

If “Everyone Does It,” Then You Can Too

Charlie Melman

Abstract: I argue that the “But Everyone Does That” (BEDT) defense can have significant exculpatory force in a legal sense, but not a moral sense. I consider whether legal realism is a better theory of the law than the more orthodox view of respecting the law as it is written. I next examine what the purpose of the law is, especially attending to how widespread disobedience is treated. Finally, I attempt to fit BEDT within Paul Robinson’s framework for categorizing defenses. I conclude that, first, BEDT can have significant exculpatory force; second, a BEDT plea does not comport with either Robinson’s definition of an excuse or other commonly held conceptions and so needs its own classification; and finally, BEDT does not exonerate the offender in a moral sense—only in a legal context.

Two competing views about the nature of the law underlie the debate about whether the BEDT plea has any exculpatory significance at all. On the orthodox view, the law is what is written in the official statutes of a particular society or community. If one wants to know how fast one can go on a particular road, whether one is allowed to steal from one’s neighbor, or what the legal drinking age is, one need only consult one’s corpus of laws. Violating any of these rules constitutes a breach of the law, for which one is culpable and liable to be punished by the criminal justice system. Even if a person *P* joins most members of her community in breaking the written law, she is just as liable to be punished and is just as blameworthy as she would be were she the only person who transgressed. This would remain true even if those in charge of enforcing the law in question broke that law as well.

A legal realist conception of the law is entirely different. On this view, the written law is meaningless *vis-à-vis* determining what the law actually is. Instead, *P* should consult judges’ decisions and the actions of law enforcement officials to figure out what she *actually* can and cannot do. If the statute “on the books” sets the speed limit on a particular road at thirty-five miles per hour, but people are only forced to pay speeding tickets when they exceed forty-five miles per hour, then the speed limit is really forty-five miles per hour. The



written law thus has no intrinsic meaning; it is merely ink on paper. What matters is what people are actually allowed to do, not what an official text says they are allowed to do.

Which of these views is correct depends largely upon what the purpose of law is. If it is true that law is meant to set absolute and objective standards for permitted and prohibited actions, then these standards cannot lose their force over time. If the people who make law are accepted as infallible, then the orthodox view is probably correct. But this is not, in fact, how people and the legal system actually operate. Law fundamentally exists to ensure and promote standards of conduct that society wants. A community could formalize its desire to prohibit driving at any speed over ten miles per hour by establishing it as a law and using this statute as a tool to prosecute people who drive faster than this speed. If the community later decided that it wanted to keep people from going faster than thirty miles per hour, it could either change the written law or simply stop prosecuting people who did not obey this threshold. Writing an amendment to the law and prosecuting people in accordance with this amendment would be much more effective, since it would both clearly inform community members what is expected of them, and apply punishment in a manner consistent with these expectations. But both the realist and orthodox methods of changing the law intend to enforce the community's will through legal means, and both, properly enforced, have the same effect.

Thus, the fact that a law is written in a certain way does not preclude people from rejecting it through disobedience. A law cannot have any force if it bans conduct for which the actor is not deemed worthy of blame by a significant portion of the community. Jaywalking, to use a common example, is illegal in New York City. But any native New Yorker knows that it is perfectly acceptable to jaywalk in the city, and it is even common for pedestrians to do so directly in front of police officers without being punished. If person *P* gets prosecuted for jaywalking in New York City, she would likely feel aggrieved and claim that she was wronged because "everyone does that." This is a perfectly valid plea. While *P* did *technically* break the law, she did not *effectively* break the law. In other words, she acted wrongly according to the criminal statute "on the books," but not according to the majority of people in her community. What intrinsic or instrumental value is there, then, in prosecuting *P*? If the other members of her community have plainly demonstrated that they do not want to prohibit the sort of conduct for which she is being prosecuted, then her prosecution is

instrumentally unjustifiable. The law, as written, has ceased to serve its purpose. Since its purpose is to reflect and promote the standards of conduct that the community wants, it only has instrumental value.¹ *P* will rightly feel that she is being discriminated against, for her conduct alone does not provide a good enough reason for the state to prosecute her. In the context in which she acted, she is not blameworthy.²

One may wonder exactly when *P* ceases to be liable for prosecution. What proportion of the population needs to disobey the written law for the BEDT plea to have significant exculpatory force? Douglas Husak notes that when *P* asserts BEDT, *P* does not claim that literally *everyone* in her community would do what she did if put in the same circumstances.³ Rather, she asserts that the “average” person *and* most people would do the same thing in the same situation.⁴ While this is the strongest and most easily defended formulation of BEDT, it is not the only one that works. It is difficult to draw a bright line that defines what proportion of people have to consider a written law invalid for the BEDT plea to have exculpatory significance. But there does not seem to be anything inherently special about the fifty percent threshold. Surely no one would consider a law very effective or forceful if, say, forty-five percent of community members routinely violated it and did not believe themselves worthy of punishment. It is thus better to say that the exculpatory force of the BEDT plea admits of degrees. If, for example, *P* violated a written law that was commonly disobeyed by twenty percent of people in her community, a judge should still convict her if BEDT was her only defense but consider it as a mitigating factor in determining her quantum of punishment. Fifty percent is a useful threshold for determining whether BEDT should totally exculpate because past this point we can say that most people would do the thing in question. However, it seems difficult to justify punishing *P* for an action that is technically illegal but slightly less than half the people in her community commit anyway. It is

¹ The only law that can have intrinsic value is a “moral law,” or a law given by God, if either of these exists. Thus, the sort of law with which we are concerned here can only *reflect* these intrinsically valuable laws. Even if they did, they would only be instrumentally valuable insofar as they enforced these moral laws.

² As Husak notes, the force of the BEDT plea depends significantly on the community in which the action in question was done. If *P* jaywalked in a community that made jaywalking illegal through written law *and* adhered to this law, *P* would be blameworthy and liable for prosecution. Douglas Husak, “The ‘But-Everyone-Does-That!’ Defense,” *Public Affairs Quarterly* 10, no. 4 (October 1996): 309.

³ *Ibid.*

⁴ *Ibid.*



impossible to avoid disputes about the importance of various levels of disobedience, and when there is enough of it for the BEDT plea to work by itself, but that does not mean that we should dismiss the importance of BEDT altogether. A “most or nothing” approach seems too analytically facile.

When might someone reasonably be able to claim BEDT? Husak mentions several instances in which people are punished for behaving, or not behaving, as others would have if put in the same situation: negligence (how do we determine what constitutes a significant “deviation from a standard of care that a reasonable person would observe?”) and duress (“but everyone would have aided the robber’s escape if a gun was put to their head!”) are two particularly persuasive examples.⁵ However, we should also consider laws that draw clear distinctions between what is legal and what is illegal. Salient examples include speeding, underage drinking, jaywalking, drunk driving, and trespassing. It is very easy to determine if a person is guilty of one of these crimes by consulting the written law. The legal drinking age is twenty-one, the speed limit is thirty-five miles per hour, the boundaries of the crosswalk are painted on the street, one cannot have a blood alcohol content of over 0.08, etc. These cases are particularly useful for illustrating how one can violate the written law and still be excused. Husak does not consider these offenses as a category, but they seem to elicit the BEDT plea most often in the real world. BEDT tends to be more applicable when it is relatively easy to determine whether a crime has been committed than in cases where the exact conditions of an individual incident are more difficult to specify. Determining whether the “average” community member would also have violated the written law in the same situation is necessary for evaluating BEDT’s exculpatory significance, and this is possible only when we know what the accused is supposed to have done.

If BEDT is a valid defense, what type of defense is it? Among others, Paul Robinson enumerates justification and excuse defenses.⁶ BEDT can only be a Justification if the written law is flawed, such that *P*’s following the law in the given circumstance does not prevent a greater harm than would be realized by not following the law. This is usually not the case in many of the situations in which BEDT is applied. The world is not *better* for *P* having jaywalked or exceeded the speed limit; in fact, it is usually better, *ceteris paribus*, for people to drive slower and walk within the crosswalk at designated

⁵ *Ibid.*, 311.

⁶ Robinson, “Criminal Law Defenses,” *Columbia Law Review* 82 (1982): 221.

times. In short, these two laws generally serve a clear purpose. But the value of the law in question does not matter *vis-à-vis* *P*'s guilt or innocence based on the BEDT plea. What matters is whether *P*'s act comported with her community's accepted standard of action in her particular circumstance. Thus, in pleading BEDT, *P* makes no claim about the instrumental benefit of her action.

If BEDT is an excuse, then *P* acknowledges that her action was wrong and, in making the BEDT plea, asserts that she has a condition that absolves her of responsibility for her action. While BEDT seems to fit this definition more closely than it fits the definition of a justification, it does not work if we assume that *P* acts with full agency and knowledge of the law. I propose a special exception to Robinson's definition of an excuse for the BEDT plea. If *P* pleads BEDT, she asserts not that there is a quality about *her* that makes her not responsible for her action, but that there is a feature of the *community* in which she acted that absolves her of legal culpability for her action. That quality is the disobedience of a substantial portion of her fellow community members in the same circumstances, viz., the fact that “everyone does that.” Assuming that *P*'s claim is true, she can justifiably claim that she would be discriminated against if convicted and the law, as written, has no force.

The BEDT plea will not satisfy moral philosophers who rightly worry about groupthink determining what is permissible and impermissible in a society. It could, in theory, enable a majority to discriminate against a minority. For example, many, if not most Hutus, would have killed their Tutsi neighbors during the Rwandan genocide regardless of Rwanda's laws regarding murder or hate crimes. The BEDT plea says nothing about what we ought to do; rather, it endorses a particular method of determining whether disobeying the written law makes one liable to criminal prosecution, and if so, what quantum of punishment one deserves. Thus, it is entirely possible for a community to let flagrantly immoral actions go unpunished. That does not, however, reduce the BEDT plea's exculpatory significance in a legal context. Judges should take it seriously, and consider it as a mitigating factor during sentencing if it does not have enough force to fully exonerate the alleged wrongdoer.⁷

⁷ I owe thanks to Professor Douglas Husak for helping me hone my understanding of many of the ideas discussed in this paper.

