justified. Are there any reasons why the victims ought to tolerate Miller's action? This notion might sound rather strange on first reading. How could anyone in the eye of death possibly tolerate what the actor is about to do? But there are arguments of this kind, and in the following sections I will analyze different rationales why one could justify Miller's action morally and legally.

A. Causing the Danger (Defensive Necessity)

A detail which is sometimes crucial in "life against life" scenarios is that one of the parties has caused the danger which now threatens not just him, but also another person. The classic example (which appears in more than a hundred years of criminal law literature,[13] but also has turned into a real case[14]) is that of two mountaineers hanging in a difficult situation, connected by a rope. The one below stumbles and hangs helplessly

12. For a more detailed analysis, see Tatjana Hörnle, Das Unwerturteil und der Schuldvorwurf—Inhalte und Adressaten, in Empirische und dogmatische Fundamente, kriminalpolitischer Impetus: Symposium für Bernd Schünemann zum 60. Gerburtstag, at 105 (Roland Hefendehl ed., 2005).

13. See Wilfried Küper, Tötungsverbot und Lebensnotstand, 21 Juristische Schulung 785, 786 n.14 (1981); Günter Jerouschek, Nach dem 11. September 2001: Strafrechtliche Überlegungen zum Abschuss eines von Terroristen entführten Flugzeugs, in Strafrecht, Biorecht, Rechtsphilosophie, Festschrift für Hans-Ludwig Schreiber, 185, 189 n.21 (Knut Amelung et al. eds., 2003).

14. See Joe Simpson, Touching the Void (1988) (recounting what happened in 1985 in the Peruvian Andes).

over the abyss. Eventually, his weight will pull both into the gorge because the mountaineer above is not physically strong enough to pull his comrade up. If one imagines a dialogue between the two, the one above may plead: Do not pull me with you into the abyss! This is a morally plausible claim, and the other one, who had the bad luck to stumble, is morally obliged to act accordingly—as he should not doom his comrade to death as a consequence of what has happened to him. I would argue that he is under a moral duty to cut the rope himself, if he still is able to do so. If he remains passive, the mountaineer above him must be allowed to cut the rope.[15]

In terms of criminal law, this is not a case of self-defense because the mountaineer who is hanging helplessly does not act.[16] It is his weight pulling on his comrade that creates the deadly danger. However, it might fall under the category of necessity. In German criminal law doctrine, it is common to differentiate between "aggressive necessity" (*aggressiver Notstand*) and "defensive necessity" (*defensiver Notstand*). The first label applies to situations where some kind of sacrifice is demanded from an uninvolved person. Defensive necessity refers to cases like the one just mentioned where the person to be killed is the source of the danger.[17] It is hotly debated whether defensive necessity can justify killing a human being. Some authors argue that in "life against life" situations, one can never conclude that the protected interest is considerably more important, as all human lives count equally.[18] Others, however, contend that the fact

15. This logic also applies to the separation of conjoined twins in cases where one of the children is healthy enough to survive but the other has no chance and will extinguish the former child's life as well without surgery. Therefore, conjoined twins cases can be quite different from the hijacked airplane scenario. But see Luis Ernesto Chiesa Aponte, Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing, 10 New Crim. L. Rev. 102 (2007).

16. The minimum requirement for an attack is an action. See Claus Roxin, Strafrecht Allgemeiner Teil, Band 1, 658 (4th ed. 2006).

17. See id. at 758. The necessity clause in the German Penal Code, § 34 StGB, does not differentiate between aggressive and defensive necessity. It just contains the general instruction to evaluate whether the protected interest is considerably more important. But within this weighing of interests, the difference between aggressive and defensive necessity can be accommodated.

18. Küper, supra note 13, 792–94; Kristian Kühl, Strafrecht Allgemeiner Teil, 234–35 (5th ed. 2005); see also Volker Erb, in Münchener Kommentar zum Strafgesetzbuch, § 34 Nr. 152 (2003).

that the victim caused the danger can be important enough to justify killing him.[19] Taking this point of view, which I do, one can conclude in the mountaineer example that the cutting of the rope was not only morally, but also legally justified.

The question then is: Are there similarities between the mountaineer-type situations and the killing of passengers in a hijacked airplane? Some contributions argue that crew and passengers are indeed part of the dangerous situation. The authors claim that harm caused by the airplane could be attributed to all those who are in it—of course, attribution does not mean responsibility in the sense of culpability, but in the way of "cumulatively creating danger."[20] This argument needs examination: one has to decide what kind of relation is required between the danger and the person to whom it is attributed. As a necessary but not sufficient condition one has to establish a causal contribution. With respect to uninvolved passengers aboard, a causal contribution is lacking. Their mere presence does not create or shape the danger. Unlike in the mountaineer case, the "impact through weight" argument does not work. The bodies' physical effect in the case of a crash is, in comparison to the impact of the plane, so trivial that it can be neglected.[21] Are there any other causal factors? One could consider a causal contribution by members of the crew if they had started the flight before the hijacking took place. At this point, it is necessary to become more specific about "causal contribution." Simply pointing to causality can not legitimize attribution. Causality covers an enormously wide range of factors behind any given event. Everything that happens has thousands, millions, billions of causes. If one wants to base attribution at all on causality,[22] one needs to limit this to events that create an *immediate* danger. Any acts prior to that should not count.[23] This leaves one possible situation where the

19. Harro Otto, Grundkurs Strafrecht, Allgemeine Strafrechtslehre, 146 (7th ed. 2004); Ulfrid Neumann, in Nomos Kommentar zum Strafgesetzbuch § 34 Nr. 87 (2d ed. 2005); Roxin, supra note 16, at 760–61; Helmut Frister, Strafrecht Allgemeiner Teil 200 (2006).

20. Walter Gropp, Der Radartechniker-Fall—ein durch Menschen ausgelöster Defensivnotstand, 153 Goltdammer's Archiv 284, 287–88 (2006); Hans Joachim Hirsch, Defensiver Notstand gegenüber ohnehin Verlorenen, in Festschrift für Wilfried Küper 149 (Michael Hettinger et al. eds., 2007); Klaus Rogall, 1st der Abschuss gekaperter Flugzeuge widerrechtlich?, 28 NStZ 1 (2008).

21. Merkel, supra note 7, at 373, 384–385; see also Michael Pawlik, § 14 Abs. 3 des Luftsicherheitsgesetzes – ein Tabubruch?, 59 Juristenzeitung 1045, 1049 (2004).

22. Critically Erb, supra note 18.

23. Merkel, supra note 7, at 385.

necessary causal relationship could be assumed: if the flight's regular pilot, with a gun held to his head, were to crash the plane into the terrorists' target, violence against the pilot would be justified.[24] But even under such circumstances, the justification could not be extended to the death of other crew members or passengers. Nothing the crew members or passengers did would justify attributing the danger to them. Therefore, defensive necessity is not the appropriate category to frame our problem.

B. Sacrifice to Save Many Other Lives

Perhaps the analysis leads to different results if one tries another line of argument. After all, pilot Miller acts to save many other lives. Evaluating the situation from a *result-oriented, agent neutral view*, one would compare the numbers of expected deaths in both possible courses of events.[25] Consequentialist thinking justifies firing at the plane if there are fewer persons in it than are present at the airport. The philosophical underpinning could be utilitarianism, pointing to the greater good achieved. A different explanation arriving at similar results relies on contractual arguments. A group of persons under the veil of ignorance (that is, ignorant about their individual position should the drama later become real) might agree beforehand that such action should be allowed as it is statistically more likely that they would be at the airport than in the plane.[26] In my example, the persons in the airplane and those at the targeted airport can be described as subgroups of one large group consisting of travellers and airlines' employees. Therefore, those who are shot down belong to the group which potentially profits from a (hypothetical) agreement that

24. This assumes that one could fire a gun shot precisely at the pilot. Although the pilot acted under duress, his behavior would constitute an attack which could have been averted.

25. For the agent-neutral perspective, see Jonathan Glover, It Makes No Difference Whether or Not I Do It, 49 Proc. Aristotelian Soc'y 172 (1975); John Gardner, Complicity and Causality, 1 Crim. L. & Phil. 127 (2007).

26. For such an approach to difficult life-against-life-cases: Eric Rakowski, Taking and Saving Lives, 93 Columb. L. Rev. 1063 (1993); Lothar Fritze, Moralisch erlaubtes Unrecht, 51 Deutsche Zeitschrift für Philosophie 213 (2003). Alan Strudler and David Wasserman argue in a similar vein that it matters if the deaths are approved by a fair procedure in which those concerned could participate (The First Dogma of Deontology: The Doctrine of Doing and Allowing and the Notion of a Say, 80 Philosophical Studies 51, 64–66, 1995).

allows action against the hijacked plane in the interests of all individuals concerned.[27]

Resorting to a result-oriented assessment, the drafters of the American Model Penal Code held that the justification labeled "choice of evils" should be applied if the goal is to safe a greater number of lives.[28] In stark contrast to this position, German contributions express disdain for such calculations if they lead to the killing of a human being.[29] German criminal courts also have refuted such thoughts if they considered them (which they hardly do).[30] Obviously, it would be unfair to label the American tradition as straightforwardly consequentialist as there are many American contributions in the field of moral philosophy exploring and defending limits to this way of thinking.[31] However, even in view of the wide-ranging positions to be found in the American discussion, one can still conclude that there is a difference between the legal cultures.

Within the debate about "taking lives to safe a greater number of lives," two examples are used frequently. One prominent illustration of the problem has appeared in the German literature at least since 1951[32] and in the American literature for several decades[33]: an out-of-control train or trolley

27. If the terrorists' target were different (a skyscraper, like in the September 11 events), the argument would be somewhat more difficult. Would the victims in the shot-down plane have agreed beforehand that deadly force against hijacked airplanes was in their own interest? See for such questions Rakowski, supra note 26, 1123–1129.

28. Model Penal Code § 3.02 (Proposed Official Draft 1962). See Markus Dubber, Einführung in das US-amerikanische Strafrecht 148 (2005). For the less uniform legal framework in the American states, see Rakowski, supra note 26, at 1151–52.

29. Roxin, supra note 16, at 739; Otto, supra note 19, at 144; Kühl, supra note 18, at 223; Neumann, supra note 19, § 34 Nr. 74; Erb, supra note 18, § 34 Nr. 116; Jerouschek, supra note 13, at 192; Schenke, supra note 7, at 736, 738. For a different outcome, see Dieter Birnbacher, Tun oder Unterlassen, 220–21 (1995). For a general critique of consequentialist thinking, see Julian Nida-Rümelin, Kritik des Konsequentialismus (1993).

30. BGH, 6 Neue Juristische Wochenschrift 513, 514 (1953).

31. See, e.g., Judith Jarvis Thomson, The Realm of Rights (1990); Warren Quinn, Morality and Action (1993); Frances M. Kamm, Intricate Ethics: Rights, Responsibilities, and Permissible Harm (2007).

32. Hans Welzel, Zum Notstandsproblem, 63 Zeitschrift für die gesamten Strafrechtswissenschaften 47, 51 (1951).

33. See Philippa Foot, The Problem of Abortion and the Doctrine of Double Effect (1967), reprinted in Virtues and Vices and Other Essays in Moral Philosophy 19, 23 (2002) (using this problem, though with a driver steering the trolley); see also Warren S. Quinn, Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing, 98 Phil. Rev. 287, 304 (1989); Thomson, supra note 31, at 176.

threatens to kill a great number of persons (either on the same track or in a passenger train with which it will soon collide). By throwing the switch, a passerby could divert the train/trolley to another spur of track, however, if he does that, the trolley will crush a man working on this track. Would it be wrongdoing if the man throws the switch, knowing that he will kill the single worker? Opinions diverge. German authors almost uniformly conclude that arithmetic considerations are strictly prohibited and thus this act could not be justified.[34] In stark contrast, American writers, even those with a nonconsequentialist orientation, are willing to justify throwing the switch.[35] The second example shows us, however, that it will not do to focus on obvious benefits. Judith Jarvis Thomson has recast the problem in terms of organ transplant. In this scenario, one person's organs could rescue several patients desperately waiting for donor organs, and thus a doctor decides to take kidneys, lungs, and a heart from a healthy young person, ending one life to save five others.[36] Across moral and legal cultures, there is widespread consensus about the outcome: almost every writer who includes this example declares that the doctor's conduct cannot be justified.[37]

Beyond a neutral calculation of expected consequences, one can look at difficult cases either by focusing on the actor or the victim. Nonconsequentialist writers have mostly employed the first perspective in "taking lives to save lives" cases. There is an extensive literature in moral philosophy about the Doctrine of Double Effect, which draws a distinction

34. Supra note 29.

35. Foot, supra note 33, at 23 ("without hesitation"); Frances M. Kamm, Harming Some to Save Others, 57 Phil. Stud. 227, 228 (1989) ("commonly assumed that it is permissible"). Quinn and Thomson assume that "most people" would react this way . See Quinn, supra note 33, at 304; Thomson, supra note 31, at 176. See also Rakowski, supra note 26, at 1063 ("an irreproachable course").

36. Thomson, supra note 31, at 135.

37. See Kamm, supra note 35, at 227; Thomson, supra note 31; Rakowski, supra note 26, at 1063; Birnbacher, supra note 29, at 155–57; Tom Stacy, Acts, Omissions, and the Necessity of Killing Innocents, 29 Am. J. Crim. L. 481, 506–07 (2002); Fritze, supra note 26, at 214; Eric Blumenson, Killing in Good Conscience: What's Wrong with Sunstein's and Vermeule's Lesser Evil Argument for Capital Punishment and Other Human Rights Violations?, 10 New Crim. L. Rev. 210, 214–15 (2007). Even John Harris, when examining from a utilitarian perspective the possibilities of a "survival lottery," concedes that we would think such a step to be "out of the question" and that our moral intuition tells us that there is something wrong with the survival lottery. See John Harris, The Survival Lottery, 50 Philosophy 81, 87 (1975).

between the intentional and the merely foreseen. In the airplane case (as well as in the train and transplant examples) the actor does not intend the victims' death. It is neither his goal nor a necessary means to achieve his purposes, but he knows with certainty that they will die if he fires a missile at the plane (or removes vital organs or throws the switch). There seem to be obvious parallels between the airplane case and the situation in which the Doctrine of Double Effect is frequently invoked: the killing of civilians in war as the foreseen side effect of an important military operation.[38] However, I doubt that this doctrine is much more than a sham to hide pockets of consequentialist reasoning in states of emergency or other situations when the consequences of deontological thinking might seem too harsh.[39] Beyond that function, it is hard to see why lack of intention should lead to a justification in our cases: if the actor knows for sure that his conduct will kill persons, these deaths are his choice.

I have argued above that the *relationship* between offender and victim must be examined. For our scenario, this means to take both groups of (actual and potential) victims into view and to ask: Was Miller obliged to help those who profited from his choice (those at the airport who survived)? At this point, a difference between the transplant case on the one hand, and the plane and train cases on the other hand, should be noted. If the surgeon in the former also has been treating the patients receiving the organs, this prior doctor-patient relationship might have established a strong duty to help them. This would result in a conflict of duties (the duty not to harm the person singled out for "donation" and the duty to help his five patients). Our shared intuition that the actor in the transplant case does something particular obnoxious should not lead us to conclude that this judgment is easily explained! If proceeding with an analysis of this case, one would need to examine the relative weight of these duties, the difference between acts and omissions or doing and allowing,[40] and slippery slope arguments about why the doctor's conduct

38. For a discussion about the Doctrine of Double Effect, see Foot, supra note 33; Warren S. Quinn, Actions, Intentions and Consequences: The Doctrine of Double Effect, 18 Phil. & Pub. Aff. 334 (1989); Frances M. Kamm, Justifications for Killing Noncombatants, Midwest Stud. Phil. 219 (2000); Haque, supra note 11.

39. See also Birnbacher, supra note 29, at 154.

40. Within moral philosophy, a lot of attention is paid to the difference between acts and omissions, or between doing and allowing. Foot, supra note 33; Quinn, supra note 33; Birnbacher, supra note 29, ch. 5; Strudler & Wassermann, supra note 26.

could be harmful to all of us.[41] Fortunately, the arguments are somewhat simpler in the airplane case because pilot Miller (as well as the bystander in the train case) does not have a special prior relationship with those who benefit from their actions. For the airplane hypothetical, the notion of protective duties will be taken up again in part III, where I discuss duties of the *state* towards those at the airport. For now, let us continue the analysis of an individual who shoots down the plane without acting as a representative of the state and thus without strong protective duties towards those at the airport.

The next step is to shift attention from the potential victims at the airport to those who would be killed on the plane. Are the passengers[42] obliged to help the many people who would benefit if the plane were shot down? The answer depends on whether or to what degree there are duties of solidarity among human beings. With respect to such duties of solidarity, moral and legal evaluation do not always run parallel. It is somewhat easier, up to a certain point, to construe moral duties to care about the well-being of others. In the field of legal judgments, some argue that there are no duties of solidarity at all (for example, it is debated whether one must assist others in an emergency).[43] For my purposes, it is not necessary to ponder the scope of moral duties and the possible existence of legal duties in general. Here, it is only the most extreme situation to be judged: giving up one's *life* for the sake of others. From the moral point of view, it would be hard to identify any situation at all where one could plausibly claim that someone is obliged to sacrifice his or her life for another human being. Even in the most intimate personal relationships (husband and wife, parent and child) this would be considered heroic, but not something to be demanded, and this becomes even more obvious when strangers benefit from such a sacrifice.

41. There have been attempts to locate our misgivings about the transplant case within a consequentialist framework: an obvious slippery slope concern is that public trust would be destroyed if such things were to happen in hospitals. See Birnbacher, supra note 29, at 157. Stacy, supra note 37, points out that the physiological benefits of transplantation are overvalued.

42. As it is no longer necessary to differentiate between passengers and crew, I will mention the passengers, but the same arguments apply to members of the crew.

43. See § 323c StGB [German Penal Code] (stipulating such a duty). For a critical analysis, see Henrike Morgenstern, Unterlassene Hilfeleistung, Solidarität und Recht (1997); Regina Harzer, Die tatbestandsmäßige Situation der unterlassenen Hilfeleistung gemäß § 323c StGB (1999).

Our moral practice does not demand such sacrifices. It remains to be discussed if this is not irrational under some circumstances. Above the notion has been introduced that reasonable persons under the veil of ignorance could have good reasons to decide in favor of shooting down the plane.[44] If the real situation did occur, the passengers most likely would not be convinced if the *only* argument at hand was that their sacrifice would save a greater number of persons (the additional argument that their deaths are imminent regardless of the choice they make will be examined below in subsection C). How should one evaluate the discrepancies one finds between solutions based on disinterested rationality and sheer probabilities, on the one hand, and those more influenced by personal involvement, on the other? I would argue that under extreme circumstances psychological realities must override contractualist constructions of moral demands. The need to survive is one of the conditions which everybody not only experiences, but which also can be understood in other human beings without much empathy being necessary. The demand to sacrifice twenty, thirty, forty or more years of one's life becomes increasingly difficult to justify when one goes beyond the merely hypothetical and takes into account that such a demand is made of real people with real lives. While the theoretical argument seems rational in the abstract, nobody could seriously use it to ask passengers on a hijacked plane to accept death.[45]

The analysis of the offender's and the victims' duties leads to the following conclusion: As the passengers were not obliged to sacrifice their lives, pilot Miller stood under the corresponding duty not to harm them. At the same time, his duty to help those at the airport was at most the weak duty of a general solidarity one has towards fellow human beings in distress (if one acknowledges such duties at all). In this situation, shooting at the airplane does constitute wrongdoing, both morally and legally.[46]

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44. One could come up with similar arguments in the train example if those who got killed belonged to the same group which profited from an agreement, see Rakowski, supra note 26. In the transplant case, much depends on the likelihood of needing transplantation in one's own life. But still one could come up with constellations where it might, under a veil of ignorance, rational to agree. See Harris, supra note 37.

45. See also Fritze, supra note 26, at 220. However, although he acknowledges the victims' right not to accept an attack, he does not postulate a corresponding duty for the actor to refrain from the action.

46. Neumann, supra note 19, § 34 Nr. 74.

C. Sacrifice of a Very Short Remaining Life Span

An important difference between the train and the transplant examples and the case of the hijacked airplane needs to be discussed now. While in the former examples the victims hope to live for a considerable time (for as long as present age and health leads them to expect), the passengers' lives are doomed before the shot is fired. Here we have a parallel to the case of the two mountaineers discussed under the heading "defensive necessity": even if the climber above who cuts the rope does not do so, the other one will die nevertheless in a short period of time. If there is no chance to survive at all, the sacrifice one has to make is dramatically different from the sacrifices discussed above in subsection B. It would be legitimate to ask the passengers: Do you really value the remaining five minutes of your life so much that it is worth more to you than the opportunity to save the lives of others? Let us assume that there could be a dialogue between pilot Miller and one of the passengers (Smith) via cellular phone. Miller urges Smith to reconsider her plea to live and to take into account that her remaining lifespan will be only five minutes. Should Smith relent, and what should Miller do if she does not? With these questions, one arrives at the core of the problem, both in terms of morality and criminal law. While it is not so difficult to develop an argument that Smith is, in general, not obliged to give up her life for the benefit of others, the matter becomes more complicated when we introduce Smith's imminent death.

The German Constitutional Court has addressed this point in a rather abstract and short mode by stating that each human life is of equal worth, independent of how long it is likely to last.[47] Also, the majority among German criminal lawyers refuses to take the probable duration of a person's remaining life span into account.[48] Behind this firm refusal stand

47. 115 BVerfGE at 158.

48. Küper, supra note 13, at 792–93; Roxin, note 16, at 738–39; Jerouschek, supra note 13, at 193; Arndt Sinn, Tötung Unschuldiger auf Grund § 14 III Luftsicherheitsgesetz—rechtmäßig?, 24 Neue Zeitschrift für Strafrecht 585, 586 (2004); Höfling & Augsberg, supra note 7, at 1083–84; Hirsch, supra note 7, at 8, 12; Schenke, supra note 7, at 738. Again, one finds contrasting views in the American literature. See, e.g., Rakowski, supra note 26, at 1136 (discussing Bernard Williams example of "Jim and the Indians" and expressing the view that of course it matters that all Indians were doomed to death anyway).

fears about further consequences. Authors hint that it would "violate a taboo" if one starts to take closer looks at the actual meaning and value of a person's life.[49] Obviously, one has to deal with slippery slope arguments. Allowing statements about a life's worth might lead us also to demand, for example, that terminally ill patients in hospitals ought to give up their right to life and clear their bed for a patient with better prospects towards recovery. Slippery slope arguments are popular, but they undercut the possibility to fine tune judgments. In the case of the patient, it is not a "five minutes from now" situation, and, what is even more important, dying undisturbed in peace and dignity is a valid claim on its own. What makes the hospital example so obnoxious is that the patient's interest in dying peacefully would be blatantly disregarded if he were expelled from the hospital. However, in the airplane case the situation is different: crashing into the airport is not a better way of dying than crashing into the woods five minutes before.

Behind the vivid debate about the "Luftsicherheitsgesetz," although mostly not explicitly spelled out, lurks a moral intuition:[50] that the person who shoots down the plane would not necessarily commit a moral wrong. If Miller pleads with Smith, he could do so by emphasizing the horrors she will endure during the remaining time. Knowing that one will die within five minutes probably means great despair and anxiety for many. This argument alone, however, will not suffice. It might not be the case that the quality of life is drastically impaired by fear even if the passengers are aware of their fate. How individuals cope with the cruel message that they will die very soon differs. Many will find the remaining minutes unbearable, while others will not. Smith might reply that she wishes to exchange last words with her partner who sits besides her, or leave a phone message to a beloved one, or pray. But still, even if Smith turns out to be a relatively calm passenger, the question remains whether the general verdict against ambitious duties of solidarity ought to be upheld under such very specific circumstances. In my view, sacrificing the last five minutes of one's life would not require awe-inspiring

49. Hartleb, supra note 7, at 1398; Schenke, supra note 7, at 738; see also Pawlik, supra note 21, at 1050; Höfling & Augsberg, supra note 7, at 1084.

50. For the prevalence of such an intuition, see Stefan Huster, Zählen Zahlen? Zur Kontroverse um das Luftsicherheitsgesetz, 58 Merkur 1047, 1048–50 (2004); Chiesa Aponte, supra note 15, at 103–04.

heroism, and from a moral point of view Smith and the other passengers *should* make this decision.[51]

What follows from such a moral judgment? Should Miller also be justified from the perspective of the criminal law? Some criminal law theorists come to this result.[52] One point is out of the question: one cannot assume that he would be justified on the basis of consent. The dialogue I have been referring to is merely hypothetical. The place to anchor moral considerations in criminal law doctrine would be the justification called necessity. However, the crucial issue contains two elements: Besides the question whether Smith should relent to Miller's plea, which can be answered in the affirmative, it still remains to be discussed what Miller should do if she does *not*. May her individual preference be ignored? Under some circumstances, one can consider doing this. In the mountaineer case mentioned above, if the mountaineer hanging below (who will pull the other one into the gorge) refuses to cut the rope, one can argue that his comrade above him is entitled to do the cutting himself. Ignoring the other's refusal seems legitimate because he is the one who causes the danger. However, in the airplane case, it is harder to develop reasons for disregarding Smith's protest. Unlike the hanging mountaineer who weighs the other down, Smith bears no responsibility for the situation. If one shifts from a moral assessment of Smith's decision to Miller's decision, and applies a legal perspective, there are others values which need to be taken into account. Although Smith's refusal to sacrifice five minutes of her life is morally dubious, she nevertheless might be entitled to decide such fundamental matters according to her own preference.

Issues like autonomy and self-determination come into play. Of course, the point of a justification called "necessity" is to acknowledge that sometimes it is appropriate to ignore the will of others. However, if one takes

51. Huster, supra note 50, at 1048; Pawlik, supra note 21, at 1049; see also Sinn, supra note 48, at 588–89; Höfling & Augsberg, supra note 7, at 1085 (expressing skepticism with respect to such a moral evaluation). This moral judgment is limited to scenario 1 situations, that is, if the facts are known. It crumbles in a scenario 2 case. If the dialogue starts with "you might possibly die in five minutes," this leaves the alternative open of living one's life to its natural end. It would be an unreasonable moral demand if one were to ask Smith to accept death in spite of an unclear prognosis.

52. Erb, supra note 18, § 34 Nr. 119–20; Neumann, supra note 19, § 34 Nr. 77. See also Martin Hochhuth, Militärische Bundesintervention bei inländischem Terrorakt, 44 Neue Zeitschrift für Wehrrecht 154, 165–66 (2002).

the victims' rights seriously, there ought to be limits somewhere. The more the act in question concerns the personal sphere, the less it is permissible to override individual choices.[53] While destruction of property and the like are easier to justify, stricter limits apply if one's dominion over one's own body is at stake. A comparable problem of dominion in personal matters arises if the last minutes of one's life are at stake. What is lost through the act in question can never be recovered, and one can argue that the time span immediately before dying has a markedly different meaning than any other five minutes of one's life. Therefore, in the end, Miller should respect Smith's autonomous choices even if he can argue with good reasons that to give up these last five minutes is morally preferable.

Now it becomes necessary to turn from the hypothetical dialogue to the more realistic scenario. As it would obviously be impossible to communicate with all the passengers, Miller would not be in the position to know whether they would, if asked, agree or not. On what assumption, then, should he operate? One possible approach would be the *idealistic* one: to assume that all the passengers would understand the moral requirements the situation imposes upon them. A *realistic* assessment, however, would take into consideration that it is not very likely that a random congregation of a few dozen or even a few hundred persons would react uniformly. All the pilot could plausibly hope for would be that many passengers understand that five minutes are not important enough to opt for the deaths of many more people who are not yet doomed to die. But it would not be reasonable to assume that every single person in the plane has achieved this stage of moral development. The final, and I think crucial question therefore is: May the pilot rely on the idealistic assumption? Or does he need to apply a realistic stance and assume that at least a few will not accept that it is morally preferable to be shot down? For a moral evaluation of the matter, one might opt for the idealistic assumption and discard the likelihood of less praiseworthy individual choices. However, with respect to a criminal law justification based on necessity, a realistic stance would be required. If a judge ever needs to consider these issues, she will evaluate the interests of real victims, and therefore apply the realistic assumption. Pilot Miller would not be justified if he acted

53. Quinn, supra note 33, 308–12. For the controversy over whether taking blood without consent can be justified, see Thomson, supra note 31, at 168; Roxin, supra note 16, at 745–46.

(although a moral plea to the victims to accept shooting down the plane would be founded).

D. Excuse

Those who do not acknowledge a justification keep searching for ways to spare the pilot criminal punishment.[54] The way to achieve this would be to excuse him. There is a provision about "excusing necessity" in § 35 of the German Penal Code that exempts offenders from punishment who act to avert a present danger to life. This provision does not require a weighing of conflicting interests. However, the excuse is limited to situations when the offender himself (or someone with whom he has a close relationship, such as a family member) is in danger. The wording is unequivocal: it does not cover circumstances when the offender acts on behalf of persons whom he does not know.

A discussion about extralegal excuses (*übergesetzlicher entschuldigender Notstand*) bloomed in Germany shortly after the Second World War. Trials against doctors who had sent some of their mentally ill patients to places where they were killed provide the background. The doctors claimed to have participated in selections in order to save other patients, arguing that they saved the lives of some by sacrificing others.[55] This argument was open to challenges.[56] Suspicions arose that not all of the offenders were totally immune to considering their career prospects, and some of them might have supported the euthanasia politics they later asserted to have opposed. But it would be unfair to compare a pilot's situation to these sometimes dubious cases—there are important differences. The pilot would be aware that with the decision to kill he would run into difficulties, and one would not suspect ideological blindness or prejudices against the victims tainting his motives. And, what is even more important: the moral background in

54. Chiesa Aponte suggests that there is a "normative gap" when there are "equally powerful reasons both in favor of performing the conduct and against performing it." However, his arguments seem somewhat inconsistent. When discussing necessity, Chiesa Aponte applies deontological arguments in the mainstream Continental European tradition and refutes utilitarian reasoning. Chiesa Aponte, supra note 15, at 121–23. It thus comes as a surprise that in a later section he sees the goal to rescue many lives as an "equally powerful" reason.

55. See BGH, 6 Neue Juristische Wochenschrift 513 (1953).

56. Küper, supra note 13, at 793.

the airplane case is very intricate. The "doomed to death in five minutes" feature poses the greatest difficulties, and I have argued that under such extreme circumstances, the passengers ought to make up their mind and accept being shot down. If one nevertheless concludes that the moral reasoning can be overridden by emphasizing the passengers' autonomy, as I did, this does not mean that the moral view fades away entirely. When one has to decide about justification within the criminal law, one must respect the victims' rights. But there are other places in criminal law doctrine like the question of an excuse where due attention can be paid to the fact that the actor had morally acceptable reasons. The law would be contradictory if it showed tolerance for those who act for the purpose of self-preservation and thus granted them an excuse, but did not do the same for someone in a genuine dilemma who acts under very extreme and difficult circumstances, with moral arguments supporting his decision. Against this background, pilot Miller would not deserve the blame which is normally appropriate for knowingly killing another person, and should be excused.

III. IS IT WRONGDOING IF A STATE OFFICIAL GIVES THE ORDER TO SHOOT DOWN A HIJACKED AIRPLANE?

The discussion so far has been limited to the individual offender's (the pilot's) moral and criminal responsibility. In addition, one needs to examine whether a state official, for example the Secretary of Defense, may order air force personnel to fire at the airplane. In judging the relationship between moral and penal evaluations on the one hand, and constitutional requirements on the other hand, one could conclude that a state official might be more free to make decisions based on minimizing human loss. Where a decision to kill few to save many would constitute wrongdoing for the pilot, it might not for the state official. Such a stance would have been natural both for an eighteenth-century absolutist monarch as well as for a twentieth-century dictator: he would follow his interest to have at his disposal as many soldiers, farmers, workers, etc. as possible. However, such a view of human beings as useful providers of services can no longer be considered appropriate. Rather, one has to start with a concept of persons as both individuals with a value of their own and as citizens with rights protecting them against the state. Thus, the only possibly acceptable version of counting survivors would need to start with the concept of *rights*.

A. Conflicting Claims

The passengers could evoke their right to life as a reason for not shooting the airplane down.[57] I have argued above that persons are entitled to refute claims that they ought to give up their lives. This argument is not limited to the criminal law—within constitutional theory the notion of a defensive right serves exactly this purpose.[58] The refusal to sacrifice oneself in order to save other lives would become meaningless if the state could override this individual decision. Recall the fictional dialogue between passenger Smith and pilot Miller about her remaining very short life span. Are the moral issues raised in that dialogue still relevant if we change the participant from pilot Miller, a private individual, to the Secretary of Defense, an agent of the state?[59] For several reasons, I am hesitant to apply such reasoning to decision making which can be attributed to the state. Moral conversations belong to the relationship between the members of society. In a dialogue with the Secretary of Defense, Smith could point to her right as a citizen, to her defensive rights, and tell him that the moral appropriateness of her decision is none of his business. And I have argued above that Smith's obligation does not amount to a legal duty. She should from a moral point of view choose to sacrifice the last five minutes of her life in order to save others, but at the same time she could invoke another right: her right to make autonomous decisions.[60] Smith is entitled to determine the priorities for the remaining five minutes herself, and it must be accepted if she is not willing to forego them.

On first view, a victims- and rights-centered approach seems to demand the conclusion that state officials, like private individuals, commit a wrong if they give the order to shoot down the plane. However, if we examine state officials' duties, the matter becomes more complicated as the question of protective rights needs to be addressed. While passenger Smith can demand that the state must not have her killed, airport worker Walker (who is present at the airport about to be destroyed) could possibly demand that representatives of the state thwart the terrorists' attack. A strong

57. See art. 2 II S. 1 GG.

58. See also Blumenson, supra note 37, at 225–30.

59. See Hochhuth, supra note 52, at 166 n.44; Hillgruber, supra note 7, at 217. Hillgruber does not discuss the criminal law outcome, but the constitutional legal framework, and he argues that the very short remaining time is crucial in this context.

60. See art. 2 I GG.

branch within German constitutional doctrine recognizes citizens' rights beyond the defensive rights against the state. According to this approach, citizens can insist to be safeguarded against harmful actions of their fellow citizens.[61] Although the pilot as a private person could not justify his action by pointing to the potential victims at the airport, the state might be in another position due to protective duties (a duty which the pilot himself does not have).

B. Are Protective Claims to Be Acknowledged?

This leads to two questions: should one acknowledge protective rights at all, and if so, how should state officials decide if there are two conflicting claims? It is beyond debate that the state has *some kind* of protective obligations. Basic narratives in political philosophy, which usually start with summarizing Thomas Hobbes's *Leviathan*, strive to explain why human beings have a general duty to behave in a peaceful and law abiding way and why the state has the prerogative to apply force. Restrictions on individuals' use of violence have as their counterpart the fundamental duty of the state to ensure the safety of its citizens.[62] The German Federal Constitutional Court has recognized protective duties of the state when deciding about abortion in 1975.[63] In later decisions, the court repeated this point in principle, however without concluding that this, in the end, amounted to a duty for state officials to act in a certain way. One such case concerned a drama which happened thirty years ago: terrorists who defined themselves left-wing (from the so-called Rote Armee Fraktion) had kidnapped a politician (Hanns Martin Schleyer) in order to extort the release of their imprisoned comrades. The Federal Constitutional Court maintained that the state was not under a duty to fulfil the kidnappers'

61. For the concept of protective rights, see Josef Isensee, Das Grundrecht auf Sicherheit (1983); Gerhard Robbers, Sicherheit als Menschenrecht (1987); Johannes Dietlein, Die Lehre von den grundrechtlichen Schutzpflichten (1992); Wolfram Cremer, Freiheitsgrundrechte, 228–359 (2003); Christian Calliess, Die grundrechtliche Schutzpflicht im mehrpoligen Verfassungsrechtsverhältnis, 61 Juristenzeitung 321 (2006). For a comparison with American constitutional theory, see David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986).

62. For the philosophical and historical background, see Isensee, supra note 61, at 3–26; Robbers, supra note 61, at 40–120.

63. 39 BVerfGE 1, 42 (1975). Whether fetuses have rights, is of course highly contested; this can not be discussed here.

extortive demands, though Schleyer's family pleaded for them to do so.[64] Schleyer was then murdered. In the ruling concerning the *Luftsicherheitsgesetz*, the court argued in a similar way, maintaining that the state must help and protect, but with room to exercise discretion. The judges emphasized that state officials must be able to determine priorities and to decide according to their own code of responsibility.[65]

A crucial question is whether the state's protective duty amounts to rights for individuals. Within constitutional theory, it is debated whether human rights such as the right to life can be the foundation for individual protective rights.[66] The alternative would be to acknowledge a protective duty without a corresponding right of the individual in question.[67] The recent ruling does not mention individual protective rights but argues that the state's protective duties merely stem from the objective content of human rights. Commentators point out that the judges could have easily evoked the notion of protective rights and that, as they chose not to do so, this concept "must confront its jurisprudential death"—a development which finds approval among those who are sceptical about the notion of protective rights anyway.[68]

It is not possible to discuss to a satisfying extent whether we should acknowledge protective rights at all, as the matter would require a lengthy treatment. Therefore, the discussion can only be outlined. For most possible examples of protective duties, reasons which can be labelled "pragmatical" or "political" determine the outcome. Sunstein and Vermeule, in a rather provocative article about the death penalty, propose an extensive version of protective duties: risks to life and health which could be minimized by implementing legal regulations ought—according to their view—to be averted.[69] However, such ambitious proposals must soon find their limits if one takes the realities of public resources into account. In

64. 46 BVerfGE 160, 164 (1977).

65. 115 BVerfGE 160.

66. For the position which favors subjective rights, see supra note 61 and sources cited therein.

67. Ralf Poscher, Grundrechte als Abwehrrechte, 192–98 (2003).

68. Lepsius, supra note 3, at 773–74; Peter-Alexis Albrecht, Menschenwürde als staatskritische Absolutheitsregel, 89 Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 295, 299 (2006); see also Hans Albrecht Hesse, Der Schutzstaat geht um, 46 Juristenzeitung 744 (1991).

69. Cass R. Sunstein & Adrian Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703, 749–50 (2005).

many areas, spending additional billions would have a measurable effect, but not all of these proposals could be implemented. Imagine two strategies, let's say fighting obesity and improving safety for car traffic, which both could save an equal number of lives at comparable costs. One would need to make a choice if funding is insufficient for both, and such a choice must be a political decision. Also, in some instances of alleged protective rights, it might not be obvious what kind of help would be effective. For this reason, with respect to *statistical risks*, it is almost never possible to establish a clear-cut protective duty of the state, to say nothing of corresponding rights. One can therefore conclude that the duty not to interfere with citizens' rights *in general* is more important than the duty to help and the duty to protect.

However, the question whether the state is under a duty to prevent the plane from crashing into the airport requires different judgments. Determining the financial feasibility and the success of the action does not pose a problem (shooting down the airplane over the woods would save those in the airport for certain). Under such circumstances, it would not be adequate to deny individual protective rights in principle. Shooting down a hijacked plane is not a paternalistic interference with citizens' affairs; rather, it is the only way to save the lives of the people the plane will kill when it crashes. Their interest to be protected when only the state has the means to do so and they are entirely helpless is legitimate and deserves to be acknowledged. Under such circumstances, approaches which eschew the notion of protective rights lose their persuasive force. When an interest as vital as survival in the face of imminent death is concerned, individuals have a claim against the state to be protected from this danger.[70]

C. Human Dignity As the Trump?

The foregoing reasoning leaves us with the puzzling result that both the passengers as well as the persons at the airport can claim individual rights stemming from the right to life—and that these rights are irreconcilable. A solution in favor of the passengers would be possible if an additional right could override the rights of those at the airport. The German Federal Constitutional Court declared § 14 III Luftsicherheitsgesetz unconstitutional

70. See also Dietlein, supra note 61, at 173–74; Calliess, supra note 61, at 327.

by invoking a defensive right with special status in the German constitution and German constitutional theory. The judges referred to the passengers' human dignity, postulating that their human dignity would be violated if they were to be killed.[71] Citing human dignity invites the questions of what exactly constitutes human dignity and what kind of conduct violates it—questions which are not exactly easy to answer.[72] However, for our purpose, the question is considerably more narrow: under what circumstances is the (intentional or knowing) killing of another person not compatible with the victim's human dignity? Occasionally, lawyers have argued that "life is the vital basis of dignity," and therefore killing violates human dignity.[73] But this is not convincing: the right to life and the right to have one's human dignity respected are different rights, and it must be something about the mode and circumstances of the killing which marks out the area where both rights overlap.[74]

The Federal Constitutional Court argued rather broadly that the persons in the plane would be treated as "mere objects" if they were shot down. Although Immanuel Kant is not explicitly mentioned, the source of this notion is obvious: it goes back to Kant's Second Categorical Imperative.[75] The decision also highlights the passengers' situation, the fact that they are helpless and that they are powerless to escape (as opposed

71. 115 BVerfGE at 152–54. The first clause in the German constitution states that "human dignity is inviolable" and that it is the state's duty to respect and protect human dignity. Grundgesetz für die Bundesrepublik Deutschland [German Federal Constitution], art. 1 I.

72. Compare Christian Starck, Menschenwürde als Verfassungsgarantie im modernen Staat, 36 Juristenzeitung 457 (1981); Hasso Hofmann, Die versprochene Menschenwürde, 118 Archiv des öffentlichen Rechts, 353 (1993); Christoph Enders, Die Menschenwürde in der Verfassungsordnung—Zur Dogmatik des Art. 1 GG (1997); Ulfrid Neumann, Die Tyrannei der Würde, 84 Archiv für Rechts- und Sozialphilosophie 153 (1998); Isensee, supra note 7.

73. See 39 BVerfGE 1, at 42; Ernst Benda, Verständigungsversuche über die Würde des Menschen, 54 Neue Juristische Wochenschrift 2147 (2001).

74. Horst Dreier, Menschenwürdegarantie und Schwangerschaftsabbruch, 47 Die öffentliche Verwaltung 1036 (1995).

75. "Handle so, dass du die Menschheit, sowohl in deiner Person, als in der Person eines jeden anderen, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchest." Immanuel Kant, Grundlegung zur Metaphysik der Sitten (1785), in Werkausgabe Band VII 61 (Wilhelm Weischedel ed., 1968). ("Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never simply as a means.").

to the kidnappers, who could surrender and would thus, according to the court, not be treated as mere objects if the plane were shot down).[76] Reinhard Merkel recently summarized conditions under which the state can legitimately kill a citizen: when this citizen culpably endangers another person or when he at least causes a deadly danger. Beyond such circumstances, he argues, the right to life must prevail.[77] Accordingly, one could read the court ruling as saying that "actively killing innocent or uninvolved persons violates their human dignity."[78]

I have argued elsewhere that article 1 I GG (enacted in 1949, when the constitution was passed) contains a statement against the murderous national socialist regime. As the fathers and mothers of the German constitution wanted to express a reversal of normative premises, this included the promise that never again should human lives be subject to the utilitarian reasoning which lead, for example, to the killing of handicapped and mentally ill persons. Nobody should, in the new Federal Republic, make human beings die for the sake of common interests (for instance, to save the costs of services for handicapped people).[79] As the weight of "human dignity" arguments within the German discussion is connected to our history, one might suspect that they do not appeal equally to scholars coming from other legal cultures. However, if one leaves the historical background aside, there are normative claims which can be generalized.[80] The national socialist murders had one feature in common: the underlying

76. 115 BVerfGE at 153–54.

77. Merkel, supra note 7, at 383–85.

78. There is one obvious exception to a prohibition against killing uninvolved persons: international law allows countries to defend themselves in war, even if this involves "collateral damages," that is, less euphemistically, to kill civilians during the course of military actions. For terrorists' attacks, authors have drawn a parallel. See Pawlik, supra note 21, at 1053–55; see also Schenke, supra note 7, at 738. Our Secretary of the Interior now considers constitutional provisions allowing the use of the air force in warlike states of emergency which endanger the foundations of the state. See Pestalozza, supra note 5, at 493. Critics argue that this definition is highly imprecise and that even the attacks on September 11, 2001, did not have an impact comparable to a situation of war. Id. at 495.

79. Tatjana Hörnle, Menschenwürde und Lebensschutz, 89 Archiv für Rechts- und Sozialphilosophie 318 (2003).

80. For human dignity arguments in rulings by the American Supreme Court, see Maxine D. Goodmann, Human Dignity in Supreme Court Constitutional Jurisprudence, 84 Neb. L. Rev. 740 (2006); Vicki C. Jackson, Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse, 65 Mont. L. Rev. 15 (2004) (discussing the Montana Human Dignity Clause).

notion that the victims' lives were of low worth and thus ought to be sacrificed for collective goals (financial interests, or "purity of the race"). Applying such reasoning expresses utmost contempt for the victims, and thus attacks their human dignity in addition to their right to life.[81]

To what extent is this relevant for the hijacked airplane situation? One could imagine explanations for shooting at the plane which would accordingly qualify as violations of human dignity. This would be the case if the state officials reasoned, for example, that it would be too expensive to rebuild the airport the terrorists aim at, or that the passengers are foreigners and thus less worthy of protection than the citizens present at the German airport. Killings out of *motives* which imply disrespect for the human beings concerned or an inadequate valuation of human lives in relation to financial interests violate their human dignity. The human dignity clause prohibits such assessment of the worth of human lives. Also, if we look at the transplant example mentioned above, the *circumstances* of a killing can constitute a violation of human rights even if the motives were to protect the lives of others.[82] However, such motives and gruesome conditions aside, the matter is more difficult to judge. It seems realistic to expect that a Secretary of Defense would opt for military force solely motivated by her protective duties towards the many potential victims at the airport. In contrast to the aforementioned examples, the motive would convey nothing demeaning about the actual victims nor would the circumstances of the act violate their dignity. In a situation involving defensive claims against protective claims, the victims' right to life would not be balanced against some collective good (and thus devaluated) but against the positions of other individuals. Therefore, in contrast to the Federal Constitutional Court and the vast majority of authors who approve of its central arguments, I doubt that the solution can be found in the human dignity clause of the German Constitution.[83]

81. Similar arguments are also important for the debate about the death penalty. Sentencing someone to death not only condemns the offense, but also delivers a message about the worthlessness of the executed. The objective meaning the death penalty has is, in my view, more important than the difference between intention and knowing, which other authors see as crucial. See, e.g., Carol Steiker, The Ethics and Empirics of Capital Punishment, 58 Stan. L. Rev. 751, 757–62 (2005).

82. The act of cutting a person's body into pieces without this person's consent would suffice to constitute a violation of human dignity.

83. With respect to quantitative comparisons I had previously applied a human dignity based argument, Hörnle, supra note 79, at 329, but I have subsequently developed doubts.

D. Differences between Acts and Omissions?

If human dignity arguments do not tip the scale, how should the clash of defensive claims and protective claims be resolved? In dealing with this issue, writers often argue rather briefly that there is a ranking of duties: more important, it is said, is the duty not to interfere (the duty towards the passenger Smith) than the duty to help (the duty towards the airport worker Walker). The state's duties are, according to a popular saying, asymmetrical.[84] One possible explanation would be that there is a structural difference between the two sets of duties and that therefore the state must always ignore the protective claim. This argument claims that the difference between acts and omissions becomes crucial: acts by the state (shooting at the plane) are said to be worse than omissions (the omission to protect those at the airport).

Against this widespread opinion, Sunstein and Vermeule argue that the difference between acts and omissions cannot shoulder the weight that is put on it.[85] With respect to their topic, the death penalty, one might challenge their conclusions because there are individual defensive rights, but no individualized protective rights at stake. Offenders sentenced to death are individuals, while the risk of future crimes is not yet a risk for individuals but a risk for society. Some authors writing about the hijacked airplane scenario also imply that individual rights figure just on one side (the right to life of those in the plane), while on the other side the risk that the plane reaches the terrorists' target is portrayed as a collective risk.[86] Thinking along this line would require considering a topic which Sunstein and Vermeule discuss: whether it is appropriate to give persons with names and faces higher priority than statistical risks.[87] However, for my purpose, it is not necessary to examine possible distortions of human attention. In the airplane case, the persons who would be killed at the airport could be individualized at the time the decision is made.[88]

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84. Höfling & Augsberg, supra note 7, at 1084; Merkel, supra note 7, at 381.

85. Sunstein & Vermeule, supra note 69, at 719–24. They assume preventive effects of the death penalty, a question which cannot be discussed here.

86. See Lepsius, supra note 3, at 772; Albrecht, supra note 68, at 299.

87. See Sunstein & Vermeule, supra note 69, at 740–41.

88. Granted, this might be somewhat difficult in detail. For example, those sitting in a taxi might or might not arrive at the airport before the crash. However, my crucial point is that it would be misleading to talk about a "mere statistical risk" when referring to the persons at the airport.

The relevance of the difference between acts and omissions needs to be considered against this background of individual potential victims on both sides. Within moral philosophy, it is contested whether acts and omissions should be judged differently.[89] It is not necessary to depict this general discussion as it can be narrowed to the more specific question whether the acts/omissions divide is relevant for *state officials*. Sunstein and Vermeule convincingly argue that it is not. There are reasons why we might be willing to tolerate that individuals remain passive in the face of imminent danger, but these do not apply to representatives of the state. One such reason is the notion of individual liberty. Citizens may deny help to others because widespread duties of assistance infringe upon their liberty. State officials, in contrast, are not entitled to argue with the concept of liberty when they decline to help citizens.[90] There might be other reasons why we do not blame private citizens who remain passive in states of emergency or blame them to a lesser degree, especially if the decisions to make are intricate decisions. Obviously, in truly tragic situations when helping one person necessarily means harm for another person, to decide between act and omission is painful. From the human point of view, it is understandable that persons are unable to make up their minds and simply freeze in a state of indecision. However, we expect state officials not to behave like this. Thus, a simple maxim, "if in a true dilemma, do nothing," might be acceptable for a private person; however, it would not be the adequate solution for state officials if both parties involved are individuals who can point to rights.

E. How to Decide in the End?

The tension remains between two conflicting claims concerning the right to life. At this point, we have to turn again to the difference between scenario 1 and scenario 2 mentioned in the introduction. In scenario 2 (when there is no reliable factual basis), there is an asymmetry between the state's protective duties and the duty to spare the lives of the passengers. If the

89. Birnbacher, supra note 29, ch. 5 (arguing against acknowledging such a difference); Gardner, supra note 25 (same).

90. Sunstein & Vermeule, supra note 69, at 725. With respect to the limited meaning of the act/omission distinction for the state, critics of Sunstein's and Vermeule's article have not raised fundamental objections: Blumenson, supra note 37, at 217; Steiker, supra note 81, 756–57. See also Hillgruber, supra note 7, at 217.

protective duties are not based on expected deaths, but on the likelihood that there might be a danger, but also maybe not, the defensive claims against the sure destruction of life when firing at the plane must prevail. But this leaves open how to decide in scenario 1 cases when the facts are known.

It has been argued that in very difficult situations one must refrain from legal evaluations and leave the matter to an "area beyond the law" (*rechtsfreier Raum*).[91] This notion of such an "area beyond the law" might be tested if the question is whether the state official should be sanctioned.[92] But while *making* the relevant decision, rational criteria ought to be developed. Even if it is not possible to derive an unequivocal result from the Constitution or human rights, throwing dice should only be the last resort if no other criteria for a reasonable choice can be found. In this situation, the following argument suggests itself: "let the claims of the greater number of individualized persons prevail." This is a consequentialist argument, however, one which does not point to some ominous utilitarian "greater good" but to the claims of individuals which might trump those of others. Is this the final conclusion, or are there countervailing reasons?

I assume that the idea of the air force firing missiles at the airplane feels highly uncomfortable to many.[93] Maybe this feeling could be justified by examining further consequences if such a choice was made. Restricting state officials' license to kill can be seen as a matter of political prudence, indeed of great political importance. History in Germany and elsewhere has shown that excesses are not merely a theoretical possibility. Would we not unleash the great beast the state can become if we permit the killing of innocent citizens? However, in speculating about such developments, one has to be more specific how negative developments could come about. These are slippery slope considerations, and in order for them to be plausible one has to explain why permission in one case invites abuse in others. Such arguments are very plausible with respect to another frequently

91. Arthur Kaufmann, Rechtsfreier Raum und eigenverantwortliche Entscheidung, in Festschrift für Reinhard Maurach 327 (Friedrich-Christian Schoeder & Heinz Zipf ed., 1972).

92. In my view, this is not necessary, as excuses can exempt from blame in the very rare morally intricate cases.

93. When I started working at this article, it was with the intuition that of course this must be prohibited. This intuition crumbled during the process of writing.

discussed subject, the case of torture.[94] If we were to allow state officials' "to apply pressure" under very extreme circumstances, pandora's box would indeed be opened. In many situations where information or evidence is hard to obtain, the need to extricate confessions from suspects is common. The temptation to extend torture beyond the very extreme cases to the serious cases and maybe even the not-quite-so-serious ones would be overwhelming.

That slippery slope arguments are convincing when opposing torture does not, however, mean that they are also compelling in the airplane case. If we would allow military force against a hijacked airplane in scenario 1, this would hardly pose the risk that the air force would continue firing missiles at air traffic. A somewhat more realistic slippery slope could only be described the following way: if we start with permission to shoot in scenario 1, this might tempt state officials to shoot in scenario 2 (without reliable evidence about the plane's fate). But there is another remarkable contrast to torture cases: we are talking about events which would be highly visible. Airplanes could hardly be shot down secretly, and such an incident would be the subject of intense public scrutiny afterwards. Therefore, it is not unrealistic to assume that a Secretary of Defense would respect guidelines restricting the use of force to scenario 1 cases. In the end, slippery slope considerations do not shape the assessment in a crucial way. In scenario 1 cases, it would be permissible to order that the airplane be shot down.

IV. CONCLUSION

This essay does not give a uniform answer to the question: May the airplane be shot down? Rather, it differentiates between moral arguments and criminal law judgments on the one hand, which concern the blameworthiness of individuals who decide to shoot, and arguments drawn from political and constitutional theory on the other hand, which concern state officials' decision making. With respect to the criminal law dimension, I conclude that if a *private individual* were to shoot at the airplane, this would be wrongdoing but ought to be excused. Crucial for the assessment

94. See, e.g., Ralf Poscher, Die Würde des Menschen ist unantastbar, 59 Juristenzeitung 756 (2004).

concerning the wrongdoing is the passengers' and crew members' right to decide autonomously how important the last five minutes of their lives are. Their right to autonomy weighs heavier than the overall greater number of lives that could be saved, and it is even stronger than the moral claim that the passengers ought to accept the shot under the given extreme circumstances. However, as the pilot might in a dialogue convince some of those (although most likely not all) in the plane to understand his decision, this intricate moral problem should be tackled at the level of excuses. He should be exempt from criminal blame because his choice can be supported by morally acceptable arguments.

If one shifts to a *state official's* decision making, a central difference must be taken into account: the fact that not only the defensive claims of the passengers figure prominently but also protective claims of those individuals who would be killed at the terrorists' target. Unlike private individuals, the state must give protective claims due weight. The German Federal Constitutional Court postulated that the passengers' human dignity would be violated if the plane were shot down. However, it is doubtful whether the reasons concerning the human dignity question are convincing because neither the motive nor the circumstances of the passengers' deaths would convey something demeaning about these persons. Also, the acts/omissions difference is, if we analyze decisions of state officials, not as conclusive as it is often assumed. In the end, the difference between scenario 1 and scenario 2 becomes important. If the facts of the hijacking and the terrorists' target are known, a representative of the state may order that the plane be shot down if there are more persons who have protective claims. If there is not sufficient information available, the defensive rights must prevail. In order to arrive at my conclusion for scenario 1, one does not need to and should not start with utilitarian theory. Rather, the point is that state officials must begin with the concept of individuals' rights, but that, in the end, one has to acknowledge that there is a conflict which cannot be solved by pointing to someone's rights. If individual claims of different persons who all call attention to their right to life can not be reconciled, the possibilities of a discourse about rights are exhausted. If a state official is forced to decide under such tragic circumstances, the remaining rational choice is a quantitative comparison of the conflicting claims.