Criminal Law and Philosophy
https://doi.org/10.1007/s11572-023-09696-2

ORIGINAL PAPER

Justifications and Rights-Displacements

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Accepted: 20 July 2023

Abstract
In articles published ten years apart in 2011 and 2021, Gur-Arye argues that when considering an agent's explanation for doing something that looks, prima facie, like a criminal offence, we should distinguish between a plea of justification, and an assertion that one acted within one's power. The former explains an agent's reasons for having committed a pro tanto offence (i.e., actus reus + mens rea). The latter is a denial that the agent committed any pro tanto offence at all. In this piece, I build on Gur-Arye's argument, suggesting that her claim about powers can be extended to all instances in which rights are displaced. I argue that in its expanded form, the practical significance of Gur-Arye's claim goes well beyond what she identifies. It points to important and underappreciated points about the structure and classification of defensive claims in the criminal law, and helps identify errors in some arguments commonly made to support claims about disputed features of justifications.

Keywords Justifications · Powers · Rights-displacements · Monopoly of force

1 Introduction

In two articles published ten years apart in 2011[1] and 2021,[2] Gur-Arye argues that when considering an agent's explanation for doing something that looks, prima facie, like a criminal offence, we should distinguish between a plea of justification, and an assertion that one acted within one's power. We should, that is, 'distinguish… between conduct that, while violating the prohibition that defines the offense, is justifiable, and conduct that falls outside the prohibition. The first is a [pro tanto] criminal wrong and requires justification; the second is acceptable conduct which requires no justification.'[3] This, she explains, is because a power 'revokes the legal protection

[1] Gur-Arye (2011).
[2] Gur-Arye (2021).
[3] Gur-Arye (2011: 296).

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Published online: 05 August 2023

of the right… [so the] exercise of official power does not violate the prohibition defining the offense; it falls outside the prohibition'. On the other hand, a justification 'acknowledge[s] the infringement of a legal right and yet justif[ies] such an infringement'.[4] She argues that this distinction explains, amongst other things, why it is consistent to strike down laws that empower officials to shoot down hijacked passenger planes to prevent them from being deliberately crashed into civilian populations, while still allowing that an official who (in a personal capacity) does shoot down such a plane may have a justificatory defence to criminal liability.[5]

In this piece, I build on Gur-Arye's argument, suggesting that her conceptual claim about powers can be extended to all instances in which rights are displaced, and arguing that in its expanded form, its practical significance goes well beyond what Gur-Arye identifies. In fact, it points to important and underappreciated points about the structure and classification of defensive claims in the criminal law. I argue that carefully distinguishing between true justifications and rights-displacements helps identify features of cases of the latter type that have dubiously been attributed to cases of the former type, and vice versa.

2 Moving Beyond Powers

Consider a person (D) who appears prima facie to violate another's (V's) right against having 'X' inflicted on her, where violating that right carries potential criminal sanction. Gur-Arye's argument can be summarised thus: when considering the defensive pleas (broadly understood) that D may raise in respect of this event, we should distinguish between D's claim that she was exercising a power, and her claim that she had a criminal law justification. The former asserts that despite seeming prima facie to have done something criminal, D has not committed even the pro tanto offence (i.e., actus reus + mens rea) of inflicting X. The latter plea does not deny the pro tanto offence, but instead asserts additional facts that block the presumptive transition from pro tanto offence to a criminal conviction. It is, that is, a supervening defence—specifically, a justification—to the criminal charge. Gur-Arye argues that grants and exercises of powers are subject to constitutional and administrative law constraints, whereas claims of criminal law justification are adjudicated within the criminal justice system.[6] This is a conceptual argument about the natures of powers and justifications.

This claim is plausible. The legislator could certainly design a right to be subject to some specified agent's power to displace the right in specified circumstances.[7] Where the right is so displaced, conduct occurring within the realm of displacement would not amount even to the pro tanto criminal offence associated with violating the right. There would be no call for D to explain, *on pain of criminal sanction*, that her conduct was justified. She may, of course, have to explain her conduct in other

[4] Gur-Arye (2011: 296).

[5] Gur-Arye (2011: 306–308).

[6] Gur-Arye (2011: 295–297).

[7] For one discussion, see Dsouza (2017: Sect. 8.5.2).

fora; her actions may well be subject to constitutional or administrative oversight.[8] But, when D justifies her conduct in those fora, she does not offer a *criminal law* justification—those proceedings cannot culminate in a *criminal* conviction. We can contrast such cases with others in which nothing internal to the right's definition excludes its application to D's apparently right-violating conduct, but D relies for exculpation on her good reasons for acting as she did. The conceptual differences between these two types of cases may well have practical implications.

But I think we can go further. Gur-Arye distinguishes between cases in which D pleads a justification, and those in which D asserts a power (which she conceives of in Hohfeldian terms as the legal ability, by doing certain acts, to alter legal relations[9]). In the former case, D attempts to block the presumptive transition from proving that a pro tanto offence was committed to a criminal conviction; in the latter, D denies having committed even a pro tanto offence, despite appearing prima facie to violate V's right. But actually, the set of cases in which the latter proposition is true is broader than Gur-Arye recognises. It includes, of course, cases in which D exercises a Hohfeldian power—for instance, a constable exercising the *power* to arrest V, by placing a hand on V and declaring her to be under arrest; and a judge exercising her *power* when curtailing V's liberty as she passes a sentence of imprisonment. But it also seems right to think that it includes cases in which D acts within the scope of a Hohfeldian duty.[10] Legal executioners are *duty-bound* to execute people duly sentenced to death, and jailors are *duty-bound* to lock up convicted prisoners; *pace* Gur-Arye,[11] they are not merely empowered. Yet, when they perform their duties, it seems odd to think that they commit a pro tanto offence against the convict. The same oddity also appears in respect of some cases in which D exercises a Hohfeldian privilege.[12] When V consents to a surgeon performing invasive surgery on her, she does not, *pace* Gur-Arye,[13] give the surgeon a Hohfeldian power to alter legal relations. The surgeon does not, as a result of receiving V's consent, become endowed with the legal ability to do something and thereby alter some legal relations—or at least, that is not the most apt description of the effect of receiving V's consent. Instead, it is more apt to say that V's consent gives the surgeon a Hohfeldian privilege against V, and perhaps even a Hohfeldian duty to V, to perform the surgery. But in any event, when the surgeon performs consensual surgery, it seems odd to think that she commits even a pro tanto offence against V.

In all of these cases, there *is* a power in play—specifically, the power to displace the right. In fact, this power is built into the very definition of the right granted to V. The power is sometimes exercised by the putative right-violator (eg the constable

[8] To be clear, if, and to the extent that, the criminal law is itself subject to constitutional or administrative oversight, justifications too are indirectly subject to constitutional or administrative oversight. Here, though, I refer to plenary constitutional or administrative oversight. My thanks to Re'em Segev for pushing me to clarify this point.

[9] Gur-Arye (2011: 297), Hohfeld (1919: 50–60).

[10] Hohfeld (1919: 38).

[11] Gur-Arye (2011: 298).

[12] Hohfeld (1919: 38–39); see also Thomson (1990: 44–55).

[13] Gur-Arye (2011: 301).

making an arrest, or the judge awarding a custodial sentence), but it need not necessarily be. The legal executioner and the jailor act pursuant to the exercise by a third party—a judge—of a power to displace V's relevant rights, and the surgeon acts pursuant to V's own exercise of an analogous power—the power to consent and thereby to forgo her right-based objection to the surgeon's seemingly right-violating conduct.[14] If I am right in thinking that (like the constable and the judge) the legal executioner, the jailor, and the surgeon also commit no pro tanto offences, then that suggests that whenever the power to displace V's right is exercised, a person acting within the realm of the rights-displacement[15] commits no pro tanto offence against V. So, Gur-Arye's thesis that a person exercising a *power* need offer no criminal law justification since she commits no pro tanto offence is underinclusive. In fact, all persons acting within the (more expansive) realm of a rights-displacement—whether they be exercising a power, fulfilling a duty, or acting under a privilege—commit no pro tanto offence and need offer no justification, or indeed any other answer, *to a criminal court* for their actions.

3 A distinction that Matters

Consider these facts:

> Bank Robber: D suspects V of having been the person she saw robbing a bank yesterday. She does not believe that it is practicable for a constable to arrest V, since she sees none nearby. She also believes that unless she arrests V, V will escape. She therefore announces to V that she is privately arresting him. V is unimpressed and starts walking away. D therefore uses force to subdue V.

My claim here is that it matters whether, when D says that she used reasonable force in making a private arrest, she is pleading justificatory defences to criminal liability for charges of false imprisonment and assault, or arguing that V's rights to personal liberty and against being assaulted had been displaced, and that her actions fell within the realm of displacement.

At first glance, it may not be evident why that is. After all, whether conceived as justifications or as rights-displacements, when adjudicating on D's pleas, we would be interested in essentially the same things viz. the reasonableness of the force that D used, and the genuineness and reasonableness of D's beliefs that (a) V was the bank robber; (b) there was no constable available to arrest V; and (c) V would escape if not privately arrested. We might therefore conclude that even if there is a distinction between justifications and rights-displacements, in practice, it is insignificant. A legislator could cloak D's defensive plea in the garb of either a justification or a

[14] Alexander (1996: 165, 166, 172); Dsouza (2020: 8–9).

[15] To be clear, a 'rights-displacement' only occurs when V has a right against D's conduct, and someone (not necessarily D) exercises a power to displace it. It does not occur in cases where V's right never barred D's conduct in the first place.

rights-displacement, without materially changing the plea's availability or implications.[16] That conclusion would be premature.

The legislator's choice is crucially important. Drafting D's defensive plea as a rights-displacement has a communicative effect—it communicates that D does not commit even a pro tanto offence when acting as she does. This communication might be valuable in itself. It is not difficult to imagine why a surgeon, judge, or jailor might bristle at the idea that in performing their lawful professions they are constantly committing pro tanto offences and are just one failed defensive plea away from a criminal conviction. But more importantly, framing D's defensive plea as a rights-displacement makes it possible for the legislator to identify a forum other than the criminal court to be the primary (in the sense of usual) forum to adjudicate D's defensive plea. This is not an option where the legislator creates only a justificatory defence to the criminal liability prima facie arising from D's actions—in these cases, the legality of D's defensive plea can be adjudicated solely by a criminal court, and if D pleads the defence unsuccessfully, then (assuming no other defence applies) she faces a criminal conviction. But if the legislator wants D's defensive plea to be adjudicated by some administrative authority, she should first specify the conditions under which V's right can be displaced, and then identify a forum to exercise oversight over whether those conditions were met.[17] This administrative forum would then usually be the first port of call when determining whether D's conduct fell within the realm of a genuine rights-displacement. If D cannot show that her actions fell within the realm of displacement of V's right, she will face, in the first instance, some form of administrative sanction. Of course, she might sometimes *also* face a criminal conviction, but in any sensible system, such a conviction would not accompany every administrative rap on the knuckles—it would be reserved for egregious instances of D's actions falling outside the realm of displacement of V's right. We see shades of this in the law relating to injuries suffered during organised sporting activities. In a game of football, when D's tackle on V is slightly late, she commits a foul; her action goes beyond the rules of the game. As a result, a free-kick may be awarded against D's team, and in more serious cases, D may also be ejected from the game. But these are not criminal sanctions, and ordinarily, no criminal sanctions would even be threatened. For the purposes of the criminal law, V's decision to play the game displaces her right against physical contact not only when that contact falls within the strict rules of the game, but also when it falls somewhat beyond it, but within a penumbral 'zone of toleration'.[18] Of course, conduct that falls beyond the penumbral zone of toleration might, even if performed in the context of the game, attract criminal sanction.[19] So, if D tackles V during the football match with the intention of breaking her leg and

[16] My thanks to Antony Duff and Sandra Marshall for pressing me on this point.

[17] Of course, the legislator *need not always* take the second step. For instance, she may leave it to the criminal court to decide whether, for instance, when D makes physical, but not terribly harmful, contact with V, V's consent displaced her right against that physical contact, and thereby negated an element of a pro tanto offence. But the legislator cannot give a non-criminal forum oversight over the validity of D's defensive plea unless the plea is one of rights-displacement. My thanks to Andreas Vassiliou and Javier Saade for pressing me on this point.

[18] Child et al. (2022: 515–516); *R v Barnes* [2005] 1 WLR 910.

[19] ibid.

ruling her out of the upcoming World Cup, or if she deliberately stabs V with a penknife smuggled onto the playing field, she could face criminal charges (in addition to being ejected from the game). D's conduct may fall egregiously outside the realm of rights-displacement either because of quantitative reasons—for example, using force of the permitted nature, but using too much of it—or for qualitative reasons—for example, using force not of a permitted nature.[20]

The point can also be made by imagining ourselves as legislators legislating for private arrests and for arrests by constables. Since constables will have received special training, we may legitimately expect them to exercise much better judgement than a layperson about when and how to make an arrest. So, a constable who falls short of the exacting standards set for her may still have done better than we'd expect a layperson to have done in the same circumstances. Even so, we might think that the errant constable should, at least in some cases, be liable to disciplinary action, and we might designate an administrative body (such as the Professional Standards Department in England & Wales) as the forum to decide whether such action is merited. This would not, of course, preclude a constable from facing criminal charges where egregious misconduct is alleged, but in more ordinary cases (I include here cases involving both, perfectly quotidian arrests, and arrests allegedly involving objectionable, but not egregiously bad, conduct) the criminal court would not be the appropriate adjudicatory forum. However, the sort of administrative oversight that applies to constables is inapt for application to laypersons making arrests. We do not expect laypersons to meet the standards we set for constables, and so we cannot sanction them for falling short. That said, a layperson who does not meet even the lower standard applicable to her may plausibly be subject to criminal (but not administrative) sanctions. This suggests that conscientious legislators should facilitate arrests by constables by permitting V's rights to be displaced, and may enable laypersons exceptionally to make such arrests by creating a relevant justificatory defence to criminal liability. And, insofar as this is exactly the structure adopted in England & Wales in respect of arrests by constables,[21] and arrests by laypersons,[22] this view gets the legal phenomenology right.

[20] My thanks to Marie Newhouse for pressing me on this point.

[21] A constable's power to arrest without a warrant under the Police and Criminal Evidence Act 1984 (PACE), s. 24 displaces the arrestee's right to personal liberty. A constable making such an arrest is governed by the Standards of Professional Behaviour set out in Schedule 2 to Police (Conduct) Regulations 2020, one of which is that 'Police officers only use force to the extent that it is necessary, proportionate and reasonable in all the circumstances'. Complaints of misconduct are made to the appropriate authority as identified in the Police (Complaints and Misconduct) Regulations 2020. This is not a criminal court.

[22] A private person making an arrest without a warrant may, in response to a criminal charge of kidnapping, plead the justificatory defence set out in PACE, s. 24A. With some simplification, the provision states that a private person may arrest V if she reasonably suspects that (a) V has committed an indictable offence, (b) it is not practicable for the constable to arrest V, and (c) V would escape before a constable could assume responsibility for V. If force is used in making this arrest, the arrester may, in response to the criminal charge relating to the use of force, plead the justificatory defence set out in s. 3 of the Criminal Law Act 1967 (CLA), which permits a person to use reasonable force in making a lawful arrest. Section 76 of the Criminal Justice and Immigration Act 2008 (CJIA) provides detailed guidance on what force is considered reasonable. Interestingly, on the face of it, both CLA, s. 3 and PACE, s. 24 seem to create powers for laypersons. However, the more recent CJIA, s. 76 expressly refers to pleas under CLA, s. 3 and PACE, s. 24 as defences. There's no particular reason why legislators could not frame the pleas under CLA, s. 3 and PACE, s. 24 as true rights-displacements, and perhaps, as Duff and Marshall (2023) suggest, there is a normative argument for doing so. But even if they did that, the analyses of the resulting pleas would shed no light on the nature of justifications.

The same is also true in respect of other rights-displacements. We know that executioners and jailors are also not (barring egregious misconduct) expected to justify the performance of their duties before a criminal court. Therefore, their actions too are understood as falling within the realm of displacement of the convicts' rights to life and personal liberty respectively. Similarly, surgeons performing consensual surgery on a patient are not ordinarily expected to answer to a criminal court for violating the patient's right to bodily integrity; their actions fall within the realm of displacement of that right.

While, in all these cases, criminal liability may exceptionally be pursued, insofar as administrative oversight is intended to be the primary check on an agent's prima facie rights-violating conduct, we should theorise the normative space that facilitates the performance of these agents' roles as rights-displacements rather than justifications.

4 Frequent Conflation

Justifications and rights-displacements are frequently conflated in the literature on criminal law defensive pleas. Even a cursory survey of the literature throws up several instances in which police officers exercising powers to make arrests,[23] executioners performing lawful executions,[24] and, more generally, persons performing public duties[25] are treated as if they must offer justifications for their actions. It is difficult to evaluate the effects of these conflations. Consider an instance in which a rights-displacement case is relied upon to reach a conclusion about a justification. That conclusion may independently be correct or warranted, and if so, the conflation seems at worst to be an ultimately benign case of slightly messy reasoning. However, if the conclusion is incorrect, or unwarranted, the conflation is more problematic. But since there is little consensus on what features a justification should have (and even on propositions where there is consensus, that consensus itself does not establish the correctness of the proposition), it is difficult to distinguish benign conflations from problematic ones. A better approach is to tidy up our reasoning about justifications by being scrupulous to avoid conflating justifications and rights-displacements, and trust that doing so will, in time, lead us to make better arguments about justifications, not least by being clearer about what justifications are *not*. That being said, let me tentatively make some general comments about the implications of the distinction between justifications and rights-displacements.

[23] Simester (2021: 426); Thorburn (2008: 1072); Finkelstein (1996: 644); Robinson (1996: 46); Robinson, (1997: 391); Waldron (2000: 714–715).

[24] Alexander (2013: 164); Alexander (2005: 620, 632–633); Alexander and Ferzan (2009: 61, 90 fn 27).

[25] Aponte (2007: 118).

5 Structural Implications

The distinction between rights-displacements and justifications has important structural implications for debates about whether the following constraints limit the force that may legitimately be used in justified defence:

a. *Proportionality*: D's defensive force must not be disproportionately greater than the force threatened;
b. *Retreat*: D must, if possible, retreat rather than use force in defence; and
c. *Parsimoniousness*: D must use only as little defensive force as would be effective.

To see how the distinction between justifications and rights-displacements matters to these debates, consider the source of the restrictions on the permissible use of defensive force. One prominent set of arguments traces these restrictions directly and solely to the interests of the subjects of the criminal law. For instance, on Simester's view,[26] the easy case is when D can claim only an excuse for violating V's right, ie, when D's use of force was not permissible, but D was excused from liability. Here, V's violated right is not defeated, and it continues to influence and limit the force that D can be excused for using. But when D's use of force is justified, this argument is unavailable to Simester, since he subscribes to what I call the 'wrongness hypothesis'[27]: the view that D can only be justified in her action if the reasons against D's action (including those flowing from V's right) are defeated or at least matched by the reasons in favour of it.[28] When this happens, V does not, all things considered, suffer a violation of her right—her right is defeated. It cannot, therefore, limit the force that D may use. So, instead, Simester argues that in these cases, although V's right itself is defeated, 'the rationale behind [it]… continue[s] to speak'.[29] Discussing a case in which D kills V in self-defence, Simester explains that the rationale behind V's (defeated) right to life continues to supply a first-order reason not to kill V, and must be balanced against any of D's unexcluded reasons, such as those flowing from D's own right not to be killed. This, Simester says, gives us the proportionality requirement. Additionally, the fact that D's first-order reasons not to kill V can only be balanced against unexcluded reasons for killing V explains the requirement that D be motivated by a justifying reason in order to claim a justification: D can only kill V in order to protect D's own right not to be killed, since that is the only unexcluded reason for killing V in play.[30] Simester adds that in self-defence cases, since D is defending herself against V's culpable aggression, '[w]e

[26] Simester (2021: 435–437, 457).
[27] Dsouza (2017: 3–6).
[28] Simester (2021: 404–405).
[29] Simester (2021: 435).
[30] Gur-Arye too largely agrees with this general picture of how restrictions on the use of defensive force arise, though she prefers to speak in terms of the 'values' protected by a criminal offence. Gur-Arye (2021: 169–171).

acknowledge [the wrong committed by V who was the initial aggressor] by refusing to apply a "least harmful means available" requirement to [self-defence].'[31] By contrast, in necessity cases, D is not defending herself against V's culpable aggression, and so a 'least harmful means available' requirement is applied. D must retreat from the threat if possible, and must use only the least amount of force that would be effective.[32]

I have reservations about aspects of Simester's argument,[33] but perhaps with some tweaks, a version of it can be made to work. However, on any such version, the restrictions on D's legitimate use of defensive force stem not from the specific right affected (ie, V's own right against suffering some 'X' at the hands of D) but from the generic rationale behind that type if right (ie, the generic reason that people—not V specifically—have a right not to suffer X at the hands of other people—not D specifically). We must therefore identify when that generic rationale behind the right against suffering X is engaged. But it would not do to assert something broad like, 'It is engaged whenever a person is made to suffer X'. That stipulation could not exclude cases in which the law decided ex ante not to criminalise a particular set of instances of suffering X. For instance, while the criminal law protects the right to property, it does not criminalise the compulsory acquisition of private property by the state exercising its power of eminent domain. Similarly, while the criminal law protects the right to personal liberty, it does not criminalise lawful arrests by a constable, or lawful incarcerations by a jailor. So, we need a tighter formulation of when the rationale behind a right is engaged—one that can exclude instances of suffering X at the hands of others that the law has decided ex ante not to criminalise.

[31] Simester (2021: 457).

[32] Simester (2021: 457).

[33] Why, for instance, must we be indifferent to the ranking of the various effective options available to D when identifying what D's unexcluded reasons permit? Imagine that D can defend herself against V's aggression in two equally effective ways, neither of which uses force disproportionately greater than that threatened by V. Option 1 uses minimal force, whereas option 2 uses much more force. Why think that the unexcluded reason for harming V—ie to defend against V's aggression—is broad enough to permit both options? If D were asked, 'Why did you choose option 2 rather than option 1?', surely her answer cannot refer to an excluded reason for harming V. Furthermore, even if we accept that V's culpability grounds a difference in the rules applicable to self-defence and necessity cases, why must it do so *in the particular way* that Simester identifies? Simester's suggestion seems to be that the law tacitly allows D to inflict some limited punishment on V for V's culpable aggression, by giving D a freer hand in these cases. But punishing V is simply not D's job; it is the state's job, and there's no particular reason for the state to delegate that job to D. Moreover, Simester's suggestion takes no account of the possibility of V having differing degrees of culpability. V may be more or less culpable in posing the initial threat depending on her mens rea and reasons for acting, but under Simester's model, the effects of V's culpability are always exactly the same. In short, Simester offers no compelling reason why V's non-culpability in necessity cases should be reflected in the precise way he suggests. Other alternatives are available. My preference is to insist on a larger mismatch in necessity cases between the (greater) harm averted and the (smaller) harm caused, than is required in self-defence cases. See Dsouza (2017: 126, 132–134).

And of course, that is precisely what Gur-Arye's distinction between justifications and powers (or more broadly, rights-displacements) offers. As Gur-Arye recognises,[34] when acting within the scope of a power (or a rights-displacement), D does not commit a pro tanto offence, and so need not offer a criminal court a justification. So, we could say that even when D prima facie violates one of V's rights, if her conduct falls within the realm of displacement of that right, it is not of interest to the criminal law. Conversely, *other* prima facie violations of V's right do (or may—perhaps further pruning of the remainder is appropriate, but that is not my focus here) engage the rationale behind the right, and so, they are of interest to the criminal law.

What follows? Well, when D's use of force against V engages the rationale behind the right not to suffer X at the hands of others, it is subject to such restrictions as a suitably modified version of Simester's argument about the constraints on legitimate defensive force can support. But when D's conduct falls within the realm of displacement of V's right to X, those restrictions do not apply. That is why, when a constable makes a lawful arrest, she is not required to retreat (to whatever extent retreat is required before claiming a justification), or to consider the proportionality of curtailing an arrestee's liberty to the threat (if any) posed by the arrestee remaining at liberty. Along similar lines, when an official compulsorily acquires private land on behalf of the state, that exercise of the power does not become criminal if one can show that the property was worth disproportionately more than the value derived from its contribution to the project for which the state was acquiring it. True, in both cases, we can identify restrictions on the constable's or state official's conduct, which resemble the restrictions applicable to the defensive plea: the constable must not use disproportionate force in effecting an arrest; the state official may only acquire the property for a legitimate purpose. But there is no reason to suppose that these restrictions flow from the same source, or that they must always take the same form. What counts as a legitimate purpose for triggering a displacement of the right to property when the state compulsorily acquires property may be quite different from what counts as a good reason for violating another's right to property, even though both cases involve a prima facie violation of someone's right to property. Similarly, what counts as disproportionate force in making a private arrest may be quite different from what counts as disproportionate force when a constable, having displaced the rights to personal liberty and against assault, makes an arrest, even though in both cases someone's right against being assaulted is prima facie violated. In rights-displacement cases, the legitimacy of D's conduct depends on the extent of the displacement,[35] which, in turn, depends on the interplay between the general arguments for having the right, and the political, practical, economic, and social arguments for allowing the right to be displaced. When parliament grants constables the power to arrest people, and state officials the power to acquire private property for the state, respectively, it will have good reasons to limit the powers it

[34] Gur-Arye (2011: 304).

[35] Gur-Arye (2011: 298).

grants, and the limitations it sets in place will sometimes look very similar to the conditions imposed on pleas of justification. But they will not necessarily be the *same*. We would hope to be able to discover the preconditions for a successful plea of justification through a principled theoretical analysis of the structure of defences. But the conditions imposed for displacing a right, and the extent of its displacement, may well depend on different, broader, concerns about public order, political expediency, and so on.

The same conclusions also follow if we adopt a different approach to explaining the source of the restrictions on the legitimate use of defensive force. Elsewhere, I defend an account of these restrictions that takes as its starting point the state's political claim of a monopoly over the legitimate use of force in its territory.[36] This monopoly extends to all presumptively criminal uses of force—ie, uses of force that result in criminal liability unless a supervening excuse or justification is offered. Private access to the state's force is permitted only exceptionally. Even where it is permitted in principle, the private agent 'stands in'[37] for, and derives her authority to use force from, the state. She can therefore, at most, use only as much force as the state itself is entitled to use, and must deploy it only as the state would. We can therefore identify two sets of conditions for a private use of force to be legitimate: first, the 'Requirement' conditions—a private individual must satisfy any conditions for in-principle access to the state's force, and second, the 'Derivative Force' conditions—she must satisfy any conditions that limit even the state's own deployment of that force. The Requirement conditions include that the materialisation of the threat be unavoidable without the deployment of defensive force, and that there be no non-forceful alternative (such as recourse to the police, or safe retreat) to the private use of force. The Derivative Force conditions, instead, ensure that excessive force is not deployed, by requiring that the defensive force not be disproportionately greater than the threat being averted, and that only the least harmful effective means available be deployed.

But notice that on this view too, when D's conduct falls within the realm of displacement of V's right, D does not claim to have acted within the scope of an exception to the state's monopoly of legitimate force. That may be either because D is, in fact, the very agent through whom the state exercises the force it monopolises, or because the state never claimed a monopoly over the sort of force that D is exercising. I am not certain that a bright line can (or indeed must) be drawn between the cases that fall into these two categories, but some rights-displacement cases are more naturally described as one type of case rather than the other. For instance, constables making lawful arrests, and jailors locking up convicts sentenced to jail, seem not to be seeking exceptional access to the state's force because they are precisely the agents through which the state paradigmatically deploys the (monopolised) force in question. The same explanation seems inapposite to cases of consent. Consider, for instance, surgeons performing consensual surgery. Surgeons are not state

[36] Dsouza (2015); Dsouza (2017: 138–165).

[37] See for instance, Thorburn (2008: 1126–1128); Nourse (2003: 1713, 1725); Lee (2009: 142–144); Ferzan (2008: 476–478); Fletcher (1978: 867). See also *R v Jones* [2007] 1 AC 136 at 174–176.

officials through whom the state paradigmatically employs the sort of force involved in performing surgeries; there are no such officials. The state simply does not claim a monopoly over this sort of force. In this case, this is because the state is simply not well placed to deploy it. Instead, it lets this force be deployed by highly trained specialists, even as it regulates (or provides for the regulation by professional bodies of) the profession to which these specialists belong. The common thread is that these are all rights-displacement cases in which the agent does not claim that she is exceptionally privately using force that the state monopolises. It follows, then, that neither the Requirement nor the Derivative Force conditions restrict D's conduct. As before, we can probably identify some superficially similar restrictions that apply to specific instances of a person acting within the realm of a rights-displacement, but the source of these restrictions has nothing to do with the principled basis for restricting justified force.

In sum, on either approach to theorising the restrictions applicable to the legitimate use of defensive force, Gur-Arye's distinction between justifications and powers, expanded and recast as a distinction between justifications and rights-displacements, is of critical importance. Making it helps us avoid drawing conclusions about the contours of justification by making analogies with rights-displacement cases, and vice versa. Failing to do so might permit superficial similarities in the restrictions applicable to justifications and rights-displacements to seduce us into thinking that the restrictions applicable to one also apply to the other.[38]

The distinction between justifications and rights-displacements also helps explain some other differences we see in the features of these sorts of pleas. For instance, while a plea of justified self-defence will only be successful if D takes defensive action when the materialisation of the threat is imminent—however that threshold is fleshed out[39]—usually, there is no need to wait for some harm to be imminent before acting within the realm of displacement of a right. The moment at which a rights-displacement becomes applicable depends on what the rule permitting that displacement says, and not on the rules governing the use of justified private force. Accordingly, consider the British government's policy of early intervention to prevent terrorist attacks by using drone strikes on suspected terrorists abroad.[40] Without endorsing this policy, one can recognise that nothing internal to a theory of defences in domestic criminal law prevents the state from assuming or granting itself powers that allow for early interventions of this sort. But as Gur-Arye notes, at least in some states, constitutional principles may supply an argument against such a policy.[41]

[38] My thanks to Alexander Sarch for a helpful discussion on this issue.

[39] For an argument in support of fleshing this out as unavoidability (unless defensive force is deployed), see Dsouza (2015: 16–19).

[40] Child et al. (2022: 893–894).

[41] Gur-Arye (2011: 306–308).

6 The Pay-Offs from Avoiding Conflation

When we are careful not to conflate justifications and rights-displacements, the flaws in arguments for propositions about the structure of justifications and excuses that are based on analogies between cases falling into different categories become clear. For instance:

a. *Conflicts of Justification* In a well-organised system, different people are not authorised by rights-displacements to perform mutually inconsistent actions, or if they are, there is a clear hierarchy dictating which authorisation will prevail. Others, including the person suffering the prima facie violation of her rights, are not permitted to interfere with the (overall) authorised conduct (although if the rights-displacement is by virtue of the grant of consent, the consenter may be permitted to revoke consent). This explains why, for instance, V is not permitted to resist a constable lawfully arresting her, even if V knows that she 'didn't do it'—whatever 'it' may be. So, think back to Bank Robber, and let's tweak the facts slightly. Imagine now, that V has an identical twin, V2, who has a history of criminal behaviour, and V realises that D has mistaken her for V2. Suppose also that she explains this to D, who (understandably) finds V's explanation far-fetched, and remains resolved to arrest V. If D is a constable, then it is intuitive to think that V is not entitled to resist the arrest, even though V realises that D is making a mistake.

   If we conflate such rights-displacement cases with cases of justification, we may be tempted to think that justifications too have this feature. But that is not necessarily true. On some theories of justification,[42] there may well be conflicts of justifications when, for instance, agents have different epistemic access to situational facts, or simply notice different things. Such conflicts may also arise when different agents act on the same facts, and those facts permit them to do things in justified self-defence against each other, even though both cannot succeed. If, in the above development of Bank Robber, instead of being a constable, D was a private person, we might well think that V could resist D's attempts to make a private arrest. After all, V cannot be expected to submit to arrest by every public-spirited person who mistakes her for V2—she does, after all, have her own life to lead. And we may think so even if we thought that D was justified in attempting the private arrest.

   The distinction between justifications and rights-displacements helps explain these differing intuitions. It tells us that those who reject theories of defences that allow for conflicting justifications cannot defend their position by reference to

[42] One example is the model of justification and excuse that I defend in Dsouza (2017: 76–78, 165–167). I argue that justifications are personal and subjective. A person's entitlement to a justification should turn on whether she responded appropriately to the criminal law's guidance as applicable to the circumstances as she perceived them to be. Since the criminal law's guidance guides conduct, rather than outcomes, different agents may receive personalised conduct-guidance that can conflict, insofar as both agents cannot succeed.

coherence-based arguments which look to rights-displacement cases for support. My own view, which I defend at length elsewhere,[43] is that conflicts of justifications are indeed possible. For that reason, I argue that there is no duty to submit to an action just because it is performed with justification. There may be some cases in which no proportionate response to such an action is available, and so there is no justified means of resisting it. In those cases, V's only lawful course of action is to submit to D's actions. But, of course, that could also happen when D acts without justification.

b. *Third Party Interference* A third party (T) is never permitted to interfere with actions that are authorised by a rights-displacement (or at least the rights-displacement that is at the top of the hierarchy of conflicting rights-displacements). So, T cannot prevent the lawful arrest of V by constable D, even if T knows that V 'didn't do it'. The same is true for lawful executions and lawful incarcerations. But that gives us no reason to think that the same applies to justifications. So, unless we have independent reasons to think that is the case, we should be open to the possibility that T is *sometimes* permitted to interfere with actions that D performs with justification; perhaps if T knows (or believes in) facts that make D's actions unnecessary, or their consequences too harsh.

c. *Retreat* D is unlikely to *have* to retreat when doing something that falls within the realm of displacement of a right. Nor is she likely to *have* to 'submit' to not acting within the realm of displacement of the right. This is not to deny that sometimes these may be the more appropriate or discerning courses of action. But even then, they are not obligatory. Conflating justifications and rights-displacements may lead us wrongly to think that the same is true for justifications. But actually, such arguments provide no support for that proposition. My own view is that D ought only to be able to plead a justification if she was unaware of any effective non-forceful means of nullifying the threat (including retreating from it).[44] This also used to be the position at the common law.[45] It is no longer the law in England & Wales; now, retreat is not obligatory before private force can be justified. Instead the possibility that D could have retreated is treated as a factor contributing to an

[43] Dsouza (2017).

[44] Dsouza (2017: 138–165); Dsouza (2015).

[45] Turner (1962: 135–138). In fact, Turner notes that the common law (at that time) also distinguished between cases of justification and cases in which an agent acted with the authority of the law (ie, within the realm of displacement of a right). For instance, while retreat (if safely possible) was a prerequisite for a defence in self-defence cases, the law did not require retreat in the 'execution of public justice' by a hangman carrying out the sentence of a competent court. A hangman doing their job would commit no crime, not because they had a justification, but rather, because they were *dutybound* to act within the realm of displacement of the convict's right to life, and carry out the sentence. See also Child et al. (2022: 892).

assessment of whether the force that D used was reasonable.[46] Although I doubt it, perhaps the current position of law is the principled position to adopt. But we should reject arguments that defend that proposition by drawing inapposite analogies between justifications and rights-displacements.

At the same time, we should not overstate how much the distinction between justifications and rights-displacements can tell us. For instance, although Gur-Arye,[47] Simester,[48] and others besides[49] have argued that while D is not required to compensate V for any harm caused to V by D's exercise of a power (or more broadly, D's acting within the realm of displacement of V's right), she is, or may be, required to compensate V when V is harmed by D's justified actions. Although this argument is marshalled with especial force in lesser-evils necessity cases, in which it is clear that V is not to blame, it can also be applied in self-defence cases, provided that we subscribe to a theory of justifications that also treats putative self-defence as justificatory self-defence. But in either type of case, we have reason to doubt this claim. In some powers/rights-displacement cases, compensation is required: for instance, the state usually must compensate those whose property it acquires in the exercise of its power of eminent domain.[50] Moreover, there is no especially good reason to think that *the criminal law* can or should insist on compensation as a prerequisite for granting a justificatory defence to a criminal charge. Why, after all, should impecunious persons who find themselves needing to act out of necessity, or in (unbeknownst to them, mistaken) self-defence, be put to a more onerous condition for so acting than a rich agent? It may well be that compensation is an appropriate tort law remedy, but nothing in the distinction between justifications and rights-displacements suggests that the willingness to make compensation must necessarily be a prerequisite for the grant of a criminal law defence. It isn't as if the only way to recognise that V has suffered an undeserved violation of her rights in such cases is by awarding compensation—that recognition can just as easily—and in my view,[51] should—manifest in permitting V to resist even justified actions that would wrong her (as would be the situation in necessity or mistaken self-defence cases). Thus, the criminal law need not guarantee V compensation if she fails in her efforts to resist justified action, but it can assure her that she will not be prosecuted for attempting to mount such a resistance.

[46] CJIA, s. 76(6A). See also Simester (2021: 455–457).

[47] Gur-Arye (2011: 303–304).

[48] Simester (2021: 459).

[49] For instance, Brudner (1987: 361); Ferzan (2004: 249–250).

[50] Gur-Arye (2011: 304) recognises this, but insists that state acquisition of property is actually a criminal law justification disguised as a power. This insistence is unconvincing—the acquirer is not required to offer a defence of her actions in a criminal court.

[51] Dsouza (2017: 137–138).

7 Conclusion

It is fairly well established that not all pleas that preclude criminal liability for seemingly criminal conduct work in the same way. Pleas that deny the court's jurisdiction, or the defendant's responsible moral agency, or the occurrence of the elements of the pro tanto offence are clearly quite different from pleas that admit (or at least do not deny) these matters, but supervene between the establishment of all the elements of a pro tanto offence and a resulting conviction. This latter set of supervening defences can (and should) be theorised separately from other defences. Most attempts to do so explain supervening defences as being rationale-based, insofar as a defendant pleading them relies for exculpation on her rationale for having chosen to do what appears to be a criminal deed.

Gur-Arye's powerful insight was that some seemingly rationale-based explanations for precluding criminal liability are not, in fact, pleas of supervening defences at all—some such explanations show that the agent exercised a Hohfeldian power to do as she did, and therefore, that she did not commit even a pro tanto offence. I have argued here that it is not just exercises of Hohfeldian powers that can show that seemingly criminal conduct does not, in truth, amount to even a pro tanto offence; the same may also be true of Hohfeldian liberties, duties, and immunities. The real distinction we should make is between justifications and the broader set of rights-displacements. This somewhat broader distinction has important structural and practical implications for debates about what constraints apply to force used in justified defence, and how they should be applied. Moreover, making this distinction allows us to identify errors in some arguments that are made to support claims about various features of justifications. How significant these errors are is not always clear, but being careful not to conflate justifications with rights-displacements will certainly help us improve the quality of our arguments about criminal law defences.

Acknowledgements I am grateful to the participants at the Criminal Theory Conference in honour of Miri Gur-Arye, HUJI, May 2022, including Miri Gur-Arye, Re'em Segev, Alon Harel, Schacher Eldar, Mordechai Kremnitzer, Thomas Weigand, Antony Duff, Sandra Marshall, Michelle Madden Dempsey, Leora Dahan-Katz, Itzhak Kugler; and to the participants at a meeting of the Oxford JDG, including Andreas Vassiliou, Javier Saade, and Marie Newhouse. My thanks also to Alex Sarch and Hamish Marshall who generously offered comments on early drafts.

Declarations

Conflict of interest No competing interests.

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