

Chapter Nine: Justifications.

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In defending himself on the basis of a *Justification*, the defender admits that he did the act, but claims that it was right, good—i.e., justified. "I did it, and I was right to!"—he says. Consider these examples (the list is not meant to be exhaustive).

Self-defense: Here the sense is that the defender achieved something good: that he prevented a crime from taking place, saved the Republic and possibly even that he inflicted some self-help punishment on the person attacking him (i.e. the "victim" he is accused of harming).

Defense of others: shooting someone to stop him from raping a child.

Official status: the State's executioner; a soldier in time of war; police arresting a suspect. All these people inflict injuries, but are justified because they are doing it by virtue of their official status.

Discipline: parent or teacher disciplining a child. Here there is no official status, but a legal right to impose an injury—at least to some extent.

Rescuing: stealing someone's boat in order to save a drowning child. (When a bad situation is brought about by a human, we defend the victim against it; when it is brought about by natural forces, then we rescue the victim).

Acting for the public good: killing a tyrant. Here the public good achieved is thought to outweigh the harm done the victim.

Obeying a higher law: Rosa Parks refuses to go to the back of the bus, where the "Jim Crow" laws of the time would put her. Here the act performed is technically illegal, but in a deeper way right or good.

Question: In all these cases, the defender admits that she did something that caused harm. Why should we ignore this harm?--why should we accept her Justification?

In Justification cases, the defender *admits* that what the accuser says is true. That is, he admits that she has already met her burden of proof. Instead, the defender undertakes his own burden of proof, to show that the act he admits doing was in fact a good one.

There are, of course, topoi useful for arguing Justification cases. Three clusters of topoi are phrased below as questions: both accuser and defender should be asking themselves these questions and trying to support opposite answers.

1. Was the act really the best available?

a. Was what the defender did right?--was it useful, was it moral, honorable, fair, praiseworthy?

b. Did the good achieved significantly outweigh the harm done? For example, the defender should not have killed the victim to stop her slapping a child, even if this was the only way to stop her. The harm done is worse than the good achieved.

c. Were there other, comparatively less harmful, ways of achieving the same good? For example, instead of breaking a law to protest it, the defender could have lobbied the legislature for change. Similarly, the force used in self-defense can only be enough to stop the offense; if a person kills when wounding would have work, his action appears unjustified.

2. Even if the act was the best available, was the defender justified in doing it? The accent here is on the defender: was she in such a position that *her* doing the act was justified?

a. Did the defender do the act because it was good, or for some other, less praiseworthy, motive? For example: a public health nurse might (illegally) supply clean needles to drug addicts for the praiseworthy reason of preventing the spread of AIDS. But what if a drug dealer did the same thing? If she did it because it would increase her sales, her conduct wouldn't be justified. Or again: did Dr. Kevorkian aid suicides in the name of principle, or is it just his way of getting his jollies?

b. Did the defender contribute to the bad situation that she's remedying? For example, did a police officer lure the suspect into committing a crime, so she could then arrest him and rough him up? Did the self-defender provoke the attack in order to appear justified in injuring the victim?

c. Did the defender assess the situation correctly? Maybe the defender thought what he was doing was justified, but his view was not really objectively sound. For example: Bernard Goetz may have thought that the youths in the NY subway were about to attack him, but was his view really sound, or colored by the fact that he had previously been attacked? On the other hand (the defender replies), perhaps Justifications should be judged by what a person in just those circumstances would have concluded. By this argument, Goetz only had a few seconds to judge what the youths were going to do, and his assessment was, under the circumstances, a reasonable one.

3. Do we want to allow people to take these judgments into their own hands?--what I will call the "public policy" topos. For example, do we want people to use self-help against aggressors? Isn't that what we have courts for? Do we want people to be judging on their own instead of applying laws that have been made by the due and constitutionally prescribed process? Do we want people appointing themselves judge, evading the formalities that ensure fairness in the courtroom? Many justification defenses seem to substitute the defender's judgment for the judgment of courts or legislatures. Cicero comments on this topos:

Cicero, Inv. 2. 80-85.

[The accuser may] show by whom and through whom and how and at what time it was proper that a lawsuit should be brought and the case adjudged and decided [i.e. by the defender against the victim for the wrong that the defender was trying to prevent or punish]. And at the same time one may point out that punishment should not be inflicted before judgment is given. Then one should also point to the laws and courts of justice by which the crime which the defender avenged on his own authority, could have been punished in accordance with custom and judicial process. Then the accuser should deny that it is right to listen to the charge which the defender brings against the other party, which he himself, the very man who brings it, was unwilling to submit to a court of law. Then the accuser should claim that [the victim's allegedly wrong] act which has not been passed upon by a court should be regarded as not done. After that he should call attention to the shamelessness of those who now accuse before a jury one whom they themselves have condemned without a jury Then he should point out what disastrous results will follow if it is established that men may avenge crimes with crimes and injuries with injuries; and if the accuser had been willing to do the same there would have been no need of this trial either; and if everyone should act in the same way there would be no trials at all. . . .

The force of this most severe attack of the accusers—by which they point out that the whole judicial process will be thrown into confusion if the privilege is given of punishing offenses without convicting the criminal—the force will be lessened: In the first place if it is demonstrated [by the defender] that the [victim's] offence [which led to the defender's act] was of such a nature that it would seem intolerable not only to a good man, but to any sort of free man at all; could not be questioned even by the offender; then that it was of such a nature that he who punished it was in duty bound to punish it; that it was not so right or so honorable for the offence to be brought before a court as to have it avenged in the manner in which it was and by the person by whom it was; then that the case was so clear that there was no point in having a court pass upon it. And here it must be made plain by arguments and similar means that there are many offenses so foul and undisputed that it is not only unnecessary but even inexpedient to wait for the trial to take place.

Three men and a boy on a boat: Regina v. Dudley and Stephens

The year is 1884. The yacht Mignonette has been purchased in England by a prominent Australian lawyer. The new owner arranges for the ship to be sailed out to him. The crew: Tom Dudley, captain, age 30: married father of 3, an experienced sailor and licensed navigator with a reputation for courage and efficiency; a devout and respectable man. Edwin Stephens, mate, age 37: married father of 5, another experienced and licensed sailor; a leading member of the local YMCA. Ned Brooks, ordinary seaman, age 39, unmarried. Richard Parker, cabin boy, age 17; an illiterate orphan.

They leave England on 19 May. On 5 July the ship founders in bad weather in the South Atlantic; it had been only incompletely repaired by the owner, and it is probable that rotten planking below the waterline was torn off by the waves. In the five minutes before the ship sinks, Dudley gets the lifeboat overboard, collects some navigation equipment and tries to rescue some supplies. The last effort fails.

The three men and boy are now in a small boat far from the normal trade routes. Given the prevailing winds, they are 2000 miles from the nearest accessible land. They have two cans of turnips but no water; they catch a turtle and occasionally a little rain. Dudley rigs a sail and insists that the meager provisions be rationed out slowly.

As their condition weakens from exposure, hunger and thirst, the men begin to drink their own urine. (By the way, if *you're* ever stranded in a small boat, you're supposed to start drinking your urine right away.) They also begin to discuss drawing lots to decide who will die. (They believe the common sailors' myth that a supposed "law of the sea" allows the person who draws the short straw to be "legally" killed.)

On 20 July, boy drinks seawater. (The men all believe another common sailors' myth: that drinking seawater leads to insanity and ultimately to death). Boy becomes delirious and sinks into an intermittent near-coma at the bottom of the boat. It appears to the others that he is dying.

On 24 July, Dudley and Stephens exchange gestures indicating that it is time to kill boy; Brooks watches. Dudley prays God to forgive him and cuts boy's throat. Boy dies quickly, saying "What me sir?" Dudley catches boy's blood. All drink it and eat the body.

On 29 July Dudley, Stephens and Brooks are picked up by a passing vessel, still 1000 miles from land. They are in very poor condition: their limbs swollen, bodies emaciated, lips and mouths blackened. Months later, they still show the effects of their shipwreck.

Arriving back in England in September, the men are completely forthright about the events. They report it all to the official investigation of the accident. They are

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firm in their belief that they would have died if they had not consumed the boy, and that their action was therefore justified.

Dudley and Stephens are charged with the murder of Richard Parker. Brooks turns state's evidence; he is not charged.

See the amusing and grim book by A.W. Brian Simpson, Cannibalism and the Common Law (University of Chicago Press: 1984) for more discussion; or go to law school.

Question: Defend Dudley on the grounds of justification, or refute such a defense. Use the Justification topoi to help direct your thinking.