

Against Tu Quoque

War crimes trials often weigh on the consciences of the conscientious. Aren't such proceedings mere "victor's justice"? The hypocrisy is usually palpable; after all, how often does either side in a violent conflict walk away with clean hands? Unsurprisingly, then, one of defendants' favorite legal strategies is to tell their prosecutors, "Well, you guys did the same." It's called the *tu quoque* defense:

An argument from fairness, the tu quoque argument has an enduring appeal to the human conscience. Simply put, tu quoque is the Latin rendition of "you too", with the argument built-in, though often unstated: "Since you have committed the same crime, why are you prosecuting me?" Cast in more affirmative terms, the argument is that if one side in a conflict has committed certain crimes, it has no authority to prosecute or punish nationals of the other side for the same or closely similar crimes. Whatever effect a decision-maker may choose to give it, the argument troubles the human soul, when it is presented in a fitting situation.

To be honest, though, I have trouble seeing why this argument has any appeal, much less "enduring appeal."

Consider: If a law is unjust, the less you enforce it, the better. This remains true even if 99% of violators get punished, because sparing 1% is less unjust than sparing 0%. To quote one of the best things Murray Rothbard ever said about ethics:

[T]he justice of equality of treatment depends first of all on the justice of the treatment itself. Suppose, for example, that Jones, with his retinue, proposes to enslave a group of people. Are we to maintain that "justice" requires that each be enslaved equally? And suppose that someone has the good fortune to escape. Are we to condemn him for evading the equality of justice meted out to his fellows? It is obvious that equality of treatment is no canon of justice whatever. If a measure is unjust, then it is just that it have as little general effect as

possible. Equality of unjust treatment can never be upheld as an ideal of justice.

By the same logic, if a law is just, the more you enforce it, the better. This remains true even if 99% of violators are never punished. Giving 1% of monsters what they deserve is less unjust than giving 0% of monsters what they deserve. If you have the chance to inflict retribution on 1% of the camp guards at Auschwitz, why not go for it? Sure, if you're a war criminal yourself, we should urge you to submit to punishment as well. If that's not going to happen, though, why not take whatever justice you're willing to dole out?

Justice aside, the consequentialist case against the *tu quoque* defense is also solid. Since victory is never assured, it's good for people on *all* sides to know, "I will be harshly punished for my war crimes... *if* my side loses." While it would be better if people knew they would be punished regardless of the outcome of the war, conditional deterrence is better than no deterrence at all.

Isn't it possible, though, that people will commit additional war crimes to avoid prosecution for earlier war crimes? The answer, of course, is: "Sure, it's *possible*." Most obviously, fear of war crimes trials provides an incentive to murder witnesses ASAP. Yet the same goes for *any* law. Laws against murder create an incentive to murder people who witness your murders. Yet this is a flimsy objection to laws against murder, because shrewd consequentialists focus on *overall net effects*, not worst-case scenarios.

What's the best case *against* war crimes trials? Simple: War crimes trials might delay peace - or reignite a war - and war is hell. Indeed, war is often hellish enough to overcome the intuitive moral presumption in favor of making violent criminals suffer for their misdeeds. When countries adopt amnesties to prevent future bloodshed, I keep my mind open.

When you firmly have the upper-hand, though, I say retribution *dulce et decorum est*. Letting Soviet war criminals off the hook in 1991 was defensible, though it would have been safe and wise to permanently bar former Communist Party members from holding public office. In 1945, though, defeated Axis war criminals were sitting ducks. Making tens of thousands of them pay in full for their offenses would have been easy, just, and instructive. Punishing all the war criminals on *both* sides would naturally have been even more just and instructive, but anything but easy.