

Causing the Conditions of One's Defense: A Theoretical Non-Problem

My contribution to this symposium is short and negative: There are no theoretical problems that attach to one's causing the conditions that permit him to claim a defense to some otherwise criminal act. If one assesses the culpability of an actor at each of the various times he acts in a course of conduct, then it is obvious that he can be nonculpable at T_2 but culpable at T_1 , and that a non culpable act at T_2 has no bearing on whether an actor was culpable at T_1 when he caused the circumstances that are exculpatory with respect to his act (or conduct) at T_2 . Moreover, as I interpret the Model Penal Code, it gets matters close to right on this point.

Let me illustrate my point with a few stock examples. Suppose Alice, who despises Ben, wants to flood Ben's farm. In pursuance of that aim, using a remote control device, she sets off dynamite that breaches a dam upriver from both Ben's farm and Town. Alice does so from a position next to a valve that can divert the river onto Ben's farm. If Alice does not divert the river, the head of water released by the dam's breach will flood Town and cause loss of life, injury, and major property damage. So it is clearly a choice of the lesser evil for Alice to divert the river and flood Ben's farm. Alice does so, and she is later charged with malicious destruction of property. She pleads "lesser evil" in her defense. What result?

First, after the dam was breached, Alice surely did the right thing in diverting the river. That choice was the choice of the lesser evil. She surely should have been legally permitted to divert the river onto Ben's farm. Indeed, having caused Town's peril, she arguably had an

affirmative duty to rescue Town if she could do so without causing a greater harm.¹ So in every respect, Alice's diverting the river was the right thing for her to do.

That does not mean, however, that she should be acquitted. For her act at T₁—setting off the dynamite so that she could flood Ben's farm—was a culpable act of purposely creating a threat to Ben's farm. Alice's diverting the river at T₂ was merely a nonculpable act that was a consequence—not only foreseen, but in this case intended—of the earlier culpable act. Her diverting the river was justifiable, but that does not negate her culpability for breaching the dam; for had she not diverted the river, she arguably would have committed an even more culpable omission.

Let us now turn to Mr. Decina, who has an epileptic fit while driving, loses consciousness, with the result that his car crashes. Is Decina culpable for what happens when he loses consciousness? Well, at that time, he has ceased to be a responsible agent in control of his car. His bodily movements or lack thereof are not voluntary acts or omissions. Rather, he is an involuntary passenger in an out-of-control car. He surely cannot be responsible for what happens once he has ceased to be a responsible agent. No consciousness, no culpability for what happens.

But if we focus, not on T₂, the time Decina has his epileptic fit, but at T₁, when Decina begins to drive, things might look different. Suppose Decina knows that if he drives without taking his seizure medication, he creates a substantial risk that he will have a seizure while driving and cause others' injuries or deaths. And suppose he does drive, knowing this risk and

¹ Because having caused someone's peril is one of the grounds for imposing a duty to rescue backed by criminal sanctions, Alice, had she not diverted the river onto Ben's farm, would have been guilty of knowingly causing loss of life, property damage, etc. A duty to rescue does not exist where the rescue would require commission of a crime that was a greater evil than the evil avoided by the rescue. One's affirmative duty, say, to rescue one's child from an oncoming trolley does not allow one to divert the trolley to a track on which five workers are trapped. But in Alice's case, flooding Ben's farm is a lesser, not greater, evil than letting the town be flooded.

knowing that he has not taken his medication. At that time, prior to his seizure, he has committed a culpable act, whether or not he in fact has a seizure and causes harm. He is not culpable for his behavior during the seizure no matter how much harm his car causes, but he is culpable for his behavior beforehand.

Indeed, if Decina knows that he has seizures at 10, 2, and 4 o'clock, and he concocts a plan to kill Dana by having her ride with him at 2 o'clock when he has not taken his medication, and his car has a driver's side airbag but not a passenger's side airbag, then his driving with Dana at 2 o'clock is an attempted homicide. And if Decina, as predicted, loses consciousness at 2 o'clock, and his car crashes, killing Dana, Decina is a murderer, despite being unconscious when Dana is killed.

Decina is no different, in terms of criminal liability, from Molly, who wants to kill Sally, her cabin mate aboard a ship. Molly can't bring herself to plunge a knife into Sally, so she concocts the following plan: Molly will stand on the opposite side of the cabin from Sally with a knife pointed outward. She knows that the ship is encountering huge swells, and that the ship will pitch violently and throw her off balance and across the cabin, right at Sally. This happens, and Molly and her knife are thrown into Sally, killing Sally. Molly is not an agent but merely an object when the pitching of the ship hurtles her towards Sally. She is thus not responsible for what happens when that happens. But she is clearly an intentional killer and culpable as such. Like Decina, she, as a responsible agent, merely used her later non-agent self as the means for killing Sally.

The same analysis applies to the defense of duress. Suppose Frank knows that the Mob wants to kill Frida. They know where Frida's house is, but Frida knows them and can

successfully prevent them from getting into her house. Frank also wants to kill Frida, and Frida trusts Frank and will let him into her house. But Frank, while he wants to kill Frida, fears being convicted of her killing. So Frank goes to the headquarters of the Mob, hoping they will threaten him with death unless he goes to Frida's house and kills her. They in fact so threaten him, and he does what they have coerced him to do. When charged with Frida's murder, he pleads duress.

Frank should get the excuse of duress if we focus solely on T_2 , the time at which he kills Frida. If we focus on T_1 , however, we can see that Frank is guilty of purposeful homicide. He has incorporated an episode of duress, an episode in which his actions are excusable, into a broader homicidal plot. At T_1 Frank purposefully launches a plan to kill Frida. He is no different from the homicidal Decina or Molly.

Finally, the same analysis can be applied to self-defense. If Jack Palance in *Shane* provokes the farmer into drawing his gun by taunting him, or Charles Bronson provokes the muggers in Central Park into attacking him by pretending to be a vulnerable target, then neither loses his privilege of self-defense if the deadly attacks they provoke are culpable reactions to the provocations—even if they were hoping to provoke those culpable responses.² On the other hand, if Palance provokes the farmer into drawing by a feint that makes it appear he is drawing his gun, or if Bronson does something to make the muggers fear *they* are in mortal danger, and Palance and Bronson do so for the purpose of killing the farmer and muggers (or are reckless in

² Notice that the actions of Bronson and Palance are in certain respects analogous to the actions of those engaged in police and private “sting” operations. Undercover officers, for example, pose as Johns to catch prostitutes, prostitutes to catch Johns, drug buyers to catch drug sellers, Arab shieks to catch corrupt judges, etc., etc. They commit the “crimes” of soliciting prostitution, the sale of drugs, or bribery for the law enforcement justification of catching and convicting criminals. Bronson and Palance commit the actus reus of homicide in self-defense after having provoked the attacks on them. The undercover officers commit the actus reus of solicitation with a law enforcement justification. They are all purposely trying to incite criminal responses in order to kill (in self-defense) or to arrest.

doing so), then they have committed purposeful (or reckless) homicides. They culpably created a danger to innocent persons that they could only avert by failing to defend themselves at T_2 .

The same thing can be said of Dolores Claiborne, the eponymous heroine of the movie that bears her name. At T_1 she plies her abusive husband with drink, says things to him that she believes will almost certainly lead him to attack her physically, and begins running from him in the direction of her booby trap. At T_2 she runs past the booby trap with her husband in hot pursuit, resulting in his death. Given the culpable threat he posed, her act at T_2 was justified. Or if Iago's plot in *Othello* was to have Othello murderously attack *him* (Iago) rather than Desdemona, and at T_2 that is what happens, Iago would be justified in using deadly force to defend himself.

Similarly, suppose Bertha sends Ben a letter telling him she intends to kill him the first time she sees him. Later, they encounter each other, and Ben, believing himself to be in mortal danger, draws a gun he is carrying to protect himself—just as Bertha hoped he would. Bertha is much faster on the draw than Ben, and she kills Ben before he can get off a shot. Her action at the time of the encounter, T_2 , is one of self-defense. Because Ben is an innocent aggressor, having been duped by Bertha, Bertha's self-defensive action could only be excused, not justified, or so Ferzan and I concluded in *Crime and Culpability*. Even if Bertha is excused at T_2 , having incorporated that excuse into a murderous plan that she initiated when she wrote the letter at T_1 , she is highly culpable for her act at T_1 . And for me (and Ferzan), the results of that culpable act at T_1 (and of her culpable omission thereafter to apprise Ben of her hoax) do not matter. Whether Ben lives or dies at T_2 is immaterial to Bertha's culpability at T_1 .

Given that Ferzan's contribution, at least as of November 4, appears to disagree with my conclusion that the self-defensive acts at T_2 can be justified in the cases of Bronson, Palance, and Claiborne, and excused in the case of Bertha, I shall elaborate my position more fully.

Take the cases of Bronson and Claiborne. Suppose a third party knows Bronson's and Claiborne's plans and watches their plans unfold. Suppose now that when the muggers attack Bronson, Bronson's gun is jammed. And similarly, suppose Claiborne's husband manages to dodge the booby trap and is now about to strangle her. May the third party, who has a gun, intervene and shoot the muggers and the husband? Or must the third party remain neutral?

I think the third party may justifiably come to Bronson's and Claiborne's aid and shoot the muggers and the husband. Despite Bronson's and Claiborne's being provocateurs who "started it," the muggers and the husband are murderous CAs whose attacks are neither justified nor excused by the provocations. Even if Bronson and Claiborne are culpable for their provocations at T_1 —a matter not yet resolved—they are surely less culpable than the muggers and the husband. If the third party chooses to save lives, the lives should be Bronson's and Claiborne's. And I would extend the same analysis to my rewritten *Othello*: If Othello murderously attacks Iago, and Iago's defensive weapon fails to work, a third party should prefer Iago's life to Othello's. Indeed, I would extend my analysis to justifying a third party's defending Palance were his gun to jam.

If I am correct about on whose side third parties should intervene—that they should come to the defense of the less culpable actor—then the point I wish to establish is that *Bronson, Claiborne, Palance, and revised Iago should be justified in defending themselves*. In other words, because if they are culpable at all, they are less culpable than their attackers, they are justified at

T₂ in defending themselves for the same reason that a third party, apprised of the plots, would be justified in defending *them*—namely, their lesser culpability than that of their attackers.

So we have justified self-defense at T₂. What can we conclude about culpability at T₁ for the various provocations? At T₁ each of these actors consciously created a risk that they would have to kill a culpable aggressor in justified self-defense at T₂. Culpability is a function of what risks to others the actor believes exist and what reasons the actor believes exist that bear on the justifiability of those risks.

In the actual *Othello*, Iago creates what he believes is a very high risk of Desdemona's death for bad reasons. If he were to have left the scene after planting these suspicions in Othello, so that he could do nothing after T₁ to alter the risk to Desdemona, he would have been highly culpable—even if *Othello did not kill Desdemona*.

Now turn to Bronson, Palance, and Claiborne. Their reasons were certainly (1) to kill their attackers if the latter culpably attacked them. Their reasons also could have been coupled with (2) a desire that the culpable attack occur. For Palance, (2) as well as (1) was undoubtedly present. That is probably also true of Bronson. Theirs was a “make my day” attitude. It is not so clear with Claiborne.

I would think that reasons of type (1) do not render their provocations culpable. If Paris feels emboldened to walk through Central Park at night in her sexiest outfit because she carries a gun and intends to shoot anyone who attempts to rape her, then her walking there in a sexy outfit is not culpable, even if it is imprudent or even morally criticizable.

What if we add reasons of type (2) (“make my day”)? Is Paris now culpable for her provocative stroll? Perhaps, and thus so too for Bronson, Palance, and maybe Claiborne. Even if

Paris is culpable, however, she is surely less culpable than one who tries to rape her at T_2 . And that lesser culpability is all that she needs to be justified in using defensive force at T_2 .

In summary, if we focus on actors' degree of culpability (if any) at T_1 , the time they cause the conditions of their defenses, then we can allow them their defenses at T_2 but still not let them off the hook. Theoretical problem solved!