

Excerpt from Dick Arneson, "Just Warfare and Noncombatant Immunity"
Excerpted for Philosophy 13 as implicit commentary on some of Thomson's views as expressed in her essay "Self-Defense."

Pages 668-673.

II. The Moral Shield Protecting Noncombatants

Thus far I have tried to mark the line between combatants and noncombatants. But the combatant/noncombatant distinction does not coincide with the line that divides those who are morally legitimate targets of violence according to natural law and just war theory, on the one hand, from those who are not legitimate targets, on the other. So at least I shall argue. To see this point, it helps to consider self-defense scenarios.

In a just war, some people perpetrate lethal violence against other people in order to advance the just war cause. The question then arises, on whom may such violence be legitimately perpetrated? By way of example, take the scenario in which one or a few people, in order to save their own lives, perpetrate lethal violence against one or a few people in circumstances where such violence might be thought to qualify as self-defense. Who are morally appropriate targets in self-defense scenarios? This self-defense scenario offers a simple case of violence that many will consider permissible, so the judgments we make after reflection about self-defense offer some guidance for how to decide who may be killed in the course of prosecuting a just war. 16

Consider the fault forfeits first principle. In a situation in which there is a wrongful threat to an innocent person's life, and only killing another person can avert that threat, it is morally better that among those who might die, a person who is significantly and culpably at fault with respect to this situation should be the one who dies. The following examples illustrate the principle.

A. Accommodation

You are being chased by a villainous aggressor who is trying to kill you and will succeed, unless you jump up to a niche where the aggressor cannot follow. There is a bystander standing in this niche who has a perfect right to be there. The bystander sees that if he accommodates you by moving to the back of the niche, you can jump to it and both of you will be safe. If the bystander does not move in this way, you could still save yourself, but only by jumping to the niche and jostling the bystander, causing a fatal fall. The bystander also sees that this is the case. The bystander declines to move to the back of the niche.

The example described does not specify the mental state of the niche occupier, whose failure to accommodate you creates a predicament in which either you or she must die. Perhaps this bystander believes she is entitled to remain there and expects you to respect her right even in your desperate plight. I deny that the bystander plausibly possesses any such right. On the facts described, she is at least grossly negligent, and hence significantly and culpably at fault, by virtue of failing to help you by moving to the back of the niche. The "fault forfeits first" principle dictates that it is morally preferable for the unaccommodating bystander to die rather than you. To save your life, it is then morally permissible for you to jump to the niche, causing the bystander to fall. Would you be seriously culpable for causing the death of the bystander? The fault forfeits first principle responds in the negative: you are entitled to privilege an innocent life over a culpable one. Acting to produce this morally better state of affairs is not acting wrongly and does not render you culpably at fault.

B. Guilty Past

Suppose that Smith is an innocent aggressor currently engaged in attacking you. He is wrongfully trying to inflict lethal violence against you, but he is not culpable in this respect. Perhaps he is acting on the basis of false beliefs, and that if these beliefs were true, the attack would be justified. Moreover, he is not culpable for having these false beliefs. The culpable agent here is Jones, who used deception to induce Smith to form these beliefs. Suppose Jones' evil plan was to trick Smith into killing you. But now, Jones is no longer doing anything that menaces your life, and we can suppose there is nothing Jones can do that will now annul his deception and remove the threat to your life that Smith's aggression represents.

You have a right not to be killed in these circumstances—a right that Smith is violating. Two courses of action, either one of which would save your life, are available. You could kill Smith, the innocent aggressor, and thus prevent him from killing you. Or you could kill Jones, which would sufficiently unnerve Smith to incapacitate

him. Perhaps Smith, positioned so that he sees Jones, will witness your act of killing Jones and, as Smith is very emotionally attached to Jones, Smith will be prevented from acting effectively, thereby eliminating the threat against your life. These are the sole life-saving responses available.

Any plausible theory of justifiable homicide would approve killing Jones to save your life. The pertinent facts are that Jones has contributed to bringing about the situation in which your life is in peril, Jones is morally culpable for doing so, and your killing Jones would remove the peril against your life. Even though Jones is not currently acting in a way that menaces your life and Smith is, Jones' moral guilt and his causal responsibility for your peril jointly negate his moral immunity from harm. This claim does not settle the interesting question of whether it would be morally acceptable to kill Smith in self-defense if the option of killing Jones were not available. The principle of fault forfeits first, applied to this sort of case, justifies the judgment endorsed above.

The lesson of the self-defense case is readily applicable to the case of just warfare. Consider a spy working for the Allies in Germany during World War II. It turns out that to fulfill his mission the spy needs to kill someone. There are two possibly useful homicides, either of which would contribute equally to the spy's mission. One is to kill a young soldier raised in a culture that trained young men of ordinary sensibilities not to question the civil authority. The young soldier believes he is doing the right thing by serving in the German military. He is not blameworthy for having this belief, so he is morally not culpable for his soldiering activity. The other possibility would target a civilian, a noncombatant not engaged in any war-enabling activity. But this civilian is a fervent Nazi of evil mind. This noncombatant worked ardently to facilitate Hitler's rise to power and the consolidation of Nazi rule. I submit that you are morally obligated to kill the culpable civilian rather than the non-culpable combatant.

The case of a justified military strike against noncombatants, as described above, involves three factors: (i) the moral culpability of the noncombatant target; (ii) the impact of killing the noncombatant on prosecution of the just war cause; and (iii) the noncombatant's historic contribution to initiating and sustaining the unjust war effort.¹⁷ Would the presence of only two of these factors justify attacking noncombatants? Imagine a potential noncombatant target who culpably endorses the unjust war effort. The noncombatant is placed so that killing her would advance the just war effort; however, she neither contributed to the initiation of the unjust war nor assisted in sustaining it. Again we can consider how we should respond to analogues of this decision problem that arise in simple self-defense scenarios.

C. Guilty Bystander Trying to Inflict Harm

You are driving up a narrow mountain road and see Evil Aggressor approaching in a large armored vehicle. Evil Aggressor intends to murder you in a head-on collision. Your only recourse is to drive onto the shoulder of the road. The shoulder happens to be occupied by an admirer of Evil Aggressor, Guilty Bystander, who is cheering and gloating at the prospect of your demise. Let us suppose it is clear that Guilty Bystander just happens to be there, and that he has not deliberately chosen to occupy the site you now need for your survival. Furthermore, he cannot maneuver to enable both of you to share the shoulder safely. You must either drive onto the shoulder, killing Guilty Bystander, or be killed by Evil Aggressor. Moreover, although the admirer is powerless concretely to threaten your life, he is doing his best to harm you. He is throwing snowballs to distract you and hasten your demise. Assume his efforts are entirely futile. Still, we might think that the combination of wrongfully taking pleasure at your anticipated demise and acting with evil intent, though entirely impotently, to facilitate your demise suffices to render this guilty bystander significantly and culpably at fault with respect to your mortal plight. Thus, the fault forfeits first doctrine would justify driving onto the shoulder, killing the Guilty Bystander, to save your own life.

D. Guilty Bystander Disposed to Inflict Harm

We might imagine a variant of this case involving an even more attenuated connection between the bystander's conduct and your injuries. First, suppose that the case is as described above, except that the Guilty Bystander is not trying actively to harm you now but is disposed to harm you right now if he could. I suppose that the fault forfeits first doctrine also applies here because of Guilty Bystander's evil intent. It is morally preferable that the guilty bystander dies rather than you and killing Guilty Bystander to save your own life seems justified. I would add that in both of the preceding hypotheticals, Guilty Bystander's evil attempt, or

evil disposition, would suffice to render the bystander significantly and culpably at fault in a way that involves forfeiture, in this context, of his right not to be killed.

E. Guilty Bystander Exulting in Anticipated Evil

The next case for consideration eliminates the element of wrongful intent to cause harm. The guilty bystander is merely guilty of possessing a wrongfully positive attitude toward your imminent demise. He may cheer the Evil Aggressor, take sadistic satisfaction in contemplating your wrongful death, or exult in the triumph of evil. In this case, the guilty bystander is purely a bystander. He has no opportunity or intent to cause harm. Presented with this sort of example, many deontologists would insist that the bystander has not forfeited his right to be free from harm, and that you, the innocent driver, are forbidden to harm the bystander, even to save your life.

I disagree. I should add that the fault forfeits first principle commits its proponents to the claim that in a situation in which someone must die, it is morally better that one who is significantly and culpably at fault with respect to this situation should die rather than any non-culpable person who is available to die instead. This holds even when the significantly culpable individual neither causes, threatens, attempts nor is disposed to cause any concrete harm. At least this is so if you can be seriously at fault regarding a situation even though your fault involves neither the violation of anyone's rights nor any wrongful agency aimed at harm. A wrongful attitude toward the evil that others are perpetrating or threatening can be sufficient to negate protection. This position, while controversial, strikes me as correct. Merely taking malicious pleasure in the misfortunes of others does not establish sufficient culpability to dissolve the shield that the status of mere bystander confers. But if one varies the case by making the gloating of the guilty bystander increasingly malign, the judgment that it is wrong to harm him in order to save the innocent becomes attenuated and eventually dissipates altogether.¹⁸ (Imagine a person whose life activity entirely revolves around celebratory rehearsal in thought of horrific immoral acts, such as torture-murder of the innocent.)

F. Fault Forfeits First Doctrine in Just Warfare

The principle of fault forfeits first carries over to the issue of determining the morally preferred targets of violence in the course of prosecuting a just war. If one has a sufficiently important moral cause to justify waging war against the forces opposing that cause, and if killing someone would also sufficiently advance that cause to justify a killing, it would be morally preferable to kill a target significantly culpable with respect to the war rather than an innocent person. In many cases, one can only advance the just war by killing enemy combatants, whether or not they are culpable. In many cases, when one could kill either combatants or noncombatants to advance the just cause, the combatants will be more culpable, or at least no less culpable, than the noncombatants. But if one is fighting combatants who are not culpable, and if the noncombatants are guilty bystanders in any of the ways detailed above, it will be morally preferable to kill noncombatants rather than combatants to gain a comparative advantage for the just cause.

III. Noncombatants as Wrongful Trespassers I have raised the possibility that some noncombatants might not merit the protection of noncombatant immunity because they are morally culpable with respect to the unjust war their country is waging. Their past political efforts may have contributed to the current state of affairs, in which their country is fighting an unjust war. They might be doing everything possible to aid this evil enterprise, even if this amounts to scarcely anything. Or they might be firmly disposed to contribute to their country's unjust war effort if they could. At the limit, they might be culpable for endorsing the unjust war effort and celebrating its triumphs.

There are other possible ways in which noncombatants might plausibly be viewed as legitimate objects of a just war attack. They might, for example, be enjoying the fruits of a wrongful conquest. Specifically, they might be using resources and inhabiting land to which they have no right. For example, if someone wrongly invades and establishes camp in your home, you may expel her. It would be wrong to use, or threaten the use of, force beyond what was necessary to remove the unjust occupier, but on some moral views, the use of violence, even lethal violence, is not forbidden when necessary to regain possession of significant goods to which one has a clear moral title. If all else fails, one might say to the invader, whom one is unable physically to remove, "Get out of my home or I'll shoot!" This case, as so far described, does not specify whether the continued presence of the wrongful trespasser would present a slight irritation, a major nuisance, or a serious threat. If the trespass generates only irritation or nuisance, I assert it must be borne if one has no effective means to eliminate it without subjecting the wrongful trespasser to serious harm. Suppose, however, that the sole

method to expel the recalcitrant trespasser without risking personal injury is to use lethal violence. If the trespass itself causes serious harm, many moral theorists would permit the victim to issue, and if necessary execute, threats of violence, in order to end the trespass.

The occupation of a country by a foreign conqueror or colonial power provides a parallel example of unjust trespass. In such a situation, the original inhabitants may have a legitimate grievance against civilian occupants, who are wrongly squatting on their land. Here, peaceful removal of the occupants would obviously be morally preferable, though not necessarily achievable.¹⁹ But violent removal of unjust trespassers is not in principle ruled out.

Notes

16. For contrasting views of the ethics of self-defense, compare Judith Thomson, *Self-Defense*, 20 *PHIL. & PUB. AFF.* 283 (1991), with Larry Alexander, *Self-Defense, Justification, and Excuse*, 22 *PHIL. & PUB. An.* 53 (1993), and Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 *PHIL. & PUB. AFF.* 74 (1994).

17. The number of individuals harmed or avoiding harm is also a relevant consideration. It may be permissible, for example, for me to kill several Evil Aggressors to save my own life. A firm limit, however, may exist on the number of Non-Culpable Aggressors I may kill to avoid my death.

18. Jacob Ross posed the following question to me: Why not declare instead that the morally appropriate target of violence, among all whose death would advance the just cause, is that individual who has been more culpable over the entire course of his entire life? See also McMahan, *Killing in War*, *supra* note 5, at 722. I suppose one would be rejecting rather than developing deontological ethics if one denied that to be a morally appropriate target of violence in a situation one must have violated a duty with respect to that very situation rather than at other times in one's life.

19. My abstract remarks do not imply moral judgments about particular military struggles against wrongful occupiers. That judgment must await a case-by-case analysis of the specific facts. I do not suggest, for example, that the IRA had a moral right to attack civilians in Northern Ireland, or that Palestinians presently have a moral right to attack Israeli civilians. See generally Saul Smilansky, *Terrorism, Justification, and Illusion*, 114 *ETHICS* 790, 792 (2004).

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