

Ethics & International Affairs

ONLINE EXCLUSIVE: The Distributive Justice Theory of Self-Defense (Response to Whitley Kaufman)

In several papers, I have argued for a theory of distributive justice and considered its implications.¹ This theory includes a principle of responsibility that was endorsed by others within an account of defensive force (self-defense and defense of others). Whitley Kaufman criticizes this account, which he refers to as the “distributive justice theory of self-defense” (DJ theory).² In this paper, I respond to this criticism. I argue that Kaufman presents the theory inaccurately, that his standard of evaluation of the theory is inadequate, and that his claim that the theory should be rejected is unconvincing.

Several points should be noted regarding the evaluation of the DJ theory. First, since “we do not have an account of why self-defense is justified” (96), a criticism should show that the (alleged) disadvantages of the DJ theory are more significant than those of rival theories. Kaufman does not consider other theories.

Second, Kaufman considers the clash between the specific implications of the DJ theory and common intuitions and prevailing legal rules as a demonstration of the failing of the theory (97). I believe that less weight should be assigned too such specific intuitions and more to general judgments that support the DJ theory.

Finally, Kaufman argues occasionally that when the DJ theory is combined with common intuitions about defensive force *that the theory does not accept*, it leads to implausible conclusions (103, 111). This argument is puzzling since these are *not* the implications of the DJ theory. It adds nothing to the claim that the theory clashes with common intuitions.

The version of the DJ theory that I believe is most plausible includes several principles. Each of these principles incorporates a pro-tanto consideration that reflects a conception of comparative fairness regarding the resolution of interpersonal conflicts in which the well-being of different people clash since there are limited benefits or unavoidable burdens. A principle of equality is in favor of promoting the well-being of each person equally.³ A principle of priority is in favor of preferring the larger benefit or smaller burden—for example, preventing the more serious harm. The principle that is the focus of Kaufman’s criticism supports preferring persons who are not responsible for the existence of burdens to persons who are (and vice versa regarding benefits).⁴ Finally, higher-order principles resolve clashes between these principles.⁵ This theory implies that we should prefer a non-responsible victim to a responsible aggressor unless the danger to the aggressor is much more serious than that to the victim.⁶

Several points should be emphasized concerning this theory. First, it includes clear definitions of its key concepts—interpersonal conflicts that create forced choices and justice (comparative fairness). Therefore, Kaufman’s claim that the DJ theory does not include such clear definitions (105-106) does not apply.

Second, Kaufman criticizes the applicability of the DJ theory to burdens in addition to benefits. However, his only claim is that standard distributive theories are limited to the allocation of benefits rather than burdens (106). Even if this is the case, this is not a convincing criticism since the elaboration of a distributive theory to burdens seems plausible.

Third, the responsibility principle reflects an intuition that seems plausible and widely accepted. Indeed, Kaufman never disputes the judgment that this principle reflects. His criticism seems to be

that *on its own* the principle provides an inadequate account of defensive force. If this is the claim, it reflects a misunderstanding of the DJ theory. This theory could and should include other principles in addition to the responsibility principle. It should clearly include the distributive principles just noted, as I have explicitly explained (also) in the paper that Kaufman cites.⁷ Therefore, Kaufman's claim that the DJ theory justifies killing a person who is responsible only to a minor degree (101, 102, 107) is mistaken. When the responsibility is minor, the consideration of responsibility is trivial and easily outweighed by other principles, such as the principle of equality and the principle of priority.

The DJ theory could also include, as others suggest, deontological constraints, for example, against (intentionally) harming (including, of course, torturing) people.⁸ Therefore, Kaufman's claim that the theory should be rejected since it clashes with deontological constraints (104, 106-108, 111) is also misguided. If deontological constraints are valid, the DJ theory could incorporate them. If deontological constraints are not valid, the consequentialist implications of the theory are not problematic.⁹

Fourth, the scope of the responsibility principle depends on the notion of responsibility. However, the DJ theory is compatible only with conceptions that are based on the idea of comparative fairness. This has several implications that Kaufman blurs (101-103). First, the notion of the comparative fairness applies not only to the most serious forms of responsibility but also to recklessness, negligence, and certain kinds of justified choices, but not to causal responsibility. Second, the principle is not retributive (it favors harming the responsible only when there is an inevitable choice between persons), contrary to Kaufman's assumption (106). Finally, the principle could be limited to responsibility to the relevant conflict, as opposed to culpability in general, since this reflects an important conception of fairness that is not arbitrary. However, the principle could also incorporate other conceptions of responsibility that are compatible with the framework of comparative fairness.

Finally, the DJ theory is a general theory that has implications in various contexts in addition to its account of defensive force.¹⁰ I believe that this is an advantage. Kaufman suggests otherwise when he argues that the DJ theory is not a theory of self-defense since it focuses on responsibility in general while standard theories of self-defense focus on the fact of attack (105). This observation is correct, but I fail to see why the general nature of the DJ theory, and the fact that it is not *merely* an account of defensive force (it is also that), should count against it. In any case, what matters is the content of the theory and not its label.

INNOCENT AGGRESSOR

The DJ theory does not prefer one innocent person to another, including when the choice is between an innocent victim and an innocent attacker (for example, a little child or an insane person). This implication clashes with the common intuition the one is justified in preferring an innocent victim to an innocent attacker. Kaufman argues that this clash demonstrates that the DJ theory is mistaken (100-102), but this conclusion is too hasty. First, the claim that the DJ theory "is unable to explain why it would ever be permissible to deliberately harm an innocent person" (100) and the claim that it requires "a person to stand by and let a psychotic axe murderer butcher his family rather than use force against such an Innocent Aggressor" (102) are inaccurate. The DJ theory justifies harming an innocent person (including an innocent aggressor) in order to protect another innocent person (victim), but based on the rules that govern the interaction of innocent persons, such as the principles of equality and priority, rather than the rules regarding the interaction of innocent persons and culpable persons, namely, the principle of responsibility. Specifically, one should first try to restrain an innocent attacker without harming him in order to prevent the conflict. If this is impossible, it is justified to harm the attacker if this would prevent a more serious harm to the victim. If a choice between equally important interests is inevitable, each of the two innocent persons should get an equal chance to survive.

The implication that one innocent person should not in principle be preferred to another is supported by a general principle that seems plausible. In my opinion, this general judgment is more trustworthy

than the specific intuition that one is justified in preferring an innocent victim to an innocent attacker. This view is more plausible from the perspective of a third person (neither the victim nor the aggressor) who considers whether it is right to intervene in favor of one of them, rather than that of the victim, who obviously tends to defend herself, but the former perspective is indeed more reliable since it focuses on the question of justification as opposed to an excuse (the victim who defends herself should be typically excused for preferring herself, but this does not entail that the preference is justified). Overall, I believe that the fact that the theory does not distinguish between categories of innocent persons is an advantage rather than a disadvantage.

INNOCENT BYSTANDER

The DJ theory entails that it is justified to harm innocent bystanders in accordance with the equality principle and the priority principle. This includes intentional harm, subject to the possible incorporation of a deontological constraint against intentional harm (that is not necessarily absolute). Therefore, Kaufman's claim that the DJ theory cannot explain rules that allow harm to innocent bystanders (103) is mistaken.

Kaufman speculates that the DJ theory might allow killing an innocent person who is used as a shield due to his involvement in the danger (103). This speculation is unfounded: the principle of responsibility reflects a conception of fairness that does not apply to causal responsibility.

CULPABLE BYSTANDER

The DJ theory prefers an innocent person to a responsible one (also) in contexts that do not involve aggression, namely, when the choice is between an innocent bystander and a culpable bystander. For example, when two people are in danger, one due to reckless behavior, the other not, and it is possible to save only one, the DJ theory recommends saving the latter, assuming that the degree of responsibility is significant (so that the responsibility principle outweighs the equality principle) and the seriousness of the danger is the same (so that the priority principle does not apply).

Kaufman criticizes the application of the responsibility principle to choices between innocents and culpable bystanders (104-105), but his concern is misguided, since it is based on the mistaken assumption that the DJ theory is incompatible with deontological constraints. He refers to an example in which a culpable person has shot another and destroyed her liver and the only way to save the latter's life is by killing the former and harvesting his liver (104). This action seems to many forbidden, but this is so since it violates a (strong) deontological constraint. As I have explained, the DJ theory is compatible with deontological constraints. The only claim of the DJ theory is that (comparative) fairness provides a *pro-tanto* reason of fairness to prefer the innocent to the culpable. This judgment is compatible with the view that the action is forbidden since the deontological constraint is stronger than this consideration of fairness.

INTERROGATIONAL TORTURE

Kaufman argues that the DJ theory is the only theory of self-defense that justifies torture (96). This assertion is misleading. First, the substantive question is whether a theory entails a certain implication and not under what label it does so; the question whether it is a "self-defense" implication or not is pointless. Second, the claim that a theory entails a certain implication is ambiguous, since it can refer to entailment in a *possible* (hypothetical) state of affairs or in a state of affairs that actually occurs frequently. This distinction is crucial since it is reasonable to conclude that torture might be justified under certain possible conditions but that these conditions are met in our world only rarely, if at all, either due to factual uncertainty or since there is a strong but not absolute deontological constraint against torture (and therefore the optimal institutional arrangement is perhaps an absolute ban on torture).¹¹ This conclusion is the one entailed by a plausible version of the DJ theory, and this too, I think, is an advantage of the theory, rather than a disadvantage.

1. See Re'em Segev, "Second-Order Equality and Levelling Down," *Australasian Journal of Philosophy* 87 (forthcoming 2009); Re'em Segev, "Well-Being and Fairness," *Philosophical*

Studies 131:2 (2006): 369-391; Re'em Segev, "Well-Being and Fairness in the Distribution of Scarce Health Resources," *Journal of Medicine & Philosophy* 30:3 (2005): 231-260; Re'em Segev, "Fairness, Responsibility and Self-Defense," *Santa Clara Law Review* 45:2 (2005): 383-460.

2. Whitley Kaufman, "Torture and the 'Distributive Justice' Theory of Self-Defense: An Assessment," *Ethics & International Affairs* 22:1 (2008): 93-115. The page numbers in parenthesis refer to this article.

3. See Segev, "Second-Order Equality and Levelling Down."

4. Other possible principles accord priority for the worse-off person or for saving or benefiting the greater number of persons.

5. See, for example, Segev, "Well-Being and Fairness."

6. See Segev, "Fairness, Responsibility and Self-Defense."

7. See Segev, "Fairness, Responsibility and Self-Defense," pp. 392-410. Other adherents of the theory did not elaborate in this respect but they never claimed that the responsibility principle is the only moral principle.

8. See Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104:2 (1994): 252-290, pp. 260-263.

9. It should also be noted that Kaufman's assertion that the crucial dividing line between consequential and non-consequential theories is the constraint against using persons as means is puzzling (108). Using persons as means does not seem problematic; only treating persons as *mere* means; but consequentialism does *not* treat persons as *mere* means in any straightforward sense.

10. See, for example, Segev, "Well-Being and Fairness in the Distribution of Scarce Health Resources."

11. See Mordechai Kremnitzer & Re'em Segev, "The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?" *Israel Law Review* 34:2 (2000): 509-559.

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