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Proportionality, Assumption of Risk, and Contributory Responsibility

I. Introduction

The just war criterion of proportionality, as traditionally applied, places the burden of justification for the prima facie evil that takes place in a war on anyone contemplating resorting to war.1 For example, in the aftermath of the recent United Nations' approved war to expel Iraq from Kuwait, criticism has focused on the evil impact the conduct of the war has had and presumably will have, in its so called "ripple effects," upon the Iraqi civilian population.2 Although some recent criticism suggests that the just war criterion of discrimination may have been violated because at least some targets may have been chosen so as to generate economic misery within the Iraqi population, most of the criticisms argue that the coalition bombing campaign brought about evils to the Iraqi population disproportionate to the ends the war sought to

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1. See for example, The United States Catholic Conference, "The Challenge of Peace: God's Promise and Our Response" where it is asserted that, "In terms of the jus ad bellum criteria, proportionality means that the damage to be inflicted and the costs incurred by war must be proportionate to the good expected by taking up arms... This principle of proportionality applies throughout the conduct of the war as well as to the decision to begin warfare. During the Vietnam War our bishops' conference ultimately concluded that the conflict had reached such a level of devastation to the adversary and damage to our own society that continuing it could not be justified.
2. See, for example, Barton Gellman's page one article in the June 23, 1991 Washington Post.

accomplish. 3 This criticism, so I shall argue, is too quick, for it fails to take into consideration the quite reasonable moral categories of 'assumption of risk' and 'comparative responsibility'. It is mistaken to require a party choosing to go to war to show that the end they seek in the war is proportionate to all of the destruction the war will bring. This seems to assume that justice requires that we must never do harm unless in the end our harmful acts are such as to lead to a preponderance of good over evil in the world, that the burden of resisting evil through harmful acts must be borne by the value of the good achieved in the end. But this, I contend, is not so. The evil must bear its own weight, and to some significant extent the evil must bear not only its own weight but the weight of the harms we must do in resisting it. Not only may we find ourselves in circumstances in which evil overcomes us, so that evil can triumph in this way, but we may have to do harm when the good cannot possibly outweigh the bad, and in this way evil may triumph as well. Human fate may indeed be tragic and I see no reason why we must succumb to the former disaster in order to avoid the latter.

This, I readily admit, is a rather simple-minded point but I believe that it has been generally ignored. The reason why this point has been generally ignored is perhaps

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3. Idem.

because of a difficulty in sorting out the meaning of discrimination in modern warfare. This focus on discrimination comes out for example, in a recent page one article in the Washington Post where it is asserted that, "For critics, this was the war that showed why the indirect effects of bombing must be planned as discriminately as the direct ones. The bombardment may have been precise, they argue, but the results have been felt throughout Iraqi society and the bombing ultimately may have done as much to harm civilians as soldiers." (Gellman, p. A16, Col. 3.)

The confusion is perhaps understandable, reflecting a tradition that cuts a fine line between an absolutistist prohibition of the intentional harming of the innocent and a non-absolutist concern for the unintended harming of the innocent. No end, so the tradition speaks, can justify the intentional harming of the innocent, it is absolutely forbidden to do such acts. But unintentional harmings, (and here I assume the first three conditions of the principle of double effect are met) so the tradition continues, may be permissible if, in the end, the good outweighs the bad. This fine distinction was obviated by the reality of the nature of nuclear weapons. Nuclear weapons were castigated as both disproportionate and indiscriminate. In vaporizing the Kremlin one cannot discriminate between the command center and the Muscovites, and no end is proportionate to

the damage a major nuclear war would do. So much for fine moral distinctions. Or rather, so the critics likely would maintain, so much for the moral acceptability of modern warfare. Modern warfare is, so they might maintain, inherently both indiscriminate and disproportionate. Desert storm is felt to give us evidence of both. I think the critics are mistaken on both counts. Although some of the points that I raise in this paper apply, mutatis mutandis, to the criterion of discrimination, where it is extended to so called "inherently indiscriminate" weapons, I will deal directly only with the criterion of proportionality.

II. Proportionality and Negligence Concepts

It is my contention that the criterion of proportionality ought to be understood in light of the moral categories available within the tort law of negligence. "In the law, 'negligence' means 'negligent conduct,' which may be defined as conduct that falls short of that of a reasonable, prudent person under the same or similar circumstances." (Department of Law, p. 30-1) In tort law, negligence involves a specific concept of liability that protects personal interests from unreasonable interference. It is my contention that, when properly understood, the criterion of proportionality will not require a nation resorting to war to bear the burden of all of the costs of the war. When it is the case that some nation's negligent

conduct has lead to the war, the negligent party must bear the burden of responsibility for the costs of the acts of war that are the result of the reasonable efforts of the wronged party and those who come to the aid of the wronged party to protect themselves from further harm or to correct the wrong already done. Certainly the negligence of the original wrongdoer does not excuse the subsequent negligence of the parties responding to the original wrongdoer.

Just as proportionality is not meant to excuse intentional harms done to the innocent, so in negligence law it is presumed that "the actor does not desire to bring about the consequences which follow... There is merely a risk of such consequences, sufficiently great to lead a reasonable man in his position to anticipate them, and to guard against them." (Prosser, p. 145) And just as proportionality justifies doing harms if the value of the end achieved outweighs the harms done, so in negligence law, "(a)gainst this probability, and gravity, of the risk, must be balanced in every case the utility of the type of conduct in question... Chief among the factors which must be considered is the social value of the interest which the actor is seeking to advance." (p. 148)

Negligence law includes four necessary elements that, when present, mark out an actor as negligent. These are:

1. A duty recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risk.

2. A failure on his part to conform to the standard required.

3. A reasonable causal connection between the conduct and the resulting injury, or 'proximate cause.'

4. Actual loss or damage resulting to the interests of others. (p. 143)

Since we are assuming, for the sake of this analysis, that the coalition, in prosecuting the war, took all of the precautions required to avoid intentionally harming the innocent, we know that condition #2 is not met so that the coalition conduct cannot be negligent. But wait, the objector will claim, this response is too quick, for it begs the question whether the standards set in condition #1 have not been set too low. For the standards of what a reasonable person must do when taking precautions against the unintentional harming of others must take into consideration the balancing of the risks to others when weighed against the utility of the end sought in the acts. And so, the critic asserts, you have only shown that the coalition acts, in being discriminate only remain within the bounds of international law and so are not in some international law sense negligent. This does nothing to show that the standards ought not to include greater care for the ripple effects of bombing and since these were disproportionate to the end sought in the war, the coalition

was morally negligent. But here, the critic may have, herself, assumed the very point at issue - that is whether the actor, in doing unintentional harm to uninvolved third parties, must assume all the burden of showing her ends outweigh these harms.

Now since we are assessing the proper application of the criterion of proportionality in light of a situation in which we are responding to the aggressive war of another party, let us see how the law of negligence reads with respect to defenses to the intentional interference of others. We shall look at self-defense, the defense of others, and the defense of property.

III. Defenses to Negligence Claims

It is well-known that if "in defending himself, the defendant accidentally shoots a stranger, there is no liability in the absence of some negligence." (p. 112) A possible interpretation of this is that since the person who accidentally shoots bears no liability for the harm to the stranger, it is the original wrongdoer who must bear the guilt for the harm done. The evil effect hangs on this person and need not be shown to be outweighed by the good done in defending oneself. But the critic may argue that this action of self-defense is ultimately justifiable only because she grants that the end of saving one's life is proportional to the risk of death to an innocent third

party. The critic may then claim that furthermore the coalition war fighters were not fighting in self-defense. At most they were fighting in defense of others. So let us consider what the law says with respect to the defense of others. The settled law is that the "privilege extends to the use of all force reasonably necessary for such defense, although there will be liability if unnecessary force is used." (p. 113) The law here is perfectly parallel to that of self-defense. I am non-negligent for the deaths to innocent third parties caused in my reasonable efforts to defend others. Thus the response of the critic will be the same. It is not that the original wrongdoer must bear the weight of all of the harms done, ultimately the justification must rest on the claim that the lost lives of the innocent third parties are proportional to the saved lives of those whom I defend. But, the critic will maintain, this was a war about crass property, not a war to save the lives of the innocent. The cries of "no blood for oil" stand vindicated. So let us just see what the settled law says about the defense of property:

> "Where the intruder is not proceeding with violence, the defendant may normally, in the first instance, use only the mildest of force, for which the old form of pleading had a phrase - 'molliter manus imposuit;' he gently laid hands on him. But if the plaintiff resists, the defendant may use the force reasonably necessary to overcome his resistance and expel him, and if in the process

his own safety is threatened, he may defend himnself, and even kill if necessary." (p. 115)

If blood and oil are inherently disproportionate it would seem that one could never forcibly eject a usurper of one's property where there is reason to believe that deadly force would have to be used. The good person would have to acquiece to evil, were she to have to show that the evil undone is not disproportionate to the harm done in resisting the evil. But where deadly force must be resorted to if usurpers are to be dispossessed of their unjust acquisitions, then inevitably disproportionate harm must be done. One can avoid this conclusion only by maintaining counterintuitively that oil and blood can be equivalent. This I do not wish to maintain. Rather I hold that the good does not have to bear the burden of justification of all of the evil. If we must have evil in any event, either in acquiecence or in disproportionate harming in defense of our rights, then I maintain that we need not acquiece and that in either case the usurper bears the burden of the evil that results.

The legal concepts provide two different avenues of approach to the problem of attempting to pin responsibility for harms we do in defense of our rights on those who are violating our rights. The one approach is through the concept of 'contributory negligence' and its derivative concept of 'comparative negligence' and the other is through

the concept of 'assumption of risk.' Let us explore the second approach first.

IV. Assumption of Risk; Contribution and Comparison

> In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. (p. 440)

This may be done either through explicit consent or by voluntarily entering into a relationship with some actor with knowledge that the actor will not protect him against the known risk. Although there may be some degree to which the responsibility for the harms done to innocent third parties in Desert Storm by the coalition forces is avoided by the coalition by means of this defense, there are two main problems faced by any attempt to do this which makes an appeal to the concept of assumption of risk quite weak. These are, firstly, that it is implausible to claim that the harmed individuals may be said to have consented in any real sense to the risk of harms and, secondly, that the "known risk" was too vague to satisfy.

It is of course true that the Iraqi civilians harmed by the coalition forces can only in the most extended sense be said to have either consented to or voluntarily entered into a relationship with the coalition forces with the known risk of harms likely to befall them. In the first place one

would have to maintain that they found themselves in this position, not because of any direct actions of themselves but by the direct actions of their authorized agent, Saddam Hussein. The problems with this are with the presumed authorization, not with worries about whether the agent, Hussein, voluntarily entered into a relationship with the coalition forces involving risk. It was, Saddam Hussein who began the state of belligerency, and it was Saddam Hussein who voluntarily chose to remain in Kuwait in face of the United Nations directives requiring him to leave, and it was Saddam Hussein who chose to remain in place in spite of the United Nations authorization of war. If Saddam Hussein was the authorized agent of the Iraqi citizens, then clearly he voluntarily subjected them to the relationship known as a state of belligerency with the international community with its attendant risks. But this model assumes at least a quasi-social-contractarian-foundation granting Saddam Hussein authority in this special sense and this is surely lacking. Furthermore, even if Saddam Hussein had authority in this special sense, it doesn't follow that Hussein's authority extended to subjecting his citizens to unreasonable risks, and this he surely did. Turning to the second problem, we see that even if Hussein could be said to have been the authorized agent of the Iraqi civilians in the favored sense, surely the nature of the risks were too vague

to have been altogether voluntarily accepted. It would seem plausible to suppose that even Saddam Hussein must have had only a vague idea of the dangers he faced. But, as at a baseball game, the spectator assumes the risks of being harmed by the play of the game, even if the precise nature of the danger, risk of being hit by the ball, for example, was not appreciated.4 Thus, although I think it would be beastly to claim that the Iraqi citizens must be said to have assumed all or even a significant amount of the risks that befell them, I think that there may be some that they may have to bear.

I now turn to the other avenue of approach to the problem of pinning responsibility for the harms we do in our legitimate defensive efforts on those who are responsible for forcing us to resort to this. The relevant legal concepts here are, again, 'contributory negligence' and its derivative concept of 'comparative negligence.'

Both assumption of risk and contributory negligence, are defences to claims that an actor is liable for harms that befall some other person. There has been a tendency for the two defences to be confused.5 The distinction between the two is that:

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4. Hudson v. Kansas City Baseball Club, 1942, 349 Mo. 1215, 164 S.W. 2d 318; Hunt v. Portland Baseball Club, 1956, 207 Or. 337, 296 P.2d 495.
5. Prosser makes note of this historical tendency, at p. 441 where he cites several commentaries on this issue as

> assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable man, however unaware, unwilling, or even protesting the plaintiff may be..." (p. 441)

Strictly speaking, contributory negligence is:

> conduct on the part of the plaintiff, contributing as a legal cause to the harm (s)he has suffered, which falls below the standard to which (s)he is required to conform for (her) own protection." (p.416)

Historically, a showing of contributory fault on the part of the plaintiff to her own injuries relieved the defendant of all liability for the injuries regardless of any showing of the fact that the defendant's conduct was negligent with respect to these injuries as well. Aside from the rather obvious unfairness of this standard, its application to the case of the harms done to Iraqi civilians is open to quite the same objections as those which we raised with respect to assumption of risk. That is, it requires too much creative extension to impute to the harmed civilians the characteristics necessary for them to have been negligent. This is to carry the fault of blaming the victim to yet new heights. Furthermore, this defense even removes Saddam Hussein from the hook of responsibility, for no matter how negligent were his actions, the traditional doctrine of contributory negligence would release him from liability if

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well as Petrone v. Margolis, 1952, 20 N.J. Super. 180, 89 2nd 476.

it can be shown that the civilians who were themselves harmed played any responsible role in bringing about the harms that befell them.

The doctrine of comparative negligence developed in response to the obvious unfairness of the application of contributory negligence, in which:

> the plaintiff's deviation from the community standard of conduct may even be relatively slight, and the defendant's more extreme... and the answer of the law to all this is that the defendant goes scot free of all liability, and the plaintiff bears it all. (p. 433)

The law has developed so that damages are now apportioned among the responsible parties. For example, when deciding a case in which the doctrine of comparative negligence applies, the jury must first determine the full amount of all the damages sustained by the plaintiff. Next, they compare the fault of the parties, determining by what percentage the plaintiff's own negligence contributed to his damage. The law is not settled at this point concerning the proper way to apportion the damages among the responsible parties. For example, in some jurisdictions, if the plaintiff's degree of responsibility exceeds some fixed percentage, such as 49% the defendant is relieved of all liability.6 In others, a determination is made concerning who is best able to bear the costs of reparation and this

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6. Colorado is one of the state's that applies this so called "Wisconsin rule."

becomes the overriding factor in determining liability. But in our case, where we are concerned with who is to bear the moral responsibility, and not necessarily who is to pay reparations, for the costs imposed in fighting a war, the salient point seems clearly the straight-forward, although still complicated, task of apportioning degree of fault. The morally relevant rule seems to be that she who bears some degree of fault in a situation in which third parties are harmed, bears that degree of responsibility for the harm.

V. Apportioning Responsibility

This leaves us, then, the problem of arguing that, in fact, Saddam Hussein is an actor who bears much of the responsibility for the damages that befell his nation because he was in fact negligent in his duties to the Iraqi citizens who were harmed in Operation Desert Storm. This is not to say that the coalition forces are relieved of all responsibility for the costs that befell the Iraqi citizens, for to the extent that the coalition response exceeded that which a reasonable person in the circumstances would do, the coalition was negligent as well.

The task of apportioning degree of responsibility is far too complicated to be accomplished in this forum. All that I can hope to do is to suggest some factors which relate to this task. I suggest that the following four

questions point to some of the central issues that must be addressed in any attempt to apportion degree of responsibility for the damages done to Iraqi civilians during Operation Desert Storm:

1. Did Saddam Hussein owe the Iraqi civilians a duty of care against the foreseeable consequences of Operation Desert Storm?

2. Can Hussein's failure to take the steps necessary to avoid war with the United Nations' coalition forces be considered culpable non-feasance?

3. Was the coalition decision to go to war an 'intervening cause' that relieves Hussein of responsibility?

4. Was the coalition response that which a reasonable person would choose in order to achieve the legitimate objectives of the war?

With respect to the first question, clearly if the leadership of a nation owes any duty of care to its citizens, it owes them the duty of protection from the unnecessary ravages of war. If anyone was under a duty to assess the contemplated ends of a war against all of the reasonably foreseeable consequences of the war, it was surely Saddam Hussein prior to his commencement of hostilities against Kuwait. Clearly Hussein miscalculated the likelihood that he would face a major war with a United States lead coalition, however this does not relieve him of the responsibility for failing in his duty to avoid unreasonably subjecting his citizens to the risk of war. With respect to the second question, there is no problem in

theory with holding a person culpable for their non-feasance. I can be just as morally responsible for failing to do those things that a reasonable person, in the circumstances would do, as I am for doing those things that a reasonable person wouldn't do. In the law this is restricted to those cases where relations between persons are such as to impose an obligation to act. (Prosser, p. 139) Whether or not we regard this as too restrictive, Saddam Hussein's non-action meets the test, for he was under a positive duty to protect his citizens from the ravages of war and he had numerous opportunities to take those steps necessary to avoid war. His failure to do so ought, therefore, to be regarded as culpable non-feasance.

With respect to the third question, the real issue to be decided here is not whether the coalition's actions were causes in fact of the harm to the Iraqi citizens, but whether responsibility for their harmful effects ought to rest on Hussein because they were one's "which in ordinary human experience is reasonably to be anticipated, or one which (Hussein had) reason to anticipate under the circumstances." (p. 272) Clearly the message was communicated to Saddam Hussein that the coalition response would be sudden and massive, intended, within the constraints of International Law, to eject the Iraqi forces from Kuwait as quickly as possible, while minimizing

casualties to coalition forces and eliminating the threat Hussein's military posed to its neighbors. This leads directly to question four. We must grant that to the extent that coalition efforts exceeded what was reasonably necessary to achieve this end, there may be some culpable negligence on the part of the coalition forces. However for this negligence, too, Saddam Hussein must share the responsibility, for "One who spills gasoline can expect it to be negligently set afire." (p. 274)

The answers to these questions point to the fact that Saddam Hussein bears most of the responsibility for the evils that befell his citizens. As Vatican II concluded:

> Certainly war has not been rooted out of human affairs. As long as the danger of war remains and there is no competent and sufficiently powerful authority at the international level, governments cannot be denied the right to legitimate defense once every means of peaceful settlement has been exhausted. Therefore, government authorities and others who share public responsibilities have the duty to protect the welfare of the people entrusted to their care and to conduct such grave matters soberly (Pastoral Constitution, p. 79)

The evil rests on the shoulders of Saddam Hussein, it is not vindicated by the good results of the war.

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