

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

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Abstract 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 nonculpable 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.

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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

¹ See Model Penal Code, § 3.02(2); § 3.09(2).