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Representational Content's Relevance to War: A Reply to Husak

Kimberly Kessler Ferzan

I thank Doug Husak for his careful and fair comment my paper. In this reply, I address three arguments that he advances. First, he raises the concern that my analysis has merely moved the bump in the carpet because even when we start with the core of intentions being the description that is motivationally significant to the actor, we must still articulate that representational content. Second, he claims that even concepts like death may be held less robustly than typically supposed because the actor may believe in everything from reincarnation to zombies. This poses concerns for how often we think the result is truly inseparable from the act. Third, and most importantly, Husak maintains that the “allegedly...grave difficulties,” I raise for McMahan and Haque are simply flesh wounds that can be addressed by recognizing that the Doctrine of Double Effect is not the sole determiner of permissible actions within war.

1. Representational Content and Motivational Significance

Husak was eating peanuts when he wrote his reply. I am drinking a Diet Dr. Pepper. Am I drinking it because I am thirsty? Need caffeine? Like the taste? How, asks Husak, do we know? How do we fix the content of the desire state upon which the intention relies?

Let me first concede that it is certainly true that getting at representational content is no easy task, and my paper does not offer a worked out view of how to determine the content. It's absolutely true that we often simply stipulate and assume. Consider: (1) Doug is “hungry.” (2) He believes peanuts will satisfy his hunger. (3) Therefore, he forms the intention to eat them. Surely, that is an oversimplification. Oftentimes, we find ourselves doing acts without speaking through those syllogisms. And even when we run through interior monologues, we use rough and ready linguistic descriptions of what we want. (You may think “I'm hungry,” but it is not as though you take the first thing you see when you open the refrigerator. The time spent rummaging through leftovers means that your actual desire is more discriminating.) Still, as anyone with an area rug knows, sometimes when you step on the bump in the carpet and move the bump to the periphery it does get smaller (and eventually may be eliminated). I'd like to think progress is being made here. If we don't have an understanding that intentions are the sort of thing that explain and rationalize actions – that explain *why* we do what we do – then we are simply nowhere.

I don't think we are nowhere, and I don't think Husak thinks so either. He and I simply agree that more work needs to be done. Neuroscience might give us better answers one day. In the meantime, I'm inclined to think that we often do have access to what we desire through introspection. And using counterfactuals is a good way to discriminate among alternative possible descriptions. I am drinking Diet Dr. Pepper for three reasons: It is before lunch and so I can drink caffeine (after lunch, I will switch to Sprite Zero); it is diet and I never drink soda with sugar; and I *love* the taste of Diet Dr. Pepper. If I went to grab a DDP (for short) and wound up with a Coke, I would be upset. I wouldn't say, “Oh, here's a liquid” or “a liquid to drink” or “a carbonated liquid to drink.” I'd be upset because what I wanted to drink was a DDP. Sometimes, all I want is a liquid to drink. Then that is all that is motivationally significant to me. I eat peanuts when I am in a bar and hungry, but never because I want the taste of a

peanut or the calories. So, perhaps I have simply moved the location of the stipulation, but I think the move is still important as it pushes the inquiry to an area in which we might one day be able to answer such questions. And our answers won't be sought by mere appeal to an intuition that something does or does not count as intended.

2. Fine-Graining Results: Is Death the End?

Husak also analyzes my claim that it is the actor's conception of her conduct that governs whether she intends a result. He seeks to create an innovative wedge, not between decapitation and death, but between death and *staying* dead. Maybe, he says, given all the possibilities that we don't stay dead, people do not think that death is permanent. This would mean that actors can separate actions and results even more than we might first suppose.

I think that depending upon what we really suppose the actor to believe, this belief set forth by Husak might matter. But first, here is the best argument that we just don't care about people's views of whether someone stays dead. If the actor understands that he is killing the victim but believes the victim will be reincarnated, I think it is still fair to say that the use of "death" for moral and legal purposes covers this conduct. Even if better described as "moving someone toward her next life," it is still understood as ending this one. So, too, with zombies. I don't think most of us think it would be a good thing to be "killed" so we can "live" as the "undead." Ultimately, I don't think an understanding of permanence is required for the legal and moral condemnation of the killing. So the thought is that even if the agent says, "I intend to end life under this description for V but I do not think this permanently ends V's life," that further belief creates no distance unless we believe that the "permanently" part is what is morally or legally forbidden. We don't, for example, require someone to have an understanding of scarring or bone regeneration for battery charges (though we might for mayhem to the extent it requires permanent disfiguration).

When distance can be created – as is true in the mayhem example, we may still rely on morally condemning what the actor intends to do. As it becomes conceivable to live post-decapitation, perhaps we should just criminalize decapitation. (I have sometimes mused that, given beliefs in witches and aliens, laws could just criminalize killing witches and aliens. Then, when a defendant claims that he believed he was killing a witch and not a human being, he would still be on hook. Wouldn't that solve the problem? Admittedly, it might create new ones, such as the state expressing a belief that there are such things, proportionality, etc. This is perhaps why I do not even advocate that approach here.) If certain acts do lead to a question of permanence and permanence matters morally, then law and morality ought to take the actors beliefs with respect to permanence into account.

My view does yield that people can believe more or less the same thing. The senses I ascribe to an intentional object may vary from the senses you ascribe to it. Husak may believe in reincarnation, our friend Margo may believe in zombies, and I may believe that death is permanent, but we still have a sufficiently overlapping concept of "death" that we can understand each other despite the fact that our views about what it means to die radically differ. I am thus willing to bite the bullet on this philosophy of mind implication, and further concede that to the extent that it is less wrong to kill someone under

one description of death than another, we might need to take that into account. Is killing like mayhem? Need it be forever? That is a normative question we could ask.

3. Permissibility Beyond the DDE

Moving from the subject of the undead, and more things on heaven and earth than may be dreamt of in (my) philosophy, we can now turn to the crux of Husak's objection. The DDE need not be the last word on permissibility. He offers proportionality as another limitation.

It is certainly the case that both law and morality have more resources at their disposal than simply the DDE. The problem is how to deal with uncertainty. McMahan's paper came as a response to an objection – that his claim that some unjust combatants might be innocent aggressors and others culpable ones (and further that this is an important moral implication), would create problems for just combatants, as they would be unable to discriminate. One of McMahan's responses was that when one acts in the face of epistemic uncertainty, one is not acting intentionally. My claim was that this move was too fast, though the conclusion of my paper is to agree with him on that score.

Haque's paper notices that it is a significant problem for the law of war to set forth the criteria for when combatants may act in uncertain circumstances. It is a big deal. And indeed, where McMahan's paper ends, Haque's paper appropriately takes up the problem of providing action guidance when there is a high probability. My objection to Haque was that he was too quick to give the easy answer that some of these cases will simply fall within the scope of the intention. He fails to get the content of intentions right. Moreover, with this inaccurate assumption, his reliance on the notion of intentionally killing the innocent in his deontological balancing test fails as there is no intentional conduct when one is only aware of a risk. This leaves in place the question of how we ought to set forth the degree of certainty required as a normative matter. However, my argument prevents the deck stacking claim that by killing someone who might be innocent, you are intentionally killing an innocent person.

My contribution did not seek to devastate the research agendas of either McMahan or Haque (nor could I), but to push against the swiftness with which they reached conclusions about the DDE. The problem isn't coming up with different limitations. After all, we might say – very roughly -- that when one is acting in self-defense one must (1) intend to act defensively, (2) against a culpable attacker, (3) using proportionate force, (4) to the extent that such force is necessary. However, McMahan, Haque, and myself (but not Husak) take a fact-relative view of justification. Conditions (1)-(4) must really be met for the action to be justified. But actors can get (2)-(4) wrong, and they might only estimate probabilities that the person is an attacker and not a civilian, that the person plans to use a grenade and not a knife, and that response with a gun rather than a punch is needed. In seeking to give action guidance in war, we need to know how to deal with probabilities that these limits exist. Condition (2) is an important condition, and as we have seen, it is just a duck to cast epistemic uncertainty within the boundary of intention. That still leaves lots of hard questions for war. But at least we will be asking the right questions.