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Shortcomings of and Alternatives to the Rights-Forfeiture Theory of Justified Self-Defense and Punishment

Abstract

I argue that rights-forfeiture by itself is no path to permissibility at all (even barring special circumstances), neither in the case of self-defense nor in the case of punishment. The limiting conditions of self-defense, for instance – necessity, proportionality (or no gross disproportionality), and the subjective element – are different in the context of forfeiture than in the context of justification (and might even be absent in the former context). In particular, I argue that a culpable aggressor, unlike an innocent aggressor, forfeits rights against proportionate defense, including *unnecessary* defense (as well as rights against the infliction of proportionate non-defensive harm). Yet, I demonstrate that this stance need not lead to the abandonment of the necessity condition of *justified* self-defense in the case of a culpable aggressor. Since justification and liability are not the same, there is no reason to assume that the necessity condition of justified self-defense must be explained under an appeal to the aggressor's rights. Parallel arguments apply to the other limiting conditions of permissible self-defense as well as to the limiting conditions of permissible punishment. Accordingly, I also sketch alternative explanations of the proportionality requirement and the subjective element. All these alternative explanations appeal to a *principle of precaution*: instead of explaining the unjustifiability of unnecessarily harming a culpable attacker or wrongdoer by an appeal to the rights of the attacker or wrongdoer himself, one can also, and better, explain it by a requirement to take *reasonable precautions* against violating the rights of *innocent* people.

Key words:

forfeiture; liability; necessity; precaution; proportionality; punishment; rights; self-defense; subjective element

Introduction

In this paper, I shall argue that rights forfeiture¹ or liability² must be distinguished from permissibility or justification and that certain important conclusions from this distinction

¹ There are different definitions of “forfeiture.” On some definitions, to forfeit a right means to lose it through one's own responsible/accountable action. On other definitions, to forfeit a right simply means to lose it. For the purposes of this discussion, I use the former definition.

² On the definition used here, a person is *liable* to some way of being treated, for example liable to attack or to punishment, if this person would not be *wronged* by this treatment, that is, if the person's rights would not be violated or infringed by this treatment. In other words, a person is liable to attack or to punishment if the person has no right not to be attacked or punished. Whether the person can, for instance, only become liable to “necessary” attack or punishment is a substantive question that should not be preempted by definitional *fiat*.

must be drawn. To wit, while some authors explicitly grant the analytical distinction, they nevertheless claim that a culpable aggressor's liability to self-defensive force or to punishment explains (at least in a large array of cases, that is, barring special circumstances) the defender's permission to engage in self-defense or to punish the aggressor. I will call this claim here the *rights forfeiture theory of permissible self-defense or punishment*, or *rights-forfeiture theory* for short. One can reject (as I do) rights-forfeiture *theory* without denying (as I do not) the existence of cases of rights-forfeiture.

The analytical distinction itself between forfeiture/liability on the one hand and justification on the other is not difficult to grasp. From so-called "necessity justifications" or "choice of evil justifications" it is well known that sometimes it can be justified to infringe a person's rights for the sake of a much greater good. For example, if someone has a heart attack in front of the window of a closed pharmacy at night, and the only way Pauline can save him is to smash the window and give him the life-saving drug, then morally, and legally in many jurisdictions, Pauline is justified in doing so *although* she thereby infringes the property rights of the pharmacy owner. This is shown in the fact that legally (and morally) Pauline would owe him compensation for the smashed window;³ yet, while she owes him compensation, she is not punishable. In fact, she is not only excused but fully justified. Thus, we are dealing here with a justified rights infringement: you can *justifiably* do something to someone (for example damage his or her property) although she or he has a *right* against you doing it.

But if you can *justifiably* do something to someone although he has a *right* against you doing it, then one should assume that, conversely, one can also *unjustifiably* do something to someone although he has *no right* against you doing it. If he has no right against you doing it, then this means, conversely, that you have (in the Hohfeldian terminology⁴) a so-called "privilege" or "no-duty," or, as it is now mostly called, a *liberty* against him to do it. That is, you have *no duty towards him* not to do it. For example, let us assume that the owner of the pharmacy has explicitly waived his right against Pauline that she not smash his window whenever she likes (it would be good business for him if a celebrity smashed his window); and let us further assume that Pauline would really like to smash his window. However, she knows that the insane but powerful brother of the owner will kill 100 innocent people if she indeed smashes the window. In this case, she should *not* smash the window *although* smashing it would not infringe the owner's rights.

Thus, just as you can have a necessity justification *overriding the rights* of someone (the owner of the pharmacy) for the greater good, you can also have what could be called a *necessity prohibition*, which overrides the *liberty* of someone (Pauline) for the greater good. This establishes the distinction between rights forfeiture/liability/lack of a right on the one hand and justification on the other. But while noting this analytical distinction is important enough, it is equally important to note that rights forfeiture and justification do not just come

³ This is sometimes denied, but I do not think the denial is plausible. See Uwe Steinhoff, "The Liability of Justified Attackers," unpublished ms. section 5.

⁴ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1919).

apart in such special or extreme circumstances, where the good achieved (or the evil avoided) by not exercising a liberty (which, again, one gained through someone's forfeiting or waiving a right) by far outweighs the good of exercising it. Rather, even under normal circumstances, where the costs of doing to someone what he has no right that one not do it to him are not prohibitively high, rights forfeiture *alone* justifies *nothing*. For instance, if the owner had waived his right against Pauline's smashing his window but Pauline had forgotten about it, then her vandalistic smashing of the window would still be morally unjustified: she should *not* smash the window since her action (for all she knows she is violating the owner's rights for no good reason) shows a blatant disregard towards law, morality, and, of course, the owner's rights.

In short, showing that somebody has *forfeited* his right not to be attacked and is thus *liable* to attack – that is, has no right not to be attacked – and even showing furthermore that there is no necessity prohibition or other special circumstance that would *override* the liberty of a potential attacker is still not the same as showing that one can *justifiably* attack her – that is, that such an attack does *not contravene morality* (or law, in the case of legal justification). Not all moral (or legal) constraints against doing something to someone (for example attacking her) lie in that person's rights, and not all permissions lie in a person's liberty.

Some philosophers who think that rights forfeiture is a path to permissibility or justification (at least under normal circumstances) are, of course, well aware of the fact that justification is subject to certain constraints, like necessity, proportionality, and certain subjective or epistemic elements. Yet, they think that all these constraints are *internal* to rights-forfeiture, so that one can only forfeit one's rights against necessary, proportionate measures that are done with the proper state of mind. If this were the case, rights-forfeiture would indeed be a straightforward path to permissibility and justification.

I will argue in this paper, however, that this is *not* the case. That is, I do not argue against rights-forfeiture as such; on the contrary, I agree that people can sometimes forfeit certain rights, and I also agree that this can then play an important *part* in the justification of what one may justifiably do to them. However, I deny that rights-forfeiture is *by itself* (and even barring necessity prohibitions etc.) a path to permissibility.⁵ My focus will be on self-defense, but parallel arguments could be made for the case of punishment. I shall argue that the limiting conditions of self-defense – necessity, (no gross dis-)proportionality, and the subjective element⁶ – are different (or even absent) in the context of forfeiture than in the

⁵ There are, in my view, further shortcomings of rights-forfeiture theory, but they are not a concern of this paper.

⁶ I do not discuss the imminence requirement here, which is in my view part of the *triggering* conditions for the applicability of the self-defense justification: self-defense is directed against ongoing or imminent attacks. See also Paul Robinson, *Criminal Law Defenses* (St. Paul: West Publishing, 1984), p. 75, who admits that in many statutes “the word ‘imminent’ appears to modify the nature of the triggering conditions,” but himself thinks that it is “more properly viewed as a modification of the necessity requirement.” Some authors deny that it is a valid condition for justified self-defense at all. These issues need not concern us here. However, I deal with them at length in “Self-Defense and Imminence,” unpublished ms.

context of justification (section 1). It is not my aim to provide detailed accounts of these conditions here;⁷ rather my aim is to give at least initial plausibility to the claim that their shape cannot be explained by reliance on forfeiture (alone). For example, I argue (in section 2) that a culpable aggressor, unlike an innocent aggressor, *forfeits rights* against proportionate defense, including *unnecessary* proportionate defense. Yet, I demonstrate that this stance need not lead to the abandonment of the necessity condition of *justified* self-defense in the case of a culpable aggressor. That someone has forfeited his right against being harmed or, in an alternative terminology, is liable to be harmed, does not mean that you can *justifiably* harm him: it only means that you can harm him without violating his rights. But if justification and liability are not the same, then there is no reason to assume that the necessity condition of justified self-defense must be explained under an appeal to the aggressor's rights (section 3.1). Parallel arguments apply to the other limiting conditions, and I will therefore also sketch alternative explanations of the proportionality requirement (section 3.2) and the subjective element (section 3.3). All these alternative explanations appeal to a *principle of precaution*: for instance, instead of explaining the unjustifiability of unnecessarily harming a culpable attacker by an appeal to the rights of the attacker himself, one can also, and better, explain it by a requirement to take *reasonable precautions* against violating the rights of *innocent* people.

1. The Importance of the Distinction between Permissibility and Liability for the Limiting Conditions

Why should one, for instance, accept a necessity criterion as a limiting condition for self-defense? This seems (as we will see) to be a particularly hard question to answer for those who think that permissible self-defense (at least in paradigmatic cases involving an innocent victim and a culpable aggressor) involves rights forfeiture or liability on the part of the aggressor. The basic idea of such an approach is that the aggressor through his aggression forfeits his own right not to be attacked, that is, he becomes liable to counter-attack: he can now be attacked without wronging him, without violating his rights. This view, at least as far as culpable attackers are concerned, seems to be a very popular one at least in philosophical discussions of self- and other-defense,⁸ and many subscribe to it even in the case of innocent attackers.⁹ The advantage of this view is that it can straightforwardly explain why the defender does not owe the aggressor compensation for the harm the former inflicted on the latter in justified self-defense: by harming him he did not *wrong* him, did not violate his *rights*, and therefore no compensation is due. Accounts, on the other hand, that in one way or

⁷ I do so elsewhere, see *ibid.*, as well as in “Self-Defense and Necessity,” unpublished ms., and in “Against Purely Objectivist Interpretations of Moral Obligation,” work in progress.

⁸ Philosophers as diverse as Judith Jarvis Thomson, Jeff McMahan, David Rodin, Yitzhak Benbaji, or Jonathan Quong, to just name a few, subscribe to it.

⁹ I also subscribe to the idea that the attacker forfeits his right against counter-attack, but I do not subscribe to the idea that this “grounds” the permissibility of self-defense. Compare Suzanne Uniacke, *Permissible killing: The self-defence justification of homicide* (Cambridge: Cambridge University Press, 1996), ch. 5, esp. p. 191.

another construct the self-defense justification as some kind of necessity justification (that is, as a justification that justifies *overriding rights* of others) cannot really explain this, at least not in any straightforward manner.¹⁰ After all, if one harms an aggressor, in particular a culpable aggressor, in necessary and proportionate self-defense one does not owe him any compensation. In contrast, if one harms another person in the course of overriding a right of this person, one would normally owe him compensation. There might be an additional necessity justification for not *giving* him the compensation (e.g., the King threatened to kill some innocent people in case the person whose rights have been overridden is compensated), but that does not change the fact that compensation is *due* to the person. He has a *right* to it, a right that is now violated by the King. Perhaps (although I doubt this) it is also not always the case that the attacker who violates (justifiably or not) another person's rights and harms the person owes this person compensation: for example, perhaps not in such circumstances where other parties violated the attacker's rights by unjustly putting him in a situation where he had to override somebody else's rights to avert harm from himself. The fact remains, however, that *someone* owes the person who has been harmed in the course of a rights violation compensation.¹¹

A further, and perhaps even more severe problem faced by an account which claims that the rights of the attacker are merely overridden is that it seems to ignore the very essence of rights, namely that they function as some kind of *trumps*, as extremely weighty considerations. For sure, they can be overridden in extreme circumstances on the basis of a necessity justification, for example when one has to violate the right to life of one person in order to protect the rights to life of 100 other persons. However, the idea that *one* defender might override the right to life of another person to keep his own right to life from being violated seems to simply ignore what rights are.¹²

Thus, appeals to rights forfeiture are very attractive and plausible when it comes to explaining certain aspects of self-defense. Yet, a number of authors have argued that rights forfeiture or "liability" theory has difficulties explaining why a culpable aggressor should only be liable to *necessary* force. As Joshua Dressler states, "if forfeiture explained the defense, an aggressor would forfeit the right to complain when the other party attempted to kill him, even when such a killing was unnecessary; yet lethal self-defense does not result in acquittal when the person attacked can avoid his own death by less extreme tactics."¹³

¹⁰ For a critique of such accounts, see Uwe Steinhoff, "Justifying Defense against Non-Responsible Threats and Justified Aggressors: The Liability vs. the Rights-Infringement Account," unpublished ms, available at <http://philpapers.org/rec/STEJDA>.

¹¹ While there are admittedly some authors who deny this, it is certainly the standard view and an intuitively very plausible one.

¹² Jonathan Quong, "Killing in Self-Defense," *Ethics* 119 (2009), pp. 507-537, tries to overcome this problem. I argue that he fails in "Justifying Defense against Non-Responsible Threats and Justified Aggressors."

¹³ Joshua Dressler, "Rethinking Heat of Passion: A Defense in Search of a Rationale," *Journal of Criminal Law and Criminology* 73 (1982), pp. 421-470, at 454. Dressler's own "explanation" of the necessity condition begs the question, claiming that unnecessary lethal

Yet, Dressler is committing a mistake here: he implicitly presupposes that if the aggressor cannot *complain*, then the defender must be *acquitted*. But of course that does not follow. Permissibility or justification are not the same as right-forfeiture or liability.¹⁴ Unfortunately, most authors arguing that the aggressor does forfeit certain rights (against counter-attack and punishment, for example) make exactly the same mistake as those who deny this.

A good way of avoiding this mistake is by realizing that one can defend the idea that aggressors forfeit certain rights without embracing rights forfeiture *theory*. Christopher Heath Wellman gives the following characterization of rights forfeiture theory in the context of punishment (his characterization is, obviously, applicable to the context of self-defense too): “Defenders of the weak version do not deny that punishment is permissible only when it is necessary to advance some valuable aim; they merely emphasize that realizing these aims would not suffice to justify punishment if the person punished had not forfeited her right [but if she has, then realizing the aims in question does suffice to justify punishment]. The strong version alleges that, if the person being punished has forfeited her rights, it is permissible to

force against a lethal attack would be manslaughter. He does not explain why law is right in considering it manslaughter. Judith Jarvis Thomson once voiced similar concerns as Dressler, see her *Rights, Restitution and Risk: Essays in Moral Theory* ed. by W. Parent (London: University of Harvard Press), p. 34. See also George P. Fletcher, “Right to Life,” *Georgia Law Review* 13 (1979), pp. 1371-1394, section III. Rights forfeiture theories of punishment have suffered similar criticisms, see for example David Boonin’s sustained attack on forfeiture theory in *The Problem of Punishment* (Cambridge: Cambridge University Press, 2011), pp. 103-119.

¹⁴ While some authors explicitly grant this, they do not draw the right conclusions from it. Kimberly Ferzan, for example, explicitly distinguishes permissibility from liability but nevertheless argues “that liability is its own interesting conceptual and normative path to permissibility, and the reason it is permissible to kill culpable aggressors is because they are liable to defensive force.” Kimberly Kessler Ferzan, “Provocateurs,” *Criminal Law and Philosophy* 7 (2013), pp. 597-622, at 606. Jeff McMahan, whom Ferzan credits with having introduced the distinction between permissibility and liability, succumbs to the same mistake as Ferzan, as his talk about “liability-based justifications” or a “liability justification” suggests. See Jeff McMahan, “The Conditions of Liability to Preventive Attack,” in Deen K. Chatterjee, *The Ethics of Preventive War* (Cambridge: Cambridge University Press, 2013), pp. 121-144, at 23-124, and idem, “Targeted Killing: Murder, Combat, or Law Enforcement,” in Claire Finkelstein, Jens David Ohlin, and Andrew Altman, *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012), pp. 135-155, at 138. For the record, it should be noted that said distinction is already there in Kant (see note 41 below), although with a different terminology, and implicit, in my view, in a large part of traditional just war theory. It is also made quite explicitly by Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), p. 45, and by George P. Fletcher, “The Right Deed for the Wrong Reason: A Reply to Mr. Robinson,” *UCLA Law Review* 23 (1975/76), pp. 293-321, at 320: “It might be *just* for a would-be murderer to be killed by his intended victim ..., but it does not follow that the act of killing is *justified*.”

punish her for any purpose whatsoever” (for example for the purpose of satisfying one’s sadistic impulses).¹⁵ *Pace* Wellman, both the weak and the strong version of rights forfeiture theory are wrong. The strong version’s mistake lies in the remarkably swift transition from forfeiture to permissibility. When a person has forfeited a right, she now lacks it. However, a person’s mere *lack* of a right not to be killed provides by itself no *justification* to kill her. For example, a 500-year-old oak tree does not hold a *right* against me not to be cut down, but it is difficult to see how that, by itself, can possibly *justify* me in cutting it down.¹⁶ The same logic applies to persons: justified harming therefore requires more than the target’s liability to harm (even barring necessity prohibitions or other unusual circumstances that speak against harming the target).

Moreover, that the harm is necessary to promote some valuable goal is still not sufficient, which undermines what Wellman calls the weak version of rights forfeiture theory. Consider the following example: Culpable Jill is about to murder innocent Bill, unbeknownst to greedy Gabi, who considers Jill to be an innocent person but shoots her out of selfish financial interests and, as it so happens, just in time to prevent her from murdering Bill (again, Gabi was not aware that she was thereby preventing Jill from murdering Bill). Let us further suppose that this shot, which injured Jill’s arm, was a proportionate (which of course it was) and *necessary* means “to advance some valuable aim,” namely innocent Bill’s aim to live on. Now, it seems that Jill has no valid complaint against Gabi: it is counter-intuitive to claim that Gabi owes the would-be-murderer Jill any compensation. However, the fact that Jill has no complaint against Gabi’s attack does not make this attack permissible.¹⁷ Gabi has

¹⁵ Christopher Heath Wellman, “Rights Forfeiture Theory of Punishment,” *Ethics* 122(2), pp. 371-393, at 375. Wellman himself subscribes to the strong version, see *ibid.* My addition in square brackets is a fair interpretation of Wellman, as one can see both from the preceding and the following sentence as well as from the thrust of Wellman’s entire argument. However, in a footnote (*ibid.*, n. 7) Wellman adds a qualification to his account, noting that it is “a slight oversimplification.” Since he is not an absolutist about rights, he does not say that rights-forfeiture is absolutely necessary for justified punishment. Nor is it always sufficient, “since there may be other factors that ground obligations” (like Alison’s promise to Betty that she will not punish Carol even if Carol has forfeited her right not to be punished.) These extraordinary circumstances need not concern us further here (nor does Wellman further discuss them in his article).

¹⁶ Perhaps some people might think that *other* persons have a right that I do not cut it down. However, even if all persons in the world waived such a supposed right, that still seems to be insufficient for providing me with a justification for cutting down such an old tree for the mere fun of it.

¹⁷ I have encountered the objection that Jill would have a complaint against Gabi if Gabi tortured her to death for the fun of it. This objection, however, misses the mark. Gabi is shooting at Jill out of greed, and it is unclear how that is supposed to be better than shooting here for the fun of it; however, I nowhere claim that someone who commits a rights violation of a certain gravity thereby forfeits *all* rights; rather, my claim would be that she forfeits the right against *unnecessary harm of equivalent severity*. Thus, Gabi does not forfeit her right

committed a so-called impossible *attempt* (of battery, in this case). Since the *objective* circumstances for the justification of her act were satisfied (her act was a necessary and proportionate means to stop an unjust attack) she could, from a moral point of view,¹⁸ not really commit battery with her act – this was impossible – but, nevertheless, she *did try* and only failed because (unbeknownst to her) the objective justifying circumstances were given. That is, she did attempt to commit battery, and attempts to commit battery are *not* permissible. Therefore, in order to not let attempted batterers like Gabi (let alone attempted murderers) off the hook, Western self-defense law posits a subjective element for justified self- or other-defense: the defender must at least *know* or *be aware* of the fact that the conditions of justified self-defense are fulfilled, otherwise she commits an impermissible act for which she can be punished.¹⁹ This, however, seems also to be the correct view from the

against being unnecessarily tortured. I actually do think, however, that if someone tortures someone else to death for the mere fun of it then he, conversely, forfeits his right against being tortured to death for the mere fun of it himself. While some liberal philosophers might find this “barbaric” or counter-intuitive, it is my experience that most people find this just and fair. I share this assessment (see below) and I have nowhere encountered an argument that would show it to be wrong.

¹⁸ Or, more precisely, she could not do this if we think that there cannot be a battery without a rights violation, as I think we should. Law, however, would in principle be free, of course, to categorize Gabi’s act as battery because it fits the description of the legal offense and one of the elements of the legal defense is missing. This would then, however, lead to the morally wrong results in civil court (allowing Jill to sue Gabi).

¹⁹ In the German context (and German law is here typical for Continental European jurisdictions), see for example Volker Erb, “Notwehr,” in Wolfgang Joecks and Klaus Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Vol. 1* (Munich: C. H. Beck, 2003), pp. 1249-1337, at 1333. For an overview of the Anglo-Saxon debate on this issue, see Boaz Sangero, *Self-Defense in Criminal Law* (Oxford and Portland: Hart Publishing, 2006), pp. 231-236. On “impossible attempts,” see *ibid.*, pp. 235-236. There are authors who reject the idea that there is a subjective element to the justifiability of self-defense (for example Paul H. Robinson, Judith Jarvis Thomson, and Phillip Montague). In my view, they all fail to offer a plausible way of dealing with the case of the impossible attempt. Robinson, “Competing Theories of Justification: Deeds v. Reasons,” in A. T. Simester and A. T. H. Smith (eds.), *Harm and Culpability* (Oxford: Clarendon Press, 1996), pp. 45-70, at 47-48 for example, rightly concedes that the impossible attempt should result in criminal liability, but it is mysterious how that squares with his supposedly purely objectivist theory of criminality. See on this point Andrew Botterell, “Why We Ought to be (Reasonable) Subjectivists about Justification,” *Criminal Justice Ethics* 26 (2007), pp. 36-58, at 55-56, n. 26; see there also for further references. For a recent criticism of pure objectivism in ethics, see T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, and Blame* (Harvard: Belknap Press of Harvard University Press), pp. 47-52. It is beyond the scope of this article to deal with this issue in detail, but see the brief discussion below on “culpable right action.” For a more elaborate discussion, see Uwe Steinhoff, “Against the Purely Objectivist Interpretation of Moral

moral point of view: not only Gabi's character, but Gabi's *act* – attempted battery – deserves moral condemnation (and punishment).²⁰

Such a knowledge requirement seems to govern justified punishment no less than justified self-defense and therefore leads to exactly the same problem in the case of the rights forfeiture theory of punishment as it does in the case of the rights forfeiture theory of self-defense. As Simmons puts it: “If the criminal simply forfeits his right not to be harmed in certain ways, then *any* way in which this harm is imposed appears morally acceptable, *any* reason a person has for imposing it is good enough. If Butch and his gang roam the state of nature, cutting throats at random just for the fun of it, and happen to cut the throat of a murderer (who deserves to be punished with a painful death, say), then that particular throat-cutting, but no other, might be morally acceptable. This seems a preposterous implication of the position I have been defending.”²¹

Of course, most rights forfeiture theorists, after making such confessions, then assure their readers that appearances are deceptive and *deny* that attackers or offenders like Jill are, in fact, liable to force or harms that are inflicted on them “for the wrong reasons.” The literature on punishment in particular is full of such denials by rights forfeiture theorists. Yet, I have to admit that in my view none of the arguments (or mere assertions) that have been adduced in support of such denials are even remotely plausible, and even at least some of those who adduce them seem to be aware of the fact that there is something “odd” or “awkward” about such denials.²²

Simmons tries to dissipate the impression of awkwardness by claiming that “we often voluntarily transfer to others rights to act only for certain reasons” and suggesting that it therefore “seems plausible to suppose that nonvoluntary forfeiture might result ... in rights to harm another only for certain reasons.”²³ However, this is a *non-sequitur*: the correctness of the first claim does not imply or even as much as suggest the plausibility of the second one. Simmons' example of the voluntary rights transfer is giving a doctor certain rights for your

Obligation,” work in progress.

²⁰ See also Uwe Steinhoff, “Just Cause and ‘Right Intention,’” *Journal of Military Ethics* 13(1) (2014), pp. 32-48, section II.

²¹ A. John Simmons, “Locke and the Right to Punish,” *Philosophy and Public Affairs* 20(4) (1991), pp. 311-349, at 339.

²² A. J. Simmons states about these denials: “These claims seem to me not unbearably awkward or ad hoc...” Yet, it would seem safe to assume that an author who found nothing awkward or ad hoc about an idea would feel no need to explicitly *assert* that he finds nothing “unbearably” awkward or ad hoc about it. At least he must be aware of the fact that others will find it awkward and ad hoc, and perhaps even unbearably so. See also Kimberly Kessler Ferzan, who admits that people “might find it odd” that someone is only liable to attacks that occur for the allegedly right reasons. See Simmons, “Locke and the Right to Punish,” *Philosophy and Public Affairs* 20(4) (1991), pp. 311-349, at 340; and Ferzan, “Culpable Aggression: The Basis for Moral Liability to Defensive Killing,” *Ohio State Journal of Criminal Law* 9 (2011-2012), pp. 669-697, at 695.

²³ *Ibid.*, p. 340.

upcoming surgery. But that, of course, usually happens in writing; and other voluntary rights transfers usually also are quite explicit (or occur against a conventional background that makes clear what is transferred). Thus, indeed, if someone voluntarily gives a doctor the liberty to open his chest by explicitly saying “You may open my chest for medical reasons,” then it is entirely obvious that he has not given the doctor the liberty to open his chest for other reasons. In contrast, it is not obvious at all why someone who tries to murder someone else, that is, who tries to *unnecessarily* kill him, thereby *only* forfeits his rights against *necessary* harm. Rather, this is entirely mysterious, and Simmons’ explanations do nothing to solve this mystery. In short, the comparison between voluntary rights transfer and forfeiture is simply misleading here.

Be that as it may, I will not further discuss attempts to stave off the implausible implications of rights-forfeiture theory. Rather, I would like to side-step the issue by voicing a suspicion and offering an alternative: my suspicion is that many of these denials and defenses are motivated by the concern that unless one can account for the limits that are intuitively imposed on justifiable punishment and self-defense in terms of rights-forfeiture itself, any appeal to rights-forfeiture becomes incredible. And this concern, in turn, is of course fueled by the mistaken acceptance of rights forfeiture *theory*. Once one rejects this theory, however, one can have the cake and eat it, as it were: one can subscribe to the intuitively quite plausible implications of rights-forfeiture (implications like the one that Jill in our example does not have a complaint against Gabi) without thereby incurring counter-intuitive implications about permissibility (for instance that Gabi in our example acts justifiably).

Again, the confusion between rights-forfeiture and permissibility is shared by both rights forfeiture theorists and critics of rights forfeiture (not only of rights forfeiture *theory*, but of rights forfeiture). This leads the critics of rights forfeiture into claiming victory too early, and it seduces supporters into trying to square the circle. Let me give two examples, one for each case. Wellman, a supporter, discusses a variant of the impossible attempt case.²⁴ In this variant, the authorities frame a person for a theft he has never committed and imprison him. Unbeknownst to the authorities, however, the person had committed another theft and therefore was liable to exactly the time of imprisonment that the authorities imposed on him (for the wrong reasons). Wellman concedes, *arguendo* (and, in my view, quite rightly), that the so-called limited-reasons account of liability does not work:²⁵ if people are liable to attack, they are liable to attack, irrespective of the reasons their attackers have to attack them. (We saw in our Jill, Bill, and Gabi example that Jill seems to be liable to Gabi’s attack – Gabi need not compensate her – although Gabi acts for the wrong reasons.) As a supporter of rights forfeiture theory, he therefore has to conclude that given that the framed person was liable to imprisonment by the authorities, those authorities imprisoned him *permissibly*.²⁶

²⁴ Wellman, “Rights Forfeiture Theory of Punishment,” p. 380.

²⁵ The term “limited reasons account” is used by Kershnar, to whom Wellman refers. See Stephen Kershnar, *Desert, Retribution, and Torture* (Lanham: University of America Press, 2001), pp. 133-135. Kershnar rightly rejects this account.

²⁶ One might claim here that the authorities still violated his right not to be framed. That

Wellman is aware of the fact that this is counter-intuitive. A further extremely unpalatable implication of this would be that one cannot punish the authorities for an attempt to “punish” a person for a crime that he has not committed. Wellman asserts that he, indeed, is “not sure that it would be permissible to punish the culpable authorities,”²⁷ but he seems to realize that others will not be inclined to bite this bullet. Yet, his answer is that this problem could be overcome – so that one need not bite said bullet – by “simply construct[ing] *actus reus* so that it does not require the defendant to have violated someone else’s rights.”²⁸

This is what I meant by an attempt to square the circle: there seems to be no such thing as *permissible actus reus*. An *actus reus* seem to be impermissible by definition (although without *mens rea* it is excused), and since one cannot justifiably punish people for permissible actions,²⁹ punishment cannot be justified here. Moreover, Wellman tries to defend this “construction” by musing: “If one can forfeit one’s rights against punishment without violating someone else’s right, for instance, then perhaps ... the culpable authorities performed the requisite *actus reus*.”³⁰ However, if one can commit an *actus reus* and thus an impermissible act *without* violating someone’s right, why should this then not also be true for punishment? Yet, if it is true, and given that forfeited rights cannot be violated, then Wellman contradicts his own endorsement of the strong rights forfeiture theory, that is, his claim that “if the person being punished has forfeited her rights, it is permissible to punish her for any purpose whatsoever.”³¹ Thus, it seems that defenders of rights forfeiture theory are prone to succumb to veritable moral and logical conundrums.

It should be noted, however, that some authors believe in “culpable right action,” deem culpability sufficient for punishment, and thus conclude that people (even barring extreme circumstances) can justifiably be punished for permissible action and action that does not violate anybody’s rights.³² On this view, Gabi would have acted permissibly but culpably, and she could be punished for her culpable act. This move, if successful, could avoid some of the problems pointed out above, it seems.

might be true, but it is not the issue. The question is whether he had a right not to be *punished* for the wrong reasons. One can easily change the example by having him punished without being framed first. Moreover, note that the fact that the culprit’s *legal* rights were violated here is neither here nor there. On my view, the moral foundation for giving even culpable persons such legal rights is a *precautionary rule* whose moral rationale is the protection of the innocent (see below), but not necessarily a *moral* right. It is, however, precisely moral rights we are concerned with here.

²⁷ Wellman, “Rights Forfeiture Theory of Punishment,” p. 383.

²⁸ *Ibid.*, p. 384.

²⁹ Extreme circumstances aside (the King kills innocents if you do not slightly punish someone for a permissible action). This proviso corresponds to Wellman’s own proviso with regard to rights forfeiture theory, see *ibid.*, p. 375, n. 7.

³⁰ *Ibid.*, pp. 383-384.

³¹ *Ibid.*, p. 375.

³² See for instance also Heidi Hurd, *Moral Combat* (Cambridge: Cambridge University Press, 2008), p. 265. Wellman now seems to take this view too (personal communication).

Yet, this move seems to rely on an extremely idiosyncratic reinterpretation of ordinary moral terms, that is, it has little to do with how we normally use terms like “permissible” or “culpable.” To wit, if a proponent of this view is asked by someone: “I would like to go into a full theater and shoot randomly at the guests, is that permissible?”, then on pain of inconsistency the proponent would have to answer: “Well, that depends on who you will hit. If you hit people like Jill, it’s fine, otherwise not.” Likewise, if a person asks: “Look, I would like to become a primary school teacher, but I believe I would then sexually abuse some of the children – do you think it is permissible for me to take the job anyway?”, then this person would have to be informed by the pure objectivist: “It will have been permissible if you do not actually abuse them; if, however, you do abuse them, then it will have been impermissible.” These answers, however, would certainly not be given by ordinary speakers. They are also *unhelpful*. After all, what we expect from morality is *action-guidance*, and thus morality has to take into account, as Thomas Scanlon points out, “the fact that we are commonly dealing with imperfect information.”³³ That is, morality should be able to advise human beings as to how they should act under conditions of imperfect information – the only conditions human beings will ever encounter. It should not just tell people what they should do if certain facts are given, but it should also advise them on how to deal with situations where the agents do not *know* which conditions are given.³⁴ One good piece of advice, one that reduces harm done to innocent others, is to be considerate, circumspect and cautious – but this advice also refers to states of mind.

A second problem of the view under consideration is that it is not clear what the objectivist means with “culpability.” In particular, it is difficult to see how this could be *moral* culpability. Normally we say that someone is culpable if he knowingly or at least negligently did something impermissible (and does not have an excuse). The objectivist cannot say that (on his account Gabi’s act is not impermissible). So why is Gabi culpable? Maybe the objectivist will say that she is culpable because she recklessly took the risk of killing an innocent person. But *why* does that make her culpable on the objectivist account? After all, morality does *not* require her not to be reckless in this way on the objectivist account: if it did, then her reckless act would be *impermissible* (since it contravenes a requirement of morality), which, however, is precisely what the objectivist denies. To put it differently: if morality *required* people not to act culpably, then Gabi’s act would be impermissible. If however, as the objectivist claims, morality does *not* require people not to act culpably – on what basis can the objectivist claim that Gabi is “morally culpable”? What does this even mean then? The objectivist does not really explain this.

Finally, the objectivist realizes that there is something morally problematic about Gabi’s act. Since her act, on the objectivist’s account, is not impermissible, he explains this with her “culpability” (whatever that means in the objectivist’s language). Yet, imagine Gabi had randomly shot at theatergoers (and thereby hit Jill and stopped the murder of Bill) because she reasonably but mistakenly believed that otherwise a nuclear bomb would detonate in the

³³ Scanlon, *Moral Dimensions*, p. 50.

³⁴ See on this point also Michael J. Zimmerman, “Is Moral Obligation Objective or Subjective,” *Utilitas* 18(4) (2006), pp. 329-361.

city, killing everyone in it, including the theatergoers. In my view, if her reasonable belief had been correct, then she would have acted justifiably – she would have had a necessity justification for her course of action. Yet, her belief was not correct. Thus, ordinary speakers would say that she acted impermissibly, but excusably. She is excused because her belief was reasonable and she acted because she wanted to save human life. The objectivist, however, cannot say that she acted impermissibly, and now it seems that even the escape route of at least saying that she acted culpably is blocked. In other words, the objectivist would have to say now that there was *nothing* wrong with Gabi’s act – it was neither impermissible nor culpable and thus morally unproblematic. However, this seems to be absurd and hence undermines the objectivist position.

Thus, it seems that the purely objectivist account of moral permissibility is too implausible to offer a valid escape route out of the moral and logical conundrums that rights-forfeiture theory is faced with. As I said, the source of these conundrums is the mistake of taking rights-forfeiture to imply permissibility (at least under “normal” conditions). And as I also said, this mistake is no less widespread among *critics* of rights forfeiture than among its defenders. One such critic is David Boonin. He states that “the central point of the forfeiture-based retributivist position is that serving a useful purpose is not enough to make it permissible to punish an offender in the first place were it not for the fact that he had forfeited some of his previous rights by committing the offense for which he is to be punished.”³⁵ Thus, he clearly sees here that forfeiture-based retributivists can distinguish between permission and rights-forfeiture: the latter does not yet imply the former. Yet, when *criticizing* this position he himself seems to confuse permission and rights-forfeiture constantly. He states that the “forfeiture claim ... entails that a rapist forfeits the right not to be raped and a torturer forfeits the right not to be tortured.”³⁶ But why should this amount to an argument against the position in question? Because, says Boonin, it “is difficult to believe that these people have lost these rights: that it would be morally permissible for the state to torture the torturer, ... unfairly sentence the unfair judge, and so on.”³⁷ However, I suspect that it is *only then* difficult to believe that a (culpable and unjust) torturer has forfeited his right not to be tortured if one assumes (as Boonin clearly does here) that this would then make torturing him *permissible*.³⁸ However, there is no good reason to make such an assumption. To speak for myself, while I do agree that the state – perhaps extremely rare exceptions aside – cannot justifiably torture a person, not even a serial sadist torturer of high school girls, I also think that such a serial sadist torturer has forfeited his *right* not to be tortured (I will come back to

³⁵ Boonin, *The Problem of Punishment*, pp. 105-106.

³⁶ *Ibid.*, p. 110.

³⁷ *Ibid.*

³⁸ Boonin makes this unwarranted assumption not only in the passage just quoted but also when expounding two other arguments against retributivists (*ibid.*, pp. 114 and 116). Of course, he has additional arguments (which I also find unconvincing), but I cannot and need not discuss them here. I am only concerned here with the fact that at least three of his arguments against retributivism seem to rely on a conflation of rights-forfeiture and permissibility.

this in the next section). If he insists on this alleged right of his, a valid reply seems to be: look who's talking. He is simply not in a position to complain, given what he himself did to others. (It should be noted that Boonin provides no *positive* argument demonstrating that the culpable torturer indeed does keep his right not to be tortured. Incidentally, the fact that many people who argue against the justifiability of capital punishment do not do so on the grounds that the death penalty would violate a culpable serial murderer's rights, but rather on the grounds that often, due to judicial errors, *innocent* people are executed, should have alerted Boonin to the significant practical importance of the distinction between rights forfeiture and justification.)

Thus, in my view, the best way to take the wind out of the sail of critics of *rights forfeiture* is not by trying to argue (mostly unconvincingly and rather desperately, in my view) that rights forfeiture *theory* can account for the usual limits imposed on self-defense and punishment (and allegedly can avoid a host of unattractive implications) but, instead, by arguing that rights forfeiture *theory* is simply *wrong*. In the following section 2, I will advance this argument by focusing on necessity. If rights forfeiture theory is wrong, authors who endorse the view that attackers and offenders forfeit certain rights need not account for the limits imposed on self-defense and punishment in terms of rights-forfeiture alone, or, indeed, even rights alone. They also need not be concerned about counter-intuitive implications of rights forfeiture theory. There are alternatives. I will sketch such alternatives in sections 3.1-3.3 in the context of self-defense. Parallel arguments apply to the case of punishment.³⁹

2. Against Rights-Forfeiture Theory: Forfeiture without Necessity and Instrumentality

Suppose Frank unjustly tries to kill you simply because he does not like your nose. You can as easily stop him by using your taser as by shooting him in the chest with your revolver. You shoot him in the chest. On my view, this is unjustified (and I will later explain why.) However, have you *wronged* him, that is, can the aggressor *justly complain*? Did you *violate his rights*? I think one can reasonably deny that. After all, if the aggressor says (dying), "You used lethal self-defense although you could have used less drastic means," the understandable and quite appropriate reply would be: "Look who's talking."⁴⁰ It seems that by culpably and unnecessarily trying to kill you the attacker has forfeited his right against you that you not kill him unnecessarily.⁴¹

³⁹ Of course, on a retributivist account of punishment, there is no necessity condition for punishment (on some other accounts there is). I will not go into the limiting conditions of punishment here, since it seems to me to be fairly obvious how the arguments applied here primarily in the context of self-defense can be applied to the context of punishment too.

⁴⁰ Cf. Helen Frowe, "Jeff McMahan, *Killing In War*" (book review), *Journal of Moral Philosophy* 10 (2013), pp. 112-115, esp. at 112-113.

⁴¹ This is also the view of a number of other authors. As Joachim Hruschka (2003), "Die Notwehr im Zusammenhang von Kants Rechtslehre," *Zeitschrift für die Gesamte Strafrechtswissenschaft* 115(2), pp. 201-23, at 213, points out with regard to Kant's position on the necessity or (in Kant's words) moderation requirement in self-defense situations: "This

Many, no doubt, will find this view unpalatable – but many others (no doubt here as well) will find the view unpalatable that Frank indeed does have a valid complaint against his

is the reason why, as the ‘Metaphysics of Morals’ states, ‘a recommendation to show moderation (*moderamen*) belongs not to right but only to ethics.’” See Immanuel Kant (1996), *The Metaphysics of Morals* (trans. and ed. by Mary Gregor) (Cambridge: Cambridge University Press, Cambridge 1996), p. 28. As regards Locke, see his *Two Treatises of Government*, ed. by Peter Laslett (Cambridge: Cambridge University Press: 2002), esp. pp. 273-274 (§11), 278-280 (§§ 17-18), and 282-283 (§172). Compare also Simmons’ interpretation of Locke, see “Locke and the Right to Punish,” p. 331. Seumas Miller, in “Killing in Self-Defense,” *Public Affairs Quarterly* 7(4) (1993), pp. 325-339, esp. at 332-338 likewise argues that killing a lethal aggressor to save one’s own life (or other sufficiently valuable goods) need not be necessary for the aggressor to forfeit his life. Stephen Kershnar agrees, see *Desert, Retribution, and Torture*, pp. 133-135. Helen Frowe has recently made the same point, see Frowe, “Self-Defence and the Principle of Non-Combatant Immunity,” *Journal of Moral Philosophy* 8 (2011), pp. 530-546, at 545, n. 31; and *Defensive Killing* (Oxford: Oxford University Press, 2014), ch. 4. Unlike Miller (see note 53 for Miller’s account), however, Frowe does not really make a credible effort to explain where the necessity condition of justifiable self-defense comes from. She merely claims – without argument – that it “must be grounded in a more general moral requirement not to cause unnecessary harm to people and other sentient beings” and affirms that she takes “the existence of such a requirement to be relatively uncontroversial.” *Ibid.*, p. 117. If, however, it really were uncontroversial, one would think that the requirements not to engage in boxing matches or not to kill animals for other than defensive purposes would also be uncontroversial – but in fact most people deem both practices permissible. One might reply that boxing matches and non-defensive killings of animals are necessary for *something*, for example for a certain kind of entertainment or the satisfaction of certain desires. But that, of course, is also the case in my example of the unnecessary killing of an aggressor, and thus Frowe’s “more general requirement” does not impose much of a restraint and is unable to explain the more specific necessity requirement of the self-defense justification. David Rodin, too, admits that “many rights are implicitly reciprocal” and that “on a plausible understanding of rights, one only has the right to life so long as one respects the right to life of others.” See his “The Problem with Prevention,” in Henry Shue and David Rodin, *Preemption: Military Action and Moral Justification* (Oxford: Oxford University Press, 2010), pp. 143-170, at 165. However, he does not draw the logical conclusion from this insight. Instead, like Ferzan and Simmons, he insists that there “is nothing incoherent or peculiar” in binding an aggressor’s liability to the defender’s awareness that he is being confronted with an aggressor or to “material facts about the defender” and thus to necessity. This latter claim contradicts the reciprocity claim. See for the quotes David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), p. 76. Rodin has meanwhile further elaborated his thoughts on reciprocity in “The Reciprocity Theory of Rights,” *Law and Philosophy* 33 (2014), pp. 281–308. Again, he seems not to be aware of the fact that this reciprocity theory contradicts his views on liability.

would-be victim. To be sure, I do not presume here to have a knock-down argument for rights forfeiture not being connected to necessity; however, the other side does not have a knock-down argument *against* this position either. McMahan, for example, claims: “If harming a person is unnecessary for the achievement of a relevant type of goal, that person cannot be liable to be harmed.”⁴² But why? On the previous page, McMahan explains that “a person is liable to be harmed only if harming him will serve some further purpose.”⁴³ However, first, that is a mere stipulation that I see no reason to accept. Second, even if this stipulation were correct, McMahan still commits a *non-sequitur*. After all, that a person is liable to the infliction of a certain defensive harm only if the infliction of that harm is instrumental does not imply that the infliction of the harm must be *necessary*. Shooting Frank in the chest *is* instrumental and *does* achieve the defensive goal, but it still is not necessary.

Meanwhile McMahan actually admits that he has “no decisive response to this challenge,” that is, to the claim that constraints like necessity or proportionality are not internal to liability or rights-forfeiture. He states, however, that his “main reason for treating them as internal constraints on liability is that this makes liability essentially instrumental.”⁴⁴ Yet, as we already saw, first, it is unclear why this should be an advantage,⁴⁵ and second, it would still not suffice to show that Frank is not liable to be shot in the chest.

Moreover, even if one granted such a right against unnecessary attack, its scope and strength is still open to debate, and a rights-forfeiture account seems by its own logic to be driven to making this right rather narrow and weak, so narrow and weak, in fact, that it does not suffice to uphold the usual restrictions on permissible self-defense.

Ferzan is a illustrative case in point: she has an enormously permissive account of the necessity condition. She claims that once the defender is actually facing an imminent attack, “the appropriate viewpoint [to assess the satisfaction of the necessity condition] is the self-defender’s,” and she explicitly “eschew[s] the need for any evaluative criteria. The defender’s

⁴² Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), p. 9.

⁴³ *Ibid.*, p. 8.

⁴⁴ Jeff McMahan, “Proportionality and Just Cause: A Comment on Kamm,” *Journal of Moral Philosophy* 11 (2014), pp. 428-453, at 434.

⁴⁵ However, McMahan thinks that this instrumental account makes it easier to distinguish liability from desert. Frowe, *Defensive Killing*, pp. 105-106, while denying that the necessity condition is internal to justified self-defense, nevertheless agrees with McMahan that one can only be liable to defensive harms that can avert a threat and also claims that purely backwards-looking accounts (like mine) have difficulties distinguishing between liability and desert. Yet, it is quite easy to distinguish the two without an instrumental account. If someone deserves to be attacked, this implies that there is a (defeasible) reason to attack him. If someone is liable to an attack, however, this merely implies that he would not be *wronged* by this attack – it does *not* provide a reason to attack him. “Backwards-looking accounts” can make this distinction as easily as instrumentalists. Moreover, harms can be defensive without being able to avert a *threat*. It is sufficient that they *resist an attack*. See on this Uwe Steinhoff, “What is Self-Defense?”, *Public Affairs Quarterly*, forthcoming.

subjective belief in any probability is sufficient, and this belief need not be reasonable.”⁴⁶ However, since the necessity criterion is a criterion that limits the choice of means, it would appear that Ferzan’s account implies that a heavyweight prize boxer who has the inane belief that he can stop a tiny 18-year-old girl who is trying to strangle him only by shooting her in the head would not violate the necessity condition by indeed shooting her in the head. But this implication seems absurd. A necessity criterion that is that permissive can hardly function as a limiting condition anymore,⁴⁷ but even Ferzan is well aware of the fact that the necessity criterion is indeed supposed to be a *restriction* on the permissibility of self-defense.⁴⁸

Ferzan’s response will be, of course, that “the perception of this risk has been culpably caused by the [aggressor]. Thus, he cannot stand to complain that [the defender] has acted on the very perception that he [the aggressor] has created.”⁴⁹ She is absolutely right. (Of course, she does not explain why the aggressor does stand to complain if the defender kills a lethal aggressor *knowing* that this is unnecessary, that is, she does not explain why there should be a necessity condition *at all*. But again, no forfeiture theorist really explains this.) Yet, as far as the *permissibility* of self-defense is concerned, her response presupposes that only those limitations on self-defense are warranted the absence of which would give the aggressor cause for complaint. However, as already noted, there is no good reason for making such an assumption, and once one drops it and realizes that the source of the necessity criterion need not lie in the rights of the aggressor (alone), the path is cleared for a more restrictive – and more *reasonable* – rendering of the necessity condition.

Thus, it seems that an account of self-defense that distinguishes liability from justification – not only analytically, but for practical purposes and under normal circumstances – leads to far more plausible and intuitive results. German law, for instance, holds that if a defender out of fear and confusion (as opposed to vengefulness, for example) reacts with excessive force to an unjust attack, then this excessive force, being excessive, is not justified, but the defender normally does not owe the aggressor any compensation.⁵⁰ Thus, German law acknowledges the intuition that seems to underlie Ferzan’s account: since it was the aggressor’s aggression that evoked the fear and confusion of the defender, a fear and

⁴⁶ Kimberly Kessler Ferzan, “Justifying Self-Defense,” *Law and Philosophy* 24(6) (2005), pp. 711-749, at 739.

⁴⁷ Daniel Statman also complains that Ferzan’s account “seems to make the necessity condition mute as a constraint on self-defense.” See his “Can Wars Be Fought Justly? The Necessity Condition Put to the Test,” *Journal of Moral Philosophy* 8 (2011), pp. 435-51, at 444.

⁴⁸ Ferzan, “Justifying Self-Defense,” p. 730.

⁴⁹ Ferzan, “Culpable Aggression,” p. 691. I substituted the first “[aggressor]” for Ferzan’s actual “defender” since the latter is clearly a slip of the pen on Ferzan’s part. Compare also “Justifying Self-Defense,” p. 740.

⁵⁰ Günter Spendel, “Überschreitung der Notwehr,” in Hans-Heinrich Jescheck, Wolfgang Ruß, and Günther Willms (eds.), *Strafgesetzbuch, Leipziger Kommentar, Großkommentar, Bd. 2, §§ 32-60* (Berlin: De Gruyter, 1985), §33, Rn. 77-82.

confusion for which the defender cannot be blamed (while he could be blamed for vengefulness), the aggressor does not stand to complain. However, German law does not then take the implausible further step of relaxing the necessity condition to such a degree that it can hardly function as a *restraint* on justified self-defense anymore. Thus, it seems that keeping justification and liability apart pays off in terms of plausibility.

3. *An Alternative to Rights-Forfeiture Theory: The Precautionary Rule Account*

3.1 *Necessity*

What might the source of the necessity condition then be, if it does not stem from the rights of culpable aggressors? Well, instead of being (only) about the rights of guilty people such as culpable aggressors, its (additional) underlying rationale might be about the protection of *innocent* people. There is, after all, obviously the risk that you misinterpret the situation and the allegedly culpable lethal aggressor is not culpable at all, but innocent (maybe he had a psychotic break due to drugs a villain slipped into his drink). Abiding by the necessity criterion reduces the risk that innocent people get unnecessarily killed.⁵¹ In other words, what the necessity condition tells you in the original Frank case, as far as justification is concerned,

⁵¹ Note that I am not here concerned with the harming of *bystanders* or with what McMahan calls “wide proportionality.” The self-defense justification justifies force used against attackers (morally innocent or not); the force used against *bystanders* (even if it emanates, as a side-effect, from a defensive act against an attacker), however, would have to be covered by a choice of evils or necessity justification. See Boaz Sango, *Self-Defense in Criminal Law* (Oxford and Portland: Hart Publishing, 2006), pp. 117-121; see also Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 179-181. McMahan, (incorrectly) once subsumed the “collateral” killing of innocent civilians under the self-defense justification, but he nevertheless distinguished the proportionality of this “collateral killing” from the proportionality of the force used against the unjust combatants, using the terms “wide proportionality” and “narrow proportionality,” respectively. See *Killing in War*, pp. 20-32. Meanwhile, however, he connects wide proportionality with a lesser evil justification, narrow proportionality with a “liability justification,” and allows the self-defense justification to be a “combined” lesser-evil and liability justification. See McMahan, “Proportionality and Just Cause,” esp. pp. 438-442. McMahan’s conceptual innovations are not helpful. There is no need to talk about “wide” or “narrow” proportionality. There are simply different kinds of justifications, and they come with different standards of proportionality, as is well known in the legal literature. Moreover, the self-defense justification in law – and this is also how I understand this justification for moral purposes – is what McMahan calls a “liability justification”; it is not a “combined” justification. Acts that are justified by the self-defense justification are not only justified as the lesser evil, but *just* – they do not wrong the attacker. Thus, questions of “wide proportionality” (or of “wide necessity,” for that matter) are simply beyond its scope. Compare also Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014), p. 155, n. 38.

might not be: “No, please, don’t kill Frank, because if a vicious would-be murderer is killed without defensive need, then he suffers a terrible wrong by getting what he wanted to dish out to others” – it might not tell you this partly because many people will not find it particularly convincing. Rather, it may be read as: “No, please, don’t kill Frank *unnecessarily* because you might not have the whole picture and because of this you might accidentally and needlessly kill an innocent person.” Thus, while the necessity condition of the justification of self-defense does as a matter of fact *also* protect liable, guilty people like Frank, its underlying ethical rationale is the protection of *innocent* people.⁵²

And *innocent* aggressors *can* stand to complain if they are *unnecessarily* harmed, and thus they do retain their rights against unnecessary harm. “Look who’s talking” is *not* an equally apt reply to both Frank and an innocent aggressor. Whether people are responsible actors or not obviously matters a great deal for moral questions. This is also shown in the fact that the innocent aggressor could justly respond: “What do you mean, ‘Look who’s talking’? You reproach me with not doing to others as I would have them do to me? But you are wrong. If *I* had been of sound mind and *you* had attacked me under the influence of drugs, I would *not* have used unnecessary force to stop you.” Provided this is the honest truth – and of course it can be – this is a valid rejoinder. This rejoinder, however, is not available to Frank. He *was* of sound mind (in the sense that he was a responsible actor) and nevertheless did use unnecessary force even *without* anybody attacking him. Thus, if he were to claim that *he* wouldn’t have used unnecessary force against you if you had tried to kill him, then this would be an obvious lie.

Abiding by the rule not to harm aggressors unnecessarily will reduce the likelihood that the defender unnecessarily harms innocent people and thereby violates their rights. Insofar as morality requires agents not to impose unfair and unreasonable risks on others, it requires defenders to abide by the necessity requirement. This requirement is thus *indirectly* based on rights (though not of aggressors but of innocent people), but violating it is not the same as violating a right. The rationale is also not an overall “rights-utilitarianism” that tries to reduce overall rights-violations: rather the rationale is an agent-relative requirement to take reasonable and fair precautions to reduce *one’s own* likelihood of violating other people’s rights. Thus, the necessity requirement is (at least also) a *precautionary rule*.⁵³

⁵² Robert F. Schopp, *Justification Defenses and Just Convictions* (Cambridge: Cambridge University Press, 1998), pp. 83-87, relies on the idea of an “error preference” to justify the *proportionality* requirement in *law* – while he does not explicitly state it, the idea here is of course that one should try one’s best to avoid errors that victimize innocent people. He does not apply this idea, though, to the *necessity* requirement (neither in law nor in morality).

⁵³ While, as I pointed out, a number of authors who embrace rights forfeiture claim that one can also forfeit one’s rights against unnecessary self-defense, the only author amongst them (to the best of my knowledge) who actually tries to provide an explanation for why there is a necessity requirement for morally justified self-defense anyway is Miller, “Killing in Self-Defense.” He explains that “there is the obligation not to destroy what has value, and the life of the attacker still has, or may well have, value. And there is the related obligation to be merciful to those who have wronged you. Other obligations involve considerations that are

One might be tempted to object against this rationale of the necessity condition that surely sometimes one can be fairly certain that one is indeed dealing with a culpable aggressor – and why not use unnecessary force in such a case? But the answer to this question remains the same: because even if one can be fairly certain, one cannot be *absolutely* certain. Absolute certainty is unattainable for human beings (at the very least with regard to empirical matters). Thus, even if one is “fairly” certain that one is dealing with a culpable aggressor – by using unnecessary force one would *still* run the risk of inflicting unnecessary harm on an innocent person.

But can one not sometimes be permitted to run this risk? Yes, one can, but not for the mere fun of it. Rather, one needs a very good reason to do so, one needs a *justification* for running this risk. Note that the justification cannot lie in self-defense itself. The necessity criterion adopted here is one that requires the use of the mildest means among *the most effective* ones, that is, it does not ask the defender to shoulder additional risks for the benefit of a culpable attacker (and a defender can justifiably believe herself to be confronted with a culpable attacker without having to be certain).⁵⁴ Thus, given the necessity criterion adopted

external to the attacker. For example, there may be dire consequences for the community if defenders generally kill their attackers. Hence the existence of laws to the effect that one must not kill in self-defence unless one has to.” (Ibid., p. 333) However, first, the obligation (which is often easily overridable, anyway, for example if the destruction of what has value serves to create even more value) stands at best in the way of the unnecessary *destruction* (killing) of a culpable aggressor, but not in the way of other unnecessary ways of making him suffer (and one can make another person suffer without diminishing the person’s value); second, I do not see any particular reason to assume an “obligation to be merciful” towards a culpable would-be rapist or murderer; third, there are also often dire consequences for the families of people who are laid off, but that does not yet make laying them off unjustified (and, of course laying off X – or killing him – might have very good consequences for the family of another person, who now gets the job), moreover, sometimes families might be significantly better off if their domestic tyrant does not return home; and fourth, in a society where everyone has an organ donor card, where many people need donor organs, and which has the technological means to usefully harvest the organs of practically everyone who gets killed, a principle prohibiting the unnecessary killing of lethal attackers would have dire consequences for society, but it seems that it intuitively would still be valid: namely as an agent-relative requirement to take precautions, especially when engaging in dangerous behavior, against unnecessarily harming *innocent* people – the point is not a consequentialist and agent-neutral concern about “dire consequences for the community” or minimizing overall harm, but a concern about minimizing the harm *oneself* (hence “agent-relative”) will unnecessarily inflict on *innocents*. Be all this as it may, my explanation of the necessity requirement is compatible with Miller’s, and more important than the differences between our accounts is the presence of alternatives to accounts that conceive the necessity requirement as *intrinsic* to rights forfeiture.

⁵⁴ This version of the necessity criterion basically follows German law. See Erb, “Notwehr,” p. 1296. I defend this criterion at length from a moral perspective in “Self-Defense and the

here, it is an analytical truth (like “Circles are round”) that using unnecessary force will not improve on the defense as compared to the use of necessary force.

So what other justifications could there be? Punishment would be one possibility. If the defender has sufficiently strong reasons to believe that a culpable aggressor would get away without receiving proportionate punishment if he does not inflict this punishment on the aggressor right now, then this might provide a justification to inflict harms on him that are not necessary by the standards of the self-defense justification.⁵⁵ Another possible justification would be the so-called justifying emergency justification. For example, if the defender has sufficiently strong reasons to believe that the attacker would, after the defender has stopped his attack with necessary force, quickly recover and kill another innocent person, without anybody able to intervene and stop him, then this could provide what German law calls a justifying defensive emergency justification to kill or otherwise incapacitate him with an amount of force that was not necessary by the standards of self-defense.⁵⁶

In other words, the fact that there can be extreme cases where one may inflict more force on an aggressor than was necessary according to the standards of the self-defense justification does not show that these standards are not valid. It rather shows that in extreme cases there might be *another* justification available, a justification to *override* the limits set by the self-defense justification. (Speed limits, for instance, are no less valid for the fact that under special circumstances – for example when one needs to rush someone to the hospital – they may be justifiably infringed on the basis of a necessity justification.)

Thus, conceiving of the necessity requirement of the self-defense justification as a precautionary rule for the protection of the innocent makes good sense. However, in protecting the innocent certain trade-offs have to be made, which is why I mentioned fairness

Necessity Condition,” unpublished ms.

⁵⁵ Some might be tempted to object that private punishment (at least in the form of severe punishment of adults) or “vigilantism” can “never” be justified. However, this absolutist position, like many absolutist positions, is deeply implausible. For a criticism of absolutism, see Uwe Steinhoff, *On the Ethics of Torture* (Albany: State University of New York Press, 2013), pp. 149-150. For defenses of some forms of private punishment and “vigilantism,” see Travis Dumsday, “On Cheering Charles Bronson: The Ethics of Vigilantism,” *The Southern Journal of Philosophy* 47 (2009), pp. 49-67; Kelly D. Hine, “Vigilantism Revisited: An Economic Analysis of the Law of Extra-Judicial Self-Help or Why Can’t Dick Shoot Henry for Stealing Jane’s Truck,” *The American University Law Review* 47 (1998), pp. 1221-1253, esp. 1252-1253 (there the author argues for a “justified vigilantism defense”); Elizabeth Ayyildiz, “When Battered Woman’s Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante,” *The American University Journal of Gender, Social Policy and the Law* 4(1) (1995), pp. 141-166; Uwe Steinhoff, “Does the State have an Exclusive Right to Punish?”, unpublished ms.

⁵⁶ The German self-defense justification only applies to defense against imminent or ongoing attacks. The justifying defensive emergency justification deals with threats that do not come in the form of ongoing or imminent attacks. The restrictions of the latter justification are more stringent than the restrictions of the former.

and reasonability. After all, the defender or the people he or she defends are *ex hypothesi* also innocent, and therefore there must be limits to the concessions one makes to avoid harming innocent people by one's actions. In addition, *reciprocity* considerations can also play a role. Suppose you live in a village where due to something in the water people quite regularly and innocently suffer from psychotic episodes and start insulting and even attacking other persons. You have so far always used only necessary defensive force, but after seeing again and again that all others are less scrupulous and obtaining proof that they also act towards you with excessive force during your psychotic episodes, you decide to adapt to their standards. It seems that this is justifiable.

3.2 Proportionality

Let us turn to proportionality. It is certainly not unreasonable to assume that some insults are so grave and disgusting that people who culpably offend innocent persons with them become liable to violent counter-measures, for example a punch on the nose.⁵⁷ If this happens to them, they cannot complain. They might, however, be able to complain if someone cuts out their tongue to stop their insults. Thus, while, as I argued above, the necessity requirement is not intrinsic to rights-forfeiture in the case of a fully culpable aggressor (but is in the case of an innocent aggressor), it would appear that a proportionality requirement is intrinsic to rights-forfeiture *even* in the case of a culpable aggressor.⁵⁸

However, some jurisdictions, at least in the past, had no official proportionality requirement. German law in the Weimar republic, for instance, deemed it permissible to shoot at (and possibly kill) an apple thief if the defender (of the property) had no other means of stopping the thief.⁵⁹ A German legal adage applied to self-defense holds that "Right need not yield to wrong."⁶⁰ Some might find this "barbaric," but calling it barbaric is not really an argument and certainly does not show that the German position is mistaken. As Robert Schopp, for instance, nicely shows, if one gives a sufficiently fleshed out example where a culpable apple thief turns into a *very* culpable, indeed absolutely disgusting and despicable apple thief, our intuition that lethal force against him would wrong him is severely

⁵⁷ According to German law, self-defense can be directed against all kinds of ongoing or imminent rights-violations, not only against rights-violations that come in the form of the use of force. This also seems to be the morally correct stance to take.

⁵⁸ Again, the McMahanian category of "wide proportionality" is of no concern here. See note 51 above.

⁵⁹ Rafael van Rienen, *Die "sozialethischen" Einschränkungen des Notwehrrechts: Die Grenzen privater Rechtsverteidigung und das staatliche Gewaltmonopol* (Baden-Baden: Nomos, 2009), pp. 181-182.

⁶⁰ What is meant by this is that Right need not yield to Wrong *for the benefit of the aggressor* (it might have to yield for the benefit of innocent and non-threatening persons). As mentioned before, the self-defense justification is concerned with the infliction of harms on the aggressor. Harms inflicted on bystanders are dealt with by the German justifying emergency justification, that is, by a necessity justification. See note 51.

weakened.⁶¹

But, again, luckily there is no reason to assume that the *only* source for a proportionality limitation on self-defense are the *rights* of the culpable aggressor, and this is what provides us with an argument against the Weimar position: the precaution-rationale of the previous section can be straightforwardly applied to the proportionality condition.⁶² After all, even if punching someone to stop his insults would not, given the nature of the insults and the culpability of the offender, violate his rights, it is reasonable to assume that the risks of misunderstandings, rights-violating escalations and over-reactions, and of hitting an innocent person (remember the village) are so great that, from the perspective of justification, far stricter proportionality restrictions should be imposed than the perspective of liability or rights-forfeiture calls for.⁶³

3.3. *The Subjective Element of Self-Defense and Reasonability*

The reader will recall the Jill/Bill/Gabi case from above. I stated that in order to not let attempted batterers like Gabi (let alone attempted murderers) off the hook, Western self-defense law posits a subjective element for justified self- or other-defense: the defender must at least *know* or *be aware* of the fact that the objective conditions of justified self-defense are fulfilled, or he must even *reasonably believe* it (I subscribe to this latter version). I also stated that rights forfeiture theorists have extreme difficulties in explaining this requirement: it seems counter-intuitive that aggressors like Jill only “forfeit their claims about actions that are *responsive* to their attacks.”⁶⁴ It appears that Jill simply has no standing to complain to Gabi. (Right-forfeiture theories of punishment face parallel problems.)

⁶¹ Schopp, *Justification Defenses and Just Convictions*, pp. 83-84.

⁶² Schopp does this in the context of law. He argues that a defender has “no obligation to observe rules of proportion or retreat against the culpable aggressor” (ibid., p. 83), that is, he does not owe it to the aggressor to abide by such a rule. Yet, Schopp states: “The rough rule of proportion represented by the dominant contemporary approach to the justified use of defensive force can be understood as an attempt to guide these decisions according to the moral principles presented here with adjustments for practical limitations and defensible error preferences.” (Ibid., p. 85) Such error preferences thus give rise to what I call precautionary rules. Schopp applies this rationale only to proportionality in the legal context (and interestingly does not apply it to the necessity condition at all), but I see no reason why morality should not also express error preferences and accordingly guide people with precautionary rules. Note, incidentally, that (unlike Schopp, it seems [see ibid, pp. 83-84]) I am willing to *also* recognize a proportionality requirement that has to do with the rights of an aggressor, see the main text. I do agree with him, however, that the stringency of such requirements is often severely exaggerated.

⁶³ Thus, it is wrong to claim, as David Rodin in “Justifying Harm,” *Ethics* 122(1) (2011), pp. 74-110, at 79, does, that “a person can only be liable to a particular harm that is proportionate in the circumstances.” A harm can be disproportionate all things (that is, *both* liability and justification) considered although the targeted person is liable to it.

⁶⁴ Ferzan, “Culpable Aggression,” p. 696.

Yet, again, fortunately the subjective element of the self-defense justification can be explained *without* an appeal to the rights of culpable offenders, let alone to a supposed right of culpable offenders not to be harmed “for the wrong reasons.” Consider the following example: Robert, a superb marksman, who always wanted to randomly kill a person in a theater, goes into a theater, draws his gun, and randomly shoots (unnoticed by anybody else) a person there. The shot is not lethal, but incapacitates the victim, who later wakes up in a hospital. It turns out, however, that this “victim,” a Mafia hitman, went into the theater to murder Robert, and was in fact in the process of drawing his own gun when Robert’s bullet surprisingly hit him. Did Robert wrong the hitman? Hardly. Due to the fact that the hitman was about to murder Robert and his attack was imminent, he has forfeited his right to life, and most certainly his right not to be incapacitated. The hitman simply has no valid complaint against Robert.

Given that he is such an excellent shot and that nobody else noticed his shooting, he did not actually endanger a concrete person in this concrete situation, nor did he frighten anybody. Yet, it is clear that a morality that enjoins agents not to violate the rights of the innocent (extreme circumstances covered by necessity justifications set aside), must, on pain of irrationality, also enjoin persons to take reasonable *precautions* to avoid violating the rights of the innocent. It therefore cannot be so lenient – or negligent – to allow people to impose “inchoate” unreasonable threats on other people.⁶⁵ (German law speaks of *abstrakte Gefährdungsdelikte*, that is, “offenses of abstract endangerment.) If morality would allow acts of this kind, it would allow *practices, kinds* of behavior that *will* harm the innocent for no good reason. Robert’s act was clearly immoral even *without* violating anybody’s rights: it is not permissible to go into theaters and randomly shoot at people, not even if, accidentally, one shoots the “right” person. By acting in the irresponsible way he did act, Robert might not have *violated* the *rights* of the innocent theatergoers (let alone the rights of the hitman), yet he nevertheless showed insufficient respect for them. A deontological morality cannot permit such a blatant disrespect for innocent people and their rights.

Thus, an agent who engages in some act that is normally prohibited since it would normally violate the rights of innocent people must be required to have a *reasonable belief* that the objective justifying circumstances are fulfilled precisely in order to keep him from unreasonably endangering others.⁶⁶ And keeping him from unreasonably *endangering* others

⁶⁵ Again, there are those who would describe Robert’s act as culpable but nevertheless *permissible*. See, for instance, Hurd, *Moral Combat*, pp. 263-264 for a similar example but a different interpretation. For reasons against such interpretations, see the discussion of “culpable right action” above. Compare also note 19.

⁶⁶ It has been suggested to me that one could simply make a distinction between subjective and objective justification here. However, one cannot answer substantive legal or moral questions simply by making distinctions. To wit, if the question is whether the legal self-defense justification requires a subjective element or not, one cannot answer this question by saying: “Let’s distinguish between subjective and objective justification.” What we want to know is under which conditions a certain act is *actually* legally or morally justified, and either actual justification (instead of only believed or imagined justification, which is no

also reduces the likelihood that he *actually* violates other people's rights to a reasonable level. This rationale of the subjective requirement need not make any appeal to the rights of aggressors.⁶⁷

Conclusion

While some authors explicitly grant the analytical distinction between rights forfeiture or liability on the one hand and permissibility or justification on the other, they nevertheless claim that a culpable aggressor's liability to self-defensive force or to punishment explains the defender's permission to engage in self-defense or to punish the aggressor (at least in a large array of cases, that is, barring special circumstances, like necessity prohibitions). In contrast, I argued that rights-forfeiture by itself is *no* path to permissibility at all (even barring special circumstances). The limiting conditions of self-defense – necessity, proportionality (or no gross disproportionality), and the subjective element – are different in the context of forfeiture than in the context of justification (and might even be absent in the former context). In particular, I argued that a culpable aggressor, unlike an innocent aggressor, forfeits rights against proportionate defense, including *unnecessary* proportionate defense. Yet, I demonstrated that this stance need not lead to the abandonment of the necessity condition of *justified* self-defense in the case of a culpable aggressor. Since justification and liability are not the same, there is no reason to assume that the necessity condition of justified self-defense must be explained under an appeal to the aggressor's rights. Parallel arguments apply to the other limiting conditions. Accordingly, I also sketched alternative explanations of the proportionality requirement and the subjective element. All these alternative explanations appeal to a *principle of precaution*: instead of explaining the unjustifiability of unnecessarily harming a culpable attacker by an appeal to the rights of the attacker himself, one can also, and better, explain it by a requirement to take *reasonable precautions* against violating the

justification at all) does require a subjective element or it does not. Derek Parfit, for example, who makes such distinctions, states that some “act of ours would be *wrong* in the *fact-relative* sense just when this act would be wrong in the ordinary sense if we knew all of the morally relevant facts.” Derek Parfit, *On What Matters, Volume One* (Oxford: Oxford University Press, 2011), p. 150. This definition, however, does not answer any important substantive questions about when someone is, *in fact*, justified. One reason for this is that Parfit does not give a clear definition of the “ordinary sense” of justification in the first place. Compare Saba Bazargan, “Killing Minimally Responsible Threats,” *Ethics* 125(1), pp. 114-136, at 115, note 2. Another and in the present context more important reason is that this definition of “*wrong* in the *fact-relative* sense” does not answer the question whether someone's subjective state of mind also belongs to the “morally relevant facts” or not. This, however, is precisely what we would like to know if we are interested in substantive answers as opposed to conceptual fragmentation.

⁶⁷ Compare also Fletcher, “The Right Deed for the Wrong Reason,” esp. p. 301. However, Fletcher's reference to the concern about possible *future* victims of *dangerous persons* misses the *agent-relative* concern morally responsible people should have about their *own* dangerous behavior.

rights of *innocent* people.⁶⁸

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