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In Harm's Way: Justification, Excuse and Civilian Safety in Just War Theory²

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ABSTRACT: Just War Theory asserts that armed conflict can be fought in a way that safeguards moral and legal norms while responding to pragmatic/military imperatives. One of the ways in which it seeks to safeguard justice is through specific provisions for the immunity of, and due care for, the vulnerable and innocent. Unfortunately, two doctrines within Just War Theory – the Doctrine of Double Effect and the Doctrine of Supreme Emergency – suspend or vacate these provisions. The net effect is to render justifications inaccessible, leaving only excuses, the use of which establishes that no one is truly accountable, no meaningful guidance is available, and sheer self-interest may be allowed to underwrite terrible harms. This paper explores the implications of excuses and excuse-making for the laws of war, arguing that unless key doctrines are re-oriented, 'Just War Theory' risks playing out as merely 'Excusable War Theory.'

Just War Theory attempts to establish that armed conflict can be conducted in a way that safeguards moral and legal norms while responding to pragmatic imperatives. It sets out the conditions of a 'just war,' striking a middle position between no-holds-barred Realism and absolute Pacifism. Just War Theory is, for most nation-states that have a European philosophical heritage, the same as the 'laws of war,' which customarily³ consist of *jus ad bellum* (providing justification for entering into armed conflict) and *jus in bello* (providing justification for conduct during war). One of the ways in which the laws of war seek to safeguard justice, and thus to express society's treasured moral and legal norms, is through

² The author would like to thank Dr. Christine Freeman-Roth for her continuing support and valuable input during the researching and writing of this paper.

³ *Jus post bellum*, which governs peacemaking, exit strategies, and how wars end, also exists. In some cases it is considered a part of the laws of war. It is not, however, traditionally part of the canon, and is not a part of the analysis contained in this paper.

specific provisions for the immunity of, and due care for, the vulnerable and innocent. Unfortunately, two doctrines within Just War Theory – the Doctrine of Double Effect (DDE) and the Doctrine of Supreme Emergency (DSE) – suspend these provisions. The DDE offers justification for killing civilians in war, so long as those deaths constitute (foreseeable) accidents rather than intentional acts, while the DSE vacates non-combatant immunity in situations where the military acts as the agent of a nation-state facing total annihilation. However understandable ‘accidental’ and ‘emergency’ actions may be, vacating a moral or legal norm is a perilous endeavour, since it renders justification inaccessible, leaving only excuse. In the case of warfare, excuses are often offered up against gross violations of human rights, which themselves make up the bedrock of contemporary political and legal morality.⁴ The implications of excuses and excuse-making for the laws of war are therefore quite serious. Indeed, the DDE and DSE reveal the potential for ‘Just War Theory’ to become merely ‘Excusable War Theory,’⁵ in which no one is accountable, no guidance is available, and self-interest is allowed to underwrite terrible harms.

Legal and Moral Defences: Differentiating between Justifications and Excuses

Both justification and excuse are defensive postures, but each represents a distinct rationale. A defence can be understood as either “qualifying a prima facie norm (hence conceptually a justification) or as foreclosing punishment for violation of a norm (hence conceptually an excuse).”⁶ Justification asserts that an act is *not wrongful*, while excuse asserts that an act is wrongful but *not blameworthy*. Generally, justification makes this assertion by addressing the quality of an act, making it transcendent, while an excuse speaks to the status or (in)capacity of an actor, making it particular. A more robust framing

⁴ Brian Orend, *The Morality of War* (New York: Broadview Press, 2006), 129.

⁵ David Rodin, “Defending the Indefensible?” *Journal of Applied Philosophy* 23.3 (2006): 381.

⁶ Mitchell N. Berman, “Justification and Excuse, Law and Morality,” *Duke Law Journal* 53.1 (2003): 18.

of the justification/excuse distinction would include the fact that excuse is more sympathetic, oriented toward individual pardon, while justification is more aspirational, aiming for the common good. Specifically, though not exclusively, the former involves acting in one's own self-interest, typically because one's will has been overcome⁷ by the illegitimate threat of another actor; in other words, the act for which one is asking to be excused was performed *under duress*. The latter, by way of contrast, involves action for the greater good, often in response to naturally-arising circumstances; in other words, the act for which one is asserting justification was *a necessity*. Thus, at least conceptually, a justifiable act vindicates the actor's rights while not violating those of the individual who is affected – “it is not merely an understandable though regrettable human reaction.”⁸ Ontologically, legally, and ethically, excuses are typically formulated around the absence of a justification, seen as precluding justification,⁹ analysed after the bounds of conduct have been set by justification, and are commonly felt to be an inferior defence. Justifications are thus both logically and normatively prior. Moral absolutes bound justification, while justification, in turn, sets the boundaries of excuse. Found somewhere between justification and mere explanation, then, “[e]xcuse acts as a normative safety valve, which allows for [pardon] based on just deserts while preserving the integrity of objective and transcendent truth reflected in justification.”¹⁰

Finally, there is a temporal distinction between justifying and excuse-making that feeds into the normative function of the former. “[J]ustifications serve to qualify the norm for purposes of *ex post* [after the fact] evaluation and *ex ante* [offered beforehand] direction.

⁷ This is not measured subjectively for reasons of difficulties surrounding verification and because a tailoring of norms to individual capacity is seen as patently undesirable.

⁸ Larry Alexander, “Self-Defense, Justification and Excuse,” *Philosophy and Public Affairs* 22.1 (1993): 53

⁹ Some authors go so far as to equate “justified and excused” and “a married bachelor” in terms of logic. Douglas Husak, “On the Supposed Priority of Justification to Excuse,” *Law and Philosophy* 24.6 (2005): 560.

¹⁰ Eugene R. Milhizer, “Justification and Excuse: What They Were, What They Are, and What They Ought to Be,” *St. John's Law Review* 78.3 (2004): 850.

They supplement the *prima facie* norm so as to instruct the addressees regarding what conduct the discourse allows.”¹¹ Excuses, by way of contrast, function strictly *ex post*, foreclosing the actor’s responsibility.”^{12, 13} Therefore justifications, both legal and moral, provide normative accounts which both prescribe and proscribe behaviour:

When the law says that certain conduct is justified, it grants its imprimatur and encourages the conduct. It tells all who are similarly situated that they ought to engage in the same behaviour, as doing so is objectively beneficial. Justified conduct is not only the legally permitted thing to do; it is the moral and socially responsible thing to do. On the other hand, when the law says that certain conduct is excused, it announces that the conduct harms society and others ought not to freely choose to do the same. The law communicates that the conduct is wrong, legally and morally.¹⁴

In justification, then, otherwise objectionable acts are deemed either a benefit to society or socially useful; they are openly (if subtly) encouraged. In excuse, by way of contrast, thoroughly objectionable acts are deemed non-beneficial, but are pardoned due to extenuating circumstances; they are openly (if subtly) discouraged. The relationship between law, morality, society, and individuals thus creates excuse and justification as statements about – or more specifically, statements about harmonies between – the actor/act and

¹¹ Berman 18.

¹² Berman 19.

¹³ The definition of the word itself helps to explain why excuses are incapable of providing guidance. To act in the hope of being later excused is irreconcilable with the fact that excuses are specifically offered against objectionable actions performed under duress (i.e. while the will is incapacitated).

¹⁴ Milhizer 856.

the broader social order.¹⁵ Social actions and legislation are here involved in a feedback loop of behavioural norms and conceptualizations of the greater good. The result is that, through justifications, the individual is aligned with the act, the law, and the social order, while in excuse-making he or she is distanced from all three.

The Doctrines of Double Effect and Supreme Emergency

Because determination of what is ‘just’ becomes more difficult when additional norms are in play, cases involving the protection of innocents provide a particularly useful test of the excuse/justification division within Just War Theory. Coincidentally (or not), two of its more excuse-oriented doctrines deal with civilian harm. Found within the ambit of *jus in bello*, the Doctrine of Double Effect (DDE) and Doctrine of Supreme Emergency (DSE) have special implications for non-combatants, the former because it allows non-combatant deaths as by-products of otherwise beneficial action, and the latter because it suspends the laws of war, including the specific protections afforded to civilians.

Unintended Harm: The Doctrine of Double Effect

The DDE attempts (and succeeds, some would say) to provide justification for the *unintentional* killing of civilians in war. Under this principle, the harm to non-combatants is a side effect of – never a means to – an act that aims at some other defensible end, with a good intention underwriting the dual outcome. Such a defence describes the classic ‘collateral damage’ scenario. There are four conditions that must be satisfied in order for the DDE to impart justification for harm done to non-combatants: 1) the intended outcome must be morally acceptable; 2) the means employed to that end must be good, or at least neutral; 3) the intended effect must be immediate; and 4) there

¹⁵ Richard B. Felson and Stephen A. Ribner, “An Attributional Approach to Accounts and Sanctions for Criminal Violence,” *Social Psychology Quarterly* 44.2 (1981): 138.

must be a grave reason for undertaking the action itself.¹⁶ Boyle asserts that even the Catholic theorists who fathered the DDE were themselves foggy on whether or not the doctrine constituted a justification or an excuse.¹⁷ Theoretical confusion aside, it is most often presented as plainly justifying civilian casualties in the context of a morally principled war. Walzer, in fact, asserts that the doctrine as written provides a ‘blanket’ justification, subject only to the overarching *jus in bello* rule that any force employed be proportional to the goal sought. This has raised the issue about the right amount of force and the ‘balancing’ of civilian casualties against military advantage.¹⁸ The Doctrine of Double Effect does not endorse targeting civilians, it merely acknowledges the fact that war almost always takes place in close proximity to non-combatants. The DDE thus comes up whenever debate turns to the issue of the potential or actual deaths of civilians.

Last Resort: The Doctrine of Supreme Emergency

The Doctrine of Supreme Emergency (DSE), on the other hand, addresses the *intentional* targeting of non-military personnel. Orend characterizes this doctrine, which provides a complete exemption from *jus in bello*¹⁹ and yet is entirely absent from international legislation, as “probably the most controversial, and

¹⁶ See, among others, Joseph M. Boyle, “Toward Understanding the Principle of Double Effect,” *The Morality of War: Classical and Contemporary Readings*, eds. Larry May, Eric Rovie and Steve Viner (Upper Saddle River, NJ: Pearson Prentice-Hall, 2005): 164.

¹⁷ Boyle 165.

¹⁸ Michael Walzer, *Just and Unjust Wars*, 4th ed. (New York: Basic Books, 2006).

¹⁹ “[J]us in bello contains a number of general moral rules within which the stunning number of legal conventions and prohibitions can be located. These abstract rules include 1) non-combatant immunity from direct and intentional attack; 2) benevolent quarantine for captured soldiers; 3) due care to civilians; 4) use of proportionate means only against legitimate military targets; 5) no reprisals; 6) no prohibited weapons; and 7) no use of means ‘mala in se,’ or ‘evil in themselves’ [...]” Orend 140.

consequential, amendment to just war theory ever proposed.”²⁰ Defence through the DSE posits the classic ‘backs to the wall’ scenario. It allows a nation to defend itself without any form of legal or moral restraint on action, provided that conditions such as the following have been satisfied: the nation has been victimized by an aggressor; there is public proof of imminent military collapse at the hands of that aggressor; and there is similar proof that the aggressor’s victory will bring about widespread massacre or enslavement. The DSE can be compared and contrasted with the DDE by looking at the means/ends distinction in each:

[T]he DDE (among other things) only lets one perform actions which are otherwise permissible, and in which the unintended bad effects are *not* the means to producing the intended good ones. But in supreme emergencies, the actions contemplated are *not* otherwise permissible (e.g., deliberately killing civilians), and the bad effects *are* the means to producing the good [...].²¹

Controversy arises from the fact that the suspension of *jus in bello* presents a particular risk of harm to civilians. Two of the seven rules of conduct in war deal with the immunity of, and due care to, non-combatants, while other prohibitions (in particular, those against *mala in se* and disproportionate means) are meant to decrease the risk of serious human rights violations within this same population. Orend writes that “[t]he requirement of discrimination and non-combatant immunity is the most important *jus in bello* rule. It is also the most frequently, and stridently, codified rule within the international laws of armed conflict.”²² Actions in violation of these rules are rightly associated with the worst war crimes on record, while invocation of ‘supreme emergency’ is additionally linked to the erosion of civil liberties at home. Furthermore, there is something quite illogical about closing off the threat of the massacre of one group of non-combatants

²⁰ Orend 141.

²¹ Orend 147.

²² Orend 106.

(namely, our civilians) by undertaking the massacre of another group of non-combatants (namely, their civilians). Granting ‘just’ status in warfare involves looking at precisely those actions which *differentiate* the aggressor from the defender, rather than those they share.

The Importance of Justification to the Doctrines of Double Effect and Supreme Emergency

Defence accounts are considered acceptable insofar as they are seen as normative explanations of actions.²³ Although strong excuses *are* normative, *all* excuses reference a disabling condition, and personal responsibility both shifts and shrinks when behaviour is seen to be subject to mitigating circumstances more than to individual choice. Intentionality thus becomes a central issue, since outcomes that are unanticipated or unintended are rightly seen as having a lesser tie to personal accountability – and accountability is perhaps the most critical factor in assessments of crime, punishment, and reprieve. When one offers a justification, one accepts responsibility while denying that the act itself was wrong. When one offers an excuse, one denies responsibility while accepting that the act itself was wrong. Justifications, therefore, seek to preserve accountability, either explicitly or implicitly.

More pragmatically, ongoing use of similar excuses lessens their perceived validity, while repeated use of justification carries no such risk.²⁴ Here one is considering an oft-overlooked idea: the *utility of legitimacy* – in the case of Just War Theory, with regard to the opinions of individual soldiers and the people on whose behalf they are fighting. There is more at stake than mere appearance, though, since the bastardization of the law and the ability (or propensity) to bastardize the law appear to be mutually constitutive. As Milhizer asserts, “[t]he [...] law’s actual and apparent incoherence reinforces

²³ Catherine A. Riordan, Nancy A. Marlin and Ronald T. Kellogg, “The Effectiveness of Accounts Following Transgression,” *Social Psychology Quarterly* 46.3 (1983): 213.

²⁴ Paul Woodruff, “Justification or Excuse: Saving Soldiers at the Expense of Civilians,” *The Morality of War: Classical and Contemporary Readings*, eds. Larry May, Eric Rovie and Steve Viner (Upper Saddle River, NJ: Pearson Prentice-Hall, 2005): 285.

unprincipled relativism and opportunism. It legitimizes moral loopholes.”²⁵ In the courts of public opinion, then, the benefits of justification in the DDE and DSE include assuaging anger and cynicism about civilian deaths in wartime, which are correctly perceived as an evil to be avoided whenever and wherever possible. Excuses for these acts make us uncomfortable, perhaps because we realize that a public record of successful excuse-making may actually provide a kind of negative influence. In other words, we rightly worry that an actor may have intentionally committed an objectionable act knowing, in advance, that there was a chance of an after-the-fact pardon. Purposeful distancing from excuses and excuse-making would thus do much to ameliorate the perception of Just War Theory as rhetoric used to disguise nationalistic and anti-humanitarian ambitions. In the courts of law, justification curbs the malleability of legal and moral principles – malleability that excuse-making more readily allows, and which often renders legislation unprincipled and self-contradictory.²⁶

Remorse or regret, imposed upon oneself, and stigma, imposed by society, are the price paid by the individual when excuses supplant justifications. The effects can be considerable, both on society and on that individual. To begin with, a lack of accountability prevents reunion with the community by closing off the dialogical space necessary for justice through norm clarification.²⁷ In addition, a significant wrong ensues when one is denied justification because of a lack of commitment (or imagination) on the part of those responsible for drafting, challenging, and revising the law. Wherever and whenever possible, excuses should be re-framed as justifications,

²⁵ Milhizer 861.

²⁶ On the domestic front, this can be seen in the recent, marked increase in mistake, insanity, and disability excuse defenses in criminal courts, including polemical claims such as steroid rage, serotonin syndrome (the so-called Zoloft/Prozac defense), ‘gay panic,’ monosodium glutamate-induced delusions, etc. Many such claims stretch the idea of ‘duress’ well beyond what the original framers of the law intended, and most are controversial both from the perspective of legal experts and the general public.

²⁷ It is important to remember that reconciliation is possible, while ‘making amends’ may be plainly necessary, even in fully justified action.

since it is important to remember that ‘accountability’ includes *both praise and blame*; in other words, it encompasses not only holding a man responsible for a wrong act, but holding a man responsible for a right one.²⁸ Similarly, the political tactic of obfuscating blame is foreclosed by justification. This protects not only individuals, but also the law itself, since “[t]he law is debased when it is used as a means for chastising the blameless to advance extraneous ends.”²⁹

Effective cross-cultural laws of war also call for justifications rather than excuses, since only justifications have characteristics of universality and immutability (versus culturally relative and pragmatically tailored excuse-making). With justification, although the application of transcendent norms can be adapted to specific contexts, “[o]bjective truth remains unchanged, for if it changed with the times and circumstances it would be neither objective nor true. [Excuse, however] is intertwined with the particulars of a culture in ways that are irrelevant and even illegitimate with respect to the objective underpinnings of justification.”³⁰ Similarly, there are implications for humanitarian intervention associated with justified (rather than excused) action in and around war. Although first party justification does not necessarily justify third party intervention, the robustness of the reasons underlying that initial action can certainly help strengthen subsequent calls to aid.

The DDE and DSE: Justifications or Excuses?

If justification is critical to the DDE and DSE, the pathway through which it is secured is of particular importance. Some thinkers assert that, within Just War Theory as a whole, the broader rules provide blanket justification for individual doctrines. Overarching justifications (*jus ad bellum* and relevant tenets of *jus in bello*), however, do not completely cover the DDE and DSE. This explains why these doctrines are set apart and continue to present a conceptual problem within the Just War tradition. These doctrines are, as it

²⁸ Richard N. Bronaugh, “Freedom as the Absence of an Excuse,” *Ethics* 74.3 (1964): 161.

²⁹ Milhizer 883.

³⁰ Milhizer 853.

stands, the principles appealed to when the rules of non-discrimination against civilians and protection of non-combatants are abrogated. They must therefore provide justification in and of themselves, rather than borrowing it from some other norm, value, or authority – particularly the one that actually *upholds* the very rules that the DDE and DSE seek to bend or break.³¹

There are good reasons to assert norms in warfare that are congruent with those in domestic society. Such an assertion is, in fact, a central part of the legalist paradigm that underscores Just War Theory. Clarity may therefore be gained by focusing this issue through the lens of a domestic analogy, according to which a serious harm on the domestic front (homicide) may be equated with one on the battlefield (civilian deaths). For the purposes of this investigation, the primary relevant characteristics that serve to differentiate justification from excuse in cases of fully defensible homicide are the attacker/innocent divide, the necessity/duress distinction, and the provision of *ex ante* direction in addition to *ex post* evaluation.

Self-Defence and Self-Preservation: The Question of ‘Attackers’

Broadly, both DDE and DSE fall under the rubric of self-defence (be it of a soldier or a nation-state, or both) or other-defence (i.e. military action on behalf of persons being harmed by an aggressor). Here, the domestic analogy proves quite useful. Homicide, defined as the killing of another human being, is an exceedingly serious act on the domestic stage, invariably classified (when wrongful) as a capital offence in those jurisdictions that retain the death penalty. In a domestic court of law, derogation of the ‘victim’ helps to underwrite justification of homicide. In Just War Theory, *jus ad bellum* may accomplish this at the national level, but it fails to spill over to characterize civilians as legitimate targets.³²

At home, the law typically allows one to kill an attacker provided that attacker’s death is a prerequisite for one’s own survival; in all other situations the killing of another person gravely violates his or her basic rights. Such a position in domestic law is very much in

³¹ Felson and Ribner 137.

³² Riordan, Marlin, and Kellogg 213.

line with the prohibition against targeting civilians in wartime, since doing so would amount to intentionally killing a non-attacker – an act that is simply not part of the legal concept of self-defence. Domestic law also recognizes the validity of other-defence, or killing an individual who has attacked someone else, in order to save that other individual's life. Unfortunately, civilians, by definition, do not qualify as 'attackers' in either situation; they are technically 'innocents' vis-à-vis the conflict at hand.³³ Woodruff points out that in a scenario bereft of an attacker, "the principle of *self-preservation* applies indifferently to acts reasonably deemed necessary for the survival of the agent, and so may extend to acts against the innocent."³⁴ The rub here is that self-preservation is classified as an excuse, while self-defence is classified as a justification, meaning that an intentional act that brings about the death of a non-attacker, even if that death ensures the actor's survival, remains *unjustified*.³⁵ Further, a claim of self-preservation, as a defence levied by a soldier in the context of war, is significantly weakened by the fact that the individual making that claim is a designated combatant in a violent conflict.

The relationship between the combatant and the non-combatant is patently asymmetrical, with the potential to *cause harm* stacked up on one side (the soldier's) and the potential to *suffer harm* borne disproportionately by the other (the civilian's). Civilians are more 'innocent,' less aggressive, and less threatening, while the absolute right to safety of person (key to claims of self-defence) is much diminished in the case of the soldier by virtue of his very occupation in a time of war. It is because of this, in part, that civilian lives are given special value.^{36,37} Orend, after Nagel, clarifies that the

³³ "This is the clearest sense of who is 'innocent' in wartime: all those not engaged in creating harm." Orend 110.

³⁴ Woodruff 286.

³⁵ This is, of course, assuming that one should go ahead and kill innocents even if such an act may be excusable.

³⁶ Michael Walzer, "Double Effect and Double Intention," *The Morality of War: Classical and Contemporary Readings*, eds. Larry May, Eric Rovie and Steve Viner (Upper Saddle River, NJ: Pearson Prentice-Hall, 2005): 198.

separation between combatants and non-combatants is determined by whether or not they are *immediately* threatening; further, any action in response to an immediate threat must be both direct and relevant.³⁸ Non-combatants would seem to be exempt from any such classification, however, since “it is not the enemy civilians who are threatening us, it is their military machine, and so it is impermissible to strike out deliberately at the civilians, because [...] it is not they who are the direct and active agents of the brutal force.”³⁹ There is perhaps, at first glance, an opportunity to counter this assertion by classifying civilians as attackers in the communal sense, as elements of the same totality,⁴⁰ or as being *de facto* contiguous with the enemy by virtue of their political or economic support for their government. Upon closer examination, however, this logic does not hold. The state apparatus is the only legitimate target because it is (and has always been), as Orend points out, “the main organizer and focal point of warfare.”⁴¹ It is also relevant that, although there is a distinction made between combatants and non-combatants in warfare, and between aggressor (unjust) and defender (just) combatants, there is no separation of aggressor and defender non-combatants. Thus killing one set to save another does not make sense even in terms of a purely utilitarian calculus; even if the numbers are highly unequal, this amounts to “bizarre accounting.”⁴²

³⁷ Further, the two would seem to be non-equivalent in even the most basic sense: being in the line of fire is part of the basic definition of ‘soldiering.’

³⁸ Orend 149.

³⁹ Orend 149.

⁴⁰ Walzer, *Just and Unjust Wars* 261.

⁴¹ Orend 113.

⁴² Walzer, *Just and Unjust Wars* 262.

Necessity and Duress: The Question of Free Will and the Greater Good

Determinations of personal responsibility, and hence defensive accounts, look carefully at causal and volitional criteria.⁴³ In domestic law, necessity and duress are defences relating to some form of incapacitation of free will, in which there is either a lack of control over the action that brings forth harm, or a lack of intent to produce the harm *per se*. These defences orbit the classic ‘reasonable man in unreasonable circumstances’ scenario. Necessity is strictly framed as a justification, while the idea of duress arises only in excusing action. There is thus a clear divide between necessity and duress, with the bar of ‘necessity’ placed quite high. “For conduct to be necessary, it must satisfy both temporal and substantive criteria. Conduct fails under the temporal prong if the need to engage in it is not yet ripe. [...] Conduct fails under a substantive prong of being ‘necessary’ if the interest at stake can be protected with the use of less force or the infliction of less harm.”⁴⁴ These two criteria mirror the structure of the laws of war themselves: *jus ad bellum* demands that the resort to war be timely, while *jus in bello* requires that a war entered into justly must also be fought justly. The two together “[insist] on a *fundamental moral consistency between means and ends* with regard to wartime behaviour.”⁴⁵ A just war is thus, strictly speaking, a *necessary* war. Yet the necessity of the war does not itself furnish the necessity of individual actions undertaken in war, each of which carries its own motivations and outcomes.

From both a legal and a moral standpoint, there must be a “high or presumptive threshold for an excusing encumbrance for volition as this pertains to free will.”^{46,47} The threshold rises with the

⁴³ Dennis F. Thompson, “Moral Responsibility of Public Officials: The Problem of Many Hands,” *The American Political Science Review* 74.4 (1980): 905.

⁴⁴ Milhizer 813

⁴⁵ Orend 153-4.

⁴⁶ Milhizer 796.

severity of the act in question. The end result is that, in domestic law, there is simply no accepted duress account (i.e., excuse) for lethal force exerted in self-defence, even if one's actions are wholly in line with what could be expected of any reasonable person in the same situation. This reflects, among other things, the tremendous value placed on human life, as well as the significance of free will in determination of fault. Many legal theorists assert that the availability of *any* excuse defence for homicide, because it entails allowing killing to be motivated by mere interests (however important), would be morally untenable no matter how extraordinary the circumstances. Furthermore, the legal and moral acceptability of a 'duress' claim would be likely to escalate, or at least contribute, to those circumstances, by disproportionately inflating the sense of urgency attached to protecting one's interests.

The DDE only lightly considers the issue of civilian worth and entitlement, balancing out harms to non-combatants through appeals to military utility, while providing no real requirement that due care be taken to minimize those harms.⁴⁸ The result is a standard of conduct that is far too low, and which categorizes the fulfillment of moral obligations as heroic. It is thus Walzer's opinion that the single intention is not elastic enough to cover the double effect of the DDE. "Simply not to intend the death of civilians is too easy," he writes, "[w]hat we look for in such cases is some sign of a positive commitment to save civilian lives."⁴⁹ The remedy, according to Walzer, is a *second* intention: not only must the good be achieved, the bad must be minimized. What is actually being said here is that the current incarnation of the DDE fails on the 'substantive prong of necessity' by sheer indifference. The upshot of such a claim is that if a single intention is insufficient, so too is the single justification via necessity. Even if the primary (good) outcome is a function of necessity rather than duress, that fact does not itself permit *any* means to that end. Here the proportionality rule is insufficient, as is the

⁴⁷ This is not measured subjectively for reasons of difficulties surrounding verification and because a tailoring of norms to individual capacity is seen as patently undesirable.

⁴⁸ See, among others, Walzer, *Just and Unjust*.

⁴⁹ Walzer, *Double Effect and Double Intention* 196.

condition within the DDE that the means employed be at least neutral, since these caveats establish only a *vague minimum of harm*, rather than an *aspirational maximum of protection*. The second intention criterion, calling for ‘due care,’ is thus a call to turn the Doctrine of Double Effect away from excuse and toward justification, satisfying the aforementioned ‘substantive prong of necessity.’ Such a turn would be characterized by exchanging the consideration of important interests (such as cost efficiency or lowering risks to soldiers) for consideration of the greater moral good (in particular, the special status afforded non-combatants and what, by virtue of such a status, they are entitled to). It would acknowledge that military utility is not the paramount consideration, and that “[t]he point is not to minimize the casualties while pursuing policies designed to advance majority interests regardless of whether there is a rights violation or not. The point is to minimize casualties while pursuing policies, and using means of war, that do not violate human rights.”⁵⁰ One sees this reflected in the assertion that ‘acceptable risks’ to soldiers must be reconsidered, and roughly fixed at a point where additional risk-taking either dooms the operation outright, or else renders it too costly to be repeatable.⁵¹ This is not an extraordinary or controversial declaration; the concept of ‘due care’ is itself implicit in the laws of armed conflict, while risk is what a soldier accepts by virtue of being a soldier. Any lesser position on the issue is unacceptable since, as Orend asserts, being willing to risk another’s life but not your own, being willing to kill but not die, is “a violation of the warrior ethos.”⁵² Walzer echoes this sentiment when he writes that, “[i]t is simply not the case that individuals will always strike out at innocent men and women rather than accept risks for themselves. We even say, very often, that it is their duty to accept risks [...]. We make this demand knowing that it is possible for people to live up to it.”⁵³

The DSE would, by the very definition of ‘supreme emergency,’ seem to satisfy the temporal prong of necessity. This

⁵⁰ Orend 143.

⁵¹ Walzer, *Double Effect and Double Intention* 197.

⁵² Orend 117.

⁵³ Walzer *Just and Unjust Wars* 253.

being said, “the mere recognition of such a threat is not itself coercive; it neither compels nor permits attacks on the innocent, so long as other means of fighting and winning are available.”⁵⁴ Furthermore, in the least disputed case of successful invocation of the supreme emergency exemption – that which took place in Britain in the early 1940s – targeting civilians could not be proven to have had any negative effect on the enemy’s morale, or to have been the cause of any change in his tactics.⁵⁵ Without knowing whether strategic destruction of civilian targets will reverse (or even delay) an imminent military defeat, violation of *jus in bello* simply cannot be justified on the basis of “stav[ing] off the threat posed by the aggressor.”⁵⁶ The DSE is here incapable of satisfying the second (substantive) prong of necessity. There is, as well, an overarching conceptual problem: because the rules of *jus in bello* were themselves formulated in order to address military necessity, it can be cogently argued that “no appeal to necessity can override the rules.”⁵⁷

⁵⁴ Walzer, *Just and Unjust Wars* 251.

⁵⁵ The planned invasion of Britain by Nazi forces during World War II was thought, by the British government, to constitute a threat of annihilation (meaning that they feared both total loss of sovereignty and massive loss of life). During the Battle of Britain, this ‘supreme emergency’ was used to justify the Royal Air Force’s bombing of cities such as Dresden, which had no military significance, in order to demoralize the German people. The hope was that withdrawal of popular support at home would force the Nazis to abandon their plans to invade the British Isles. Although Germany did decide against invasion in the wake of the Battle of Britain, and despite the fact that Winston Churchill portrayed this as proof of the success of targeting civilians, in the end there is simply no non-subjective way of determining whether and to what extent this tactic proved an advantage over targeting military installations, militarily significant infrastructure (e.g. fuel production and transportation, communications, dams, etc.), and actual combatants (i.e. Luftwaffe planes and their pilots).

⁵⁶ Orend 145.

⁵⁷ Orend 151.

***Ex Ante* Direction and *Ex Post* Evaluation: The Question of Guidance**

Berman asserts that “[e]xcuses don’t grant permissions. They tell judges when persons who have acted without permission ought to be punished.”⁵⁸ Because they provide strictly *ex post* evaluation, excuses are incapable of helping one to evaluate the comparative worth of behavioural alternatives in advance of action. Justifications, on the other hand, *are* action-guiding. *Ex ante* direction is provided, in part, by the very framing of justification, which allows the individual to ask ‘under what conditions does justification arise?’ The mechanism of guidance is rooted in the fact that judgment herein is not as case-specific or vague as with excuse-making – specifically, because “actor-specific justifications are largely irrelevant, [...] the subject matter upon which [one] will base [one’s] determination is far more tangible, [and decisions] can be more readily evaluated using quantitatively objective criteria.”⁵⁹ The subjectivity of excuse, by way of contrast, raises the number of relevant variables and lowers confidence in one’s assessment of them. More importantly, in this context guidance goes beyond minimally acceptable conduct, which is the only relevant standard in excuse-making. The difference between the merely permissible and the morally best (available) action is key to justification – further, there is nothing undesirable about a higher standard of conduct for individuals facing a difficult moral choice, a standard that is “an idealization of their epistemic situation.”⁶⁰ One is also entitled to forewarning that there exists a line that must not be crossed, creating a natural link between the action-guiding properties of justification and the ‘educative function’⁶¹ of law, and making the provision of such direction, whenever possible, an ethical requirement. Clarity is critical in any system of law and legal norms, in order that transgressions be accurately mapped out, enforcement be ethical, and the system itself be tied to principles greater than itself. It

⁵⁸ Berman 31-3.

⁵⁹ Millhizer 851.

⁶⁰ Berman 56.

⁶¹ See Berman.

can also be said that justifications, formulated in utilitarian terms and insofar as they provide guidance, actually help to preclude harms.

In terms of the Just War tradition, “the upshot of [the] theory, after all, is precisely to devise coherent rules that statesmen and soldiers can refer to as they make choices under pressured wartime conditions.”⁶² As currently framed, though, the Doctrines of Double Effect and Supreme Emergency fail to provide substantive *ex ante* direction, and thus lack a key characteristic of justification. With reference to the DDE, considering the deadly force now at the disposal of individual combatants, that guidance is not merely valuable, but absolutely necessary – and, unfortunately, utterly lacking. Here, asserts Walzer, the laws of war are silent, “they leave the cruellest decisions to be made by the men on the spot with reference only to their ordinary moral notions or the military traditions of the army in which they serve.”⁶³ Although it could be said that the proportionality rule provides some form of *ex ante* direction in battlefield decisions, it stands as “more of a limiting factor, a negative condition – [...] setting outside constraints [...] – than it is a positive condition which adds new content to the just war equation.”⁶⁴ In terms of the DDE itself, ‘you may not intentionally harm civilians’ is *not* guidance; indeed, as a statement of soldierly conduct it is virtually a tautology. ‘You have a positive obligation to take every precaution to actively minimize harm to civilians, including exposing yourself to greater risk’ does constitute guidance, and could be further fleshed out with specific situational procedures taught by the military to its personnel.

In the DSE, a particular course of action is decided upon not by individual soldiers, but by military commanders and statesmen. *Ex ante* direction should therefore be positioned somewhat differently. Unfortunately, because the doctrine simply suspends the laws of war pertaining to engagement, specifically abrogating the human rights of non-combatants, *every* available option amounts to a violation of the most deeply-held principles. This makes guidance pointless. The simple, awful truth is that “there is no supreme emergency exemption,

⁶² Orend 153-4.

⁶³ Walzer *Double Effect and Double Intention* 193.

⁶⁴ Orend 119.

where such is conceived as a *moral* exemption, permission or loophole [because] *[t]he whole thing is a wretched moral tragedy and, no matter what you do, you're wrong.*"⁶⁵ Attempting to leave the matter unresolved – writing it off to extreme moral complexity, and endorsing the supreme emergency exemption nonetheless – is perhaps the natural (default) position, and is in keeping with the knowledge that “the world is not a fully comprehensible, let alone a morally satisfactory place.”⁶⁶ But this is a less than completely coherent philosophical stance, since it is basically a claim that it is our moral duty to vacate a moral duty. In addition, such a principle is not in the least action-guiding. Orend offers a way to better navigate the ‘tragedy’ of supreme emergency by providing pragmatic (rather than moral) *ex ante* direction to decision-makers. He asserts that in a state of supreme emergency, choice *does* still exist and should be made rationally, employing both ‘rules of prudence’ and international ethical and legal norms. These choices orbit enacting specific measures, namely the determination of last resort (exhausting standard tactics); appeals to the international community; maintenance of right intention (stripping away imprudent motivations); and probability of success (determining the utility of civilian harm). By virtue of this approach, one is able to assert that meaningful guidance could be made available even in situations of supreme emergency, but only if the existing DSE exemption were revised to provide that guidance.

Conclusion

Certain key elements of the laws of war appear to appeal not to Justification Theory, endorsing action, but instead to Excuse Theory, pardoning transgression. Excuses present a thorny issue for two principal reasons. First, they assert that there is a potentially limitless number of situations in which no one is accountable for grave harms suffered, and in which there can thus be neither retributive nor reconciliatory justice. Second, they establish that no substantive guidance is available to those unfortunate individuals who find themselves facing the most dire choices, increasing the potential

⁶⁵ Orend 153.

⁶⁶ Orend 153.

for further miscarriages of justice through politically-motivated blaming, 'bad luck,' and simple ignorance. Only justifications provide a positive norm of proper conduct that renders acts intelligible, reasonable, and answerable.

The domestic analogy, a central part of the legalistic paradigm, and thus Just War Theory itself, speaks clearly to the necessity of re-orienting excuse-based doctrines. Some opt to dismiss the analogy with Sherman's simple truism, 'war is hell.' In war, the claim goes, the socially-seated legal and moral norms of human interaction are vacated – but this claim is unconvincing. If war vacated the social order, all bets would be off, as it were, and distinguishing combatants from non-combatants would be unnecessary.⁶⁷ If this were the case, the laws of conduct in war would themselves be optional, since "[i]f war is hell however it is fought, then what difference can it make how we fight it?"⁶⁸ The presence of well-defined *jus in bello* and the firm distinction between civilians and soldiers in the laws of war are an acknowledgement that just war is not, in fact, a *suspension* of the social order but an *affirmation* of it. Applying the domestic analogy one last time: where a police-mediated peace is the ordinary condition, war is martial law, not anarchy. Just war is thus the social order in its truest form, albeit society *in extremis*, because one fights or endures *for the sake of the social order*. One does not aim for survival at any cost, but one's highly conditional survival; one desires life *in situ*, within a society that one has reason to value. It is for this reason that the aggressor is forcefully repelled, because the alternative norms he represents are untenable. Actions during a just war therefore need to be incorporable into a society's self-image. They must be justified rather than excused.

Even those who feel that the Just War tradition already furnishes justifications must agree that it cannot hurt to shore up those instances in which it does so only weakly, since this would allow a more robust defence against charges of excuse-making. It is not inconceivable that weaker component doctrines – those that incline toward excuse – could be revisited and reframed so as to have key

⁶⁷ This, of course, is very close to the Realist position on warfare.

⁶⁸ Walzer, *Just and Unjust Wars* 265

characteristics of justification. The task need not be viewed with an ‘all or nothing’ attitude, since hybrid defences are, on the face of it, possible. Husak writes that, in domestic law, “[c]omplete defences preclude liability altogether; partial defences lessen the punishment a defendant deserves.”⁶⁹ In application of the laws of war, it is perhaps more important to note that the hybridization of excuse and justification, shifting specific aspects of the DDE and DSE as far toward justification as possible, would better preserve accountability and greatly enhance *ex ante* direction. Hybrid justifications may, for example, not qualify as full justifications by failing on the substantive prong of necessity – and here one is reminded of the pure moral tragedy of a supreme emergency – but could nevertheless provide meaningful guidance to soldiers and statesmen.

No matter what the outcome vis-à-vis legislation, significant benefit could accrue from even modest gains in clarity and coherence. Revisiting the DDE and DSE addresses a subject that has been ignored in the Just War tradition: what Orend calls “reflection upon war’s tragedy,”⁷⁰ the omission of which has had a deleterious effect on the quality of the discourse. It also brings the explicit focus back around to moral responsibility, since excuse suspends accountability (fixed at the level of the individual), while justification carefully weighs accountability in the broadest sense. Finally, because the issues here intersect firmly with human rights, the stakes become massive in a military age characterized by weapons of unparalleled and indiscriminate destructiveness. Reframing aspects of the laws of war offers clear benefits in both guiding and evaluating action – which is, in point of fact, the very purpose of Just War Theory. Unfortunately, until this task is undertaken, certain key elements of the Just War tradition will continue to appeal not to bringing about justice through engaging human moral agency, but to facilitating pardon, vacating accountability for some of the most serious crimes and moral failings of which man is capable.

⁶⁹ Husak 577.

⁷⁰ Orend 155.

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