

The Contrived Defense and Deterrent Threat Doctrines: A Reply to Professors Finkelstein & Katz

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Published online: 26 March 2013
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Abstract What is the relationship between the permissibility/impermissibility of the part and the permissibility/impermissibility of the whole? Does the moral or legal status of a constituent part of an actor's course of conduct govern the status of the actor's whole course of conduct or, conversely, does the moral and legal status of the actor's whole course of conduct govern the status of the constituent parts? This broader issue is examined in the more specific contexts of the contrived defense and deterrent threat doctrines. The latter doctrine concerns whether a prima facie impermissible act of carrying out a threatened action may be rendered permissible if embedded within an overall permissible course of action including the issuance of a deterrent threat that fails to induce compliance. The contrived defense doctrine addresses the permissibility of an actor who contrives or culpably causes the conditions of her own defense. This essay considers the claim—advanced by Claire Finkelstein and Leo Katz—that the contrived defense and deterrent threat doctrines are sufficiently related such that the preferable approach to each doctrine informs and supports the preferable approach to the other. In each, the permissible/impermissible status of the whole governs the status of the part. Regarding contrived defenses, the impermissibility of the actor's whole course of conduct renders the otherwise permissible constituent part relating to the defense also impermissible. And regarding deterrent threats, the permissibility of the actor's whole course of conduct renders the otherwise impermissible constituent parts also permissible. This essay challenges the claimed linkage between the contrived defense and deterrent threat doctrines by proposing hypothetical situations in which the claimed parallel doctrines collapse into each other. As a result, the application of the preferred approaches to each doctrine generates a contradiction.

Keywords Actio libera · Contrived defenses · Deterrent threats

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