Proportionality in the Liability to Compensate*

Todd Karhu

ABSTRACT. There is widely thought to be a proportionality constraint on harming others in self-defense, such that an act of defensive force can be impermissible because the harm it would inflict on an attacker is too great relative to the harm to the victim it would prevent. But little attention has been given to whether a corresponding constraint exists in the ethics of compensation, and, if so, what the nature of that constraint is. This article explores the issue of proportionality as it applies to the liability to compensate. The view that some perpetrators are not liable to pay full compensation because doing so would be disproportionately burdensome is clarified and defended, and it is asked what view we should adopt instead. A key step in that enquiry is an argument that someone is liable to bear the cost of compensating for an injury if and only if she would have been liable to bear that same cost in defense against that same injury *ex ante*.

Philosophers typically recognize two constraints on the liability of attackers to sustain defensive harm. According to the necessity constraint, an attacker is liable only to the minimum harm necessary to prevent the harm he threatens.[1] I am not liable to have my leg broken to prevent me from breaking your arm, for example, if you could have prevented it by spraining my ankle instead. According to the proportionality constraint, an attacker is not liable to defensive harm that is too great relative to the harm it would avert. I am not liable to be killed to prevent me from breaking your finger—even if there is no other way for you to stop me.

Just as those who threaten harm are not liable to more force than is necessary to prevent the harm they pose, so it seems that those who have already harmed are not liable to incur a greater

* Forthcoming in *Law and Philosophy*.

[1] For ease of presentation, I will assume that necessity and proportionality are 'internal' to liability, such that a person is not liable to harm that is not necessary or not proportionate.

cost than is necessary to compensate their victims to a given degree. Even if my total-loss car is a result of your reckless driving, I am not entitled to insist that you buy me an identical replacement from the more expensive of two dealerships.

Is there, similarly, a proportionality constraint on the liability to compensate? This article explores when, if ever, a perpetrator may escape liability to compensate on the grounds that to do so would be disproportionately burdensome relative to the benefit it would provide the victim. It proceeds as follows. In §1, I take up some conceptual matters and make a preliminary case against the position that compensatory liability has no proportionality constraint. In §2, I argue for a thesis I call the 'substantive symmetry' of compensation and self-defense. According to that thesis, a perpetrator is liable to the cost of compensating for an injury *ex post* if and only if he would have been liable to bear that same cost in defense against that same injury *ex ante*. In §3, I draw out the implications of the substantive symmetry for an account of proportionality in the liability to compensate. In §4, I explore how having the option of providing partial compensation may release someone from liability to provide full compensation. I conclude in §5.

1. The Limits of Proportionate Compensation

Is there an upper limit to the amount of compensation a perpetrator is liable to pay to offset the harm he has caused his victim? According to *the stringent view*, nothing short of full compensation is enough, for a perpetrator is always liable to fully compensate his victim. Provided there is more that he can do for her, until she has been fully compensated there is more that he is liable to do for her.

I think the stringent view has considerable appeal, at least in the abstract, and a number of philosophers appear to endorse it.[2] After all, how could someone who has not yet fully compensated his victim for harm he has caused her, and who is able to compensate her further, claim to have done enough?

The question of how much compensation is enough is to a certain extent ambiguous, however, for in fact there are two ways to

---

[2] See David McCarthy, "Liability and Risk", *Philosophy and Public Affairs* 25(3) (1996): pp. 238–262 at p. 244; Peter Vallentyne, "Responsibility and Compensation Rights", in S. De Wijze, M. H. Kramer, and I. Carter (eds.), *Hillel Steiner and the Anatomy of Justice: Themes and Challenges* (New York: Routledge, 2009), pp. 85–98; Saul Smilansky, "A Difficulty Concerning Compensation", *Journal of Moral Philosophy* 10(3) (2013): pp. 329–337; Robert E. Goodin, "Theories of Compensation", *Oxford Journal of Legal Studies* 9(1) (1989): pp. 56–75.

measure compensation. On the one hand, we can measure it by the cost to the perpetrator of providing it. Call this the 'compensatory cost'. On the other hand, we can measure compensation by how much of the victim's harm is offset by receiving it. Call this the 'compensatory benefit'. [3]

If the stringent view seems obviously correct, this may be because we are assuming that compensatory cost and compensatory benefit are the same. Thus it has been argued that perpetrators are always liable to fully compensate their victims because doing so simply shifts a burden from the victim onto the perpetrator.[4] But when the compensatory cost of full compensation would greatly exceed its compensatory benefit, the stringent view can yield counterintuitive results.

To take a radical example, suppose that I am at fault for breaking your mailbox, and that for whatever reason the only way I can pay to repair it is to sell my kidney. I think many would find it hard to believe I am liable to fully compensate you here, which is what the stringent view seems to prescribe. And the reason why I am not would seem to be that the cost of fully compensating you is disproportionately large relative to the compensatory benefit I would provide you in doing so.

It may be thought that the stringent view can avoid giving such a harsh judgment in a case like this. Thus it has been suggested that while a perpetrator is indeed liable to fully compensate his victim whatever the cost, as a matter of justice other people (third parties) can be liable to compensate *him* in turn, to make up for his bad luck in becoming liable to bear an enormous burden by virtue of committing what is a relatively minor fault.[5] I doubt that this

---

[3] Where necessary, I will understand a person to be harmed, or to be bearing a burden or cost, to the extent that her wellbeing is decreased relative to what it would have been if the harm were not done, or the burden or cost not borne. Correspondingly, someone is compensated for harm insofar as her wellbeing approaches the level it would have been at if not for the harm. For an instructive discussion of these issues, as well as a defense of a counterfactual-wellbeing account, see Victor Tadros, "What Might Have Been", in J. Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014), pp. 171–92.

[4] McCarthy, "Liability and Risk" at pp. 241–4. On the prevalence of this justification in tort law, see Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970), p. 28.

[5] Vallentyne, "Responsibility and Compensation Rights" at pp. 91–93. See also Jeremy Waldron, "Moments of Carelessness and Massive Loss", in D. Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995), pp. 387–408.

strategy could save the stringent view, however. If I am liable to compensate you, I have an obligation to do so whether or not others satisfy their obligations to compensate me in turn; one person's duty to rectify misconduct does not go away merely because others fail to discharge theirs. If you steal my car, and someone else steals yours, you are liable to return my car whether or not the other person will return yours. But if we initially found it unduly harsh to hold me liable to sell my kidney to repair your broken mailbox, it is doubtful that we would *not* find this unduly harsh when we add that I myself am owed, but never will receive, compensation from others.[6]

Supposing that we do reject the stringent view, we may be tempted by the thought that a compensation claim is disproportionate *whenever* its compensatory cost exceeds its compensatory benefit. But while the stringent view seems too harsh in some cases, this lenient view is not harsh enough in others. Suppose it would cost you $1,000 to repair some property you have wrongfully damaged, and that its owner would derive from that sum the same benefit that you do. If wiring the money requires $100 in bank fees, you seem liable to pay the full $1,100. You are the wrongdoer, after all, so you can hardly complain at being asked to give up a little more than the victim receives in order to ensure she is not left worse off due to your misconduct. In short, the upper limit to the compensatory cost that a perpetrator can be liable to bear is higher than the magnitude of the compensatory benefit he can provide by bearing it.

How quickly is that upper limit reached? Would you, for example, be liable to pay even $10,000 if that were the only way for a victim to recover $1,000 in damages? Our answer to this question may depend in part on how culpable we believe you to be. The answer may also depend on what options for partial compensation are available—a matter to which I shall return in §4. Even with those questions answered, however, in rejecting the stringent view and its overly lenient alternative, we may seem to have little to guide us when deciding whether compensation claims are or are not proportionate.

To determine the limits of proportionality in compensation, however, I submit that we can look to proportionality in self-defense, on which a great deal has been written and about which many of us have robust intuitions. In the next section, I will give

---

[6] Note that a defender of the stringent view cannot reply that I am liable to fully compensate you only if others compensate me (for to do so is just to deny the stringent view).

three arguments for a thesis I call the *substantive symmetry* of compensation and self-defense and defend it against a counterargument. According to the substantive symmetry, the liability to compensate is the mirror image of the liability to bear defensive harm. By this I mean that a person is liable to bear the cost of compensating for an injury if and only if she would have been liable to bear that same cost in defense against that same injury *ex ante*. If true, the substantive symmetry fully determines the limits of proportionate compensation given the correct account of proportionality in self-defense. We will therefore be free to draw on judgments about defensive proportionality to reach substantive conclusions about the role of proportionality in determining compensatory liability.

2. The Substantive Symmetry of Compensation and Self-Defense

A. Arguments for the Substantive Symmetry

My first argument for the substantive symmetry proceeds from the observation that a mismatch between proportionality in compensation and proportionality in self-defense would mean either that some harms could be defended against but need not be compensated for, or else that some harms should be compensated for but should not be defended against. Both options have implications that are difficult to believe.

To begin with, suppose that proportionality is sometimes more permissive on the defensive end; sometimes, a victim may impose a cost on a perpetrator in defense against the harm he threatens, but a similarly situated victim would not be entitled to demand that same cost in order to make up for the same harm once it eventuates. The problem with this result is that it seems to unfairly burden victims who, through no fault of their own, lack the ability to defend themselves. Consider someone who has a physical impairment which renders her unable to avert an attack. If the upper limit of proportionality is higher on the defensive end, then that person might not be entitled to receive any compensation, even though someone else, who differed only in that she lacks the physical impairment, could have justly indemnified herself against the entire harm by defending herself.

Now suppose that proportionality is sometimes more permissive on the compensation end. This means that sometimes a victim is entitled to demand compensation for harm, even though she would not have been permitted to impose an equivalent cost on

her attacker *ex ante* to prevent the same harm from eventuating. This claim implies, absurdly, that a victim can be required not to defend herself, even though the result is that she gets harmed and can later demand an amount in compensation that harms the attacker more than simply defending herself would have done. It also has the unpalatable implication that some victims have a perverse moral incentive to allow themselves to be harmed. Suppose it would be disproportionate for a victim to inflict a given cost on a threatener to prevent some portion of the harm he poses. By assumption, it might not be disproportionate to demand that he bear the same cost in order to offset that same amount of the harm *ex post*. In such a case, by allowing herself to be harmed, a would-be victim could indemnify herself against a greater portion of the total harm she faces.

My second argument for the substantive symmetry draws on a compelling underlying rationale for the liability of attackers to sustain defensive harm. Obviously enough, sometimes when we harm others we also wrong them. When defensive harm inflicted on a potentially liable person is both necessary and proportionate, however, then its infliction does not wrong that person, by which I mean that doing so neither violates, nor merely infringes, his rights. Now, it is difficult to see how one person could inflict nonconsensual harm upon another without so much as infringing his rights unless the latter already had a duty to sustain it. So it would seem to follow that an act of defensive harming is (narrowly) proportionate only if its subject has a duty to sustain it.

What could explain why a threatener has a duty to bear some or all of the harm that his would-be victim can impose on him? A plausible answer is that the duty is one of redistributive justice.[7] When inflicting defensive harm would satisfy the necessity condition, some cost will be borne by somebody. A natural explanation for why it is the threatener who should bear the bulk of that cost is that he is responsible for the fact that *someone* must bear a cost. Because people have a duty not to excessively externalize the costs of their choices onto others without their consent, threateners have a duty to internalize a greater portion of the total cost that must in the end be borne by somebody.

---

[7] On the idea that a person's liability to defensive force is grounded in the just redistribution of harm, see Jeff McMahan, "The Basis of Moral Liability to Defensive Killing", *Philosophical Issues* 15(1) (2005): pp. 386–405; Phillip Montague, "Self-Defense, Culpability, and Distributive Justice", *Law and Philosophy* 29(1) (2010): pp. 75–91; Kerah Gordon-Solmon, "What Makes a Person Liable to Defensive Harm?", *Philosophy and Phenomenological Research* 97(3) (2018): 543–567.

If that rationale is correct, and the duty not to excessively *externalize* costs is what explains the duty of threateners *to* internalize them, then it is hard to see why the limits of proportionality would differ between defensive harm *ex ante* and compensation *ex post* when other things are equal. The perpetrator's actions and the potential cost that must be borne by somebody are the same in either case, and it seems unlikely that, when other things are equal, how much cost a person is forbidden to externalize onto others would depend on whether he externalizes it directly (through an unaverted threat) or indirectly (through unpaid compensation).

The final argument for the substantive symmetry involves identifying and then factoring out a contingent difference between many cases of self-defense and compensation. To do so, it is necessary to first distinguish two modes of correcting for harm, or for the prospect of harm: negating and offsetting.[8] An act aims at *negating* a harm when it aims to approach the possible world in which the harm was not done in the first place. In the context of corrective justice, the restoration of stolen property—as opposed to mere compensation for its loss—aims at negating (rather than offsetting) harm. By contrast, an act aims at *offsetting* a harm when it aims to bring about an outcome that is merely *no worse* for the victim as the world in which the harm was not done. Financial compensation for pain and suffering aims to offset (rather than to negate) harm.

Now, one manifest difference between self-defense and compensation which has not, to my awareness, been acknowledged is this: while paradigmatic acts of self-defense aim to negate harm, those of compensation aim merely to offset it. Attending to this difference helps to reveal the deeper structural relationships between the two forms of liability. Specifically, the *ex post* analogue of defensive harm is restoration, not compensation, and the *ex ante* analogue of compensation is not defending oneself against a harm, but offsetting it before it occurs.

Thus, in evaluating the substantive symmetry, we should be comparing cases of defensive harm with cases of negating harm *ex post*, and cases of compensating for harm with those of offsetting harm *ex ante*. It will be easiest to make those comparisons with some stylized examples. In the following four cases, I enter the

---

[8] On this distinction the context of corrective justice, see Adam Slavny, "Negating and Counterbalancing: A Fundamental Distinction in the Concept of a Corrective Duty", *Law and Philosophy* 33(2) (2014): pp. 143–173. For related distinctions in that context, see Goodin, "Theories of Compensation" and John Gardner, "What is Tort Law For? Part 1. The Place of Corrective Justice", *Law and Philosophy* 30(1) (2011): pp. 1–50 at pp. 28–37.

scene having already lost my left leg for reasons unrelated to you, and you act so as to cut off my right leg. Assume that you and I are equally well off *ex ante*, that the prudential value for me of keeping my right leg is equal to that of having a left leg and I am indifferent between having either, and that there is only one way for me to counteract your assault (in other words, if I am able to defend myself, I am not be able to claim compensation, and vice versa).

First, compare two cases of negating:

(1) *Self-defense*: Before you are able to act, I can prevent you from cutting off my right leg, though doing so will have the effect that you suffer some degree of harm H.

(2) *Restoration (ex post negating)*: After you cut off my right leg I can, with minimal pain and effort, reattach that same leg in full working order, though doing so will have the effect that you suffer H.

And next, compare two cases of offsetting:

(3) *Ex ante offsetting*: I cannot stop you from cutting off my right leg, but before you are able to attack me I have the opportunity to proactively regrow my left leg, though doing so will have the effect that you suffer H.

(4) *Compensation*: I cannot reattach my right leg, which you have just cut off, but I can regrow my left leg, though doing so will have the effect that you suffer H.

We can categorize the four outcomes in which I act as follows:

	Negating harm	Offsetting harm
Ex ante	(1) *Self-defense* Keep my right leg.	(3) *Ex ante offsetting* Regrow my left leg.
Ex post	(2) *Restoration* Lose and regain my right leg.	(4) *Compensation* Regrow my left leg.

When we compare any of these four acts with its counterpart in the same column, it seems to me that the difference between them could not make a difference to liability. This is clearest when we

compare the instances of offsetting: offsetting a harm *ex ante* is just collecting compensation for it before it occurs. If that is the only way for me to attain restitution, it is hard to believe that whether *H* is proportionate or not could depend on whether the compensation is collected before or after the harm eventuates.

Provided the threat is already engaged and certain to occur, the difference is nothing but timing, which could not seriously make a difference to the cost the perpetrator is liable to bear. If a backpacker breaks into an unoccupied cabin and burns the furniture there to keep himself warm, most people would agree that he is liable to fully compensate the owner for the damage to his property.[9] If that is so, I can see no reason why the owner could not demand that the backpacker pay upfront the full damages he will cause by entering, assuming that to do so would impose no additional risk on him, as anyway collecting compensation after the fact does not. Imagine the cabin sits on a mountain frequented by overprepared hikers who always carry a credit card. If the owner would be entitled full compensation for the damage to his property, would he not be justified in installing a credit card machine on his cabin door such that, in the event of a blizzard, hikers would be automatically charged upfront the cost of the damages they will do by entering? To do so seems like little more than a way of ensuring that he receives the compensation he will eventually be owed. Could it really make a difference whether their credit cards are charged before or after they do the damage?

When it comes to *negating* harm, there is one important difference between doing so *ex ante* and doing so *ex post*. The restoration of a lost good will almost always involve an unavoidable temporary loss of that good, while successful defense can mean that not even a temporary loss occurs. Could that difference show that the limits of liability to defensive harm differ from those of liability to bring about restoration? I believe that it could not. For we ought to view a successful restoration claim as an instance of defense against the *permanent* loss of the good.

Consider a variation on (1) (*Self-defense*) in which a temporary loss is unavoidable *ex ante*:

> (1*) Whatever I do, you will soon cut off my right leg, but if and only if I strike first, the severed leg will be preserved so that it can be easily reattached thereafter, although striking first will also cause you to suffer *H*.

---

[9] Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life", *Philosophy and Public Affairs* 7(2) (1978): pp. 93–123 at p. 102.

The difference between (1*) and (2) (*Restoration*) really is just one of timing, and accordingly it seems highly implausible that there is any value of *H* such that inflicting *H* on you is proportionate in the one case but not in the other.

Of course, when a victim can, by engaging in necessary self-defense, ensure that she incurs not even a temporary loss, then the amount of harm the attacker is liable to bear may differ from the amount he would be liable to bear in order to negate the injury *ex post*. For, in the latter case, the victim will have suffered a greater loss overall. But that is not an argument against the equivalence of *ex ante* and *ex post* negating; rather, it is a matter of the threatened harm being smaller when it can be averted than in the case in which it eventuates and can only be negated *ex post*. And this difference would typically call for additional remedy. So the limits of liability will sometimes differ between negating by defense and negating by restoration, but that difference is not to do with when the negating occurred.

These observations cast serious doubt on the notion that proportionality *ex ante* could differ from proportionality *ex post* when we hold constant whether the comparison is between instances of negating or instances of offsetting. The other step in the argument is to show that the limits of proportionality also do not differ on the basis of whether an act involves negating or offsetting harm.

The equivalence of negating and offsetting harm would be easy to establish if I could show that the harm some act does its victim is *fungible*, in the sense that its moral relevance *qua* harm is just the extent to which it impacts the victim's wellbeing. Then, negating and offsetting would be interchangeable in the requisite way, for the cost a perpetrator is liable to bear would be independent of the manner in which he is required to bear it (whether by offsetting the harm or by negating it). But I do not believe that harm is fungible in that way. It is not up to a thief whether to return the goods he has stolen or else compensate his victim for their loss. It would seem that a perpetrator is, in the first place, liable to negate a harm, and may compensate his victim instead only when negating the harm is impossible or the victim consents to his doing so.[10] Nor, it should be added, does it seem that a *victim* may unilaterally claim compensation for harm if the perpetrator can negate it in-

[10] A complication arises when it is possible for a perpetrator to negate a harm but much more costly for him to do so than to offset it. Here I believe that the perpetrator is liable to negate the harm provided the cost of doing so would not be disproportionate. If negating the harm would impose on him a disproportionate cost, then he can be liable only to offset it.

stead and prefers to do so. In short, if negating is possible, it seems the perpetrator is liable to do so and only to do so.

Be that as it may, it is very hard to accept that the cost a perpetrator is liable to bear to offset a given amount of his victim's loss could differ from the cost he is liable to bear to negate the same amount of the loss, other things being equal. To see this, it is useful to compare cases of harm that cannot be fully rectified and whose perpetrator can go some way toward making up for it only by partially *negating* it, with cases in which the perpetrator can do so only by partially *compensating* for it. It seems that the highest cost a perpetrator can be liable to bear to offset his victim's loss to a given extent could not be *higher* than the cost he would have had to bear to negate it to the same extent, for what would circumscribe the perpetrator's liability to offset a harm, if not the extent to which he would have been liable to negate it, were doing so possible? But it also seems that the highest cost a perpetrator is liable to bear to offset a victim's loss to a given extent could not be *lower* than the cost he would have had to bear to negate it if doing so had been possible. Surely wrongdoers cannot get away with less, merely because the best way to make up for the harm they have done—negating it—is unavailable.

B. A Challenge and a Reply

Those are my arguments for the substantive symmetry of the liability to defensive harm and the liability to compensate. On their basis I conclude that other things being equal, to the extent, and only to the extent, that a perpetrator would have been liable to defensive harm *ex ante*, he is also liable to pay compensation *ex post*. Before examining the implications for compensatory liability, however, I want to defend the substantive symmetry against a challenge which Jeff McMahan has taken to show that "one cannot infer that a person is liable to defensive action *ex ante* from his being liable to pay compensation *ex post*".[11]

Consider two scenarios, one of which we have seen already:

---

[11] Jeff McMahan, "Debate: Justification and Liability in War", *Journal of Political Philosophy* 16(2) (2008): pp. 227–244 at p. 233. See also Uwe Steinhoff, "The Liability of Justified Attackers", *Ethical Theory and Moral Practice* 19(4) (2016): pp. 1015–1030.

Feinberg's Cabin:[12] A backpacker is trapped in a blizzard. He breaks into a cabin and burns the furniture there to avoid freezing to death.

Vincent v. Lake Erie:[13] Lake Erie Transportation Company tied its ship to Vincent's dock in the middle of a storm to safeguard the ship and crew. Doing so damaged the dock.

Almost everyone would agree that in these scenarios the trespassers acted permissibly. The transport company was later ruled to have been acting under the privilege of private necessity, as would the backpacker have rightly been. More importantly for our purposes, it would *not* have been permissible for the homeowner to forcibly prevent the backpacker from entering his cabin, or for Vincent to prevent the transport company from mooring at his dock. Yet although it would not have been permissible to prevent these acts of trespass, it is also reasonably clear that the intruders, in acting as they did, became liable to compensate their victims after the fact. Thus Feinberg wrote of his example that "almost everyone would agree that [the backpacker] owes compensation to the homeowner",[14] and Vincent sued the transport company and was awarded $500 in damages.

Because in these scenarios the threatened parties lack the permission to defend themselves against a given injury *ex ante*, but are nevertheless entitled to be compensated for that same injury *ex post*, they may seem like counterexamples to the substantive symmetry. Thus McMahan writes that Feinberg's case presents "[a]n obvious example in which the one form of liability does not entail the other".[15]

Whatever asymmetry these cases seem to present is merely apparent, however, and results from a failure to identify the relevant costs and benefits when making the comparisons. Consider Feinberg's Cabin. The challenge to the substantive symmetry we are considering takes the defensive analogue of the homeowner collecting damages to be his preventing the backpacker from entering the cabin. But collecting damages imposes on the backpacker the cost of repairing a cabin door and replacing some furniture,

---

[12] Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life" at p. 102.

[13] 124 N.W. 221 (Minn. 1910).

[14] Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life" at p. 102. See also Jules Coleman, *Risks and Wrongs* (Oxford: Oxford University Press, 1992), p. 293.

[15] McMahan, "Debate: Justification and Liability in War" at p. 233.

whereas barring his entry makes it the case that he will die. So while the cost the homeowner can avoid incurring is being held constant across the *ex ante* and *ex post* versions of the case, the harm that its avoidance will inflict on the backpacker is not.

The correct defensive analogue of the homeowner's exacting compensation *ex post* is actually his collecting payment from the backpacker upfront for the damages he will cause. Similar remarks apply to *Vincent*. It would be a mistake to take the defensive analogue of Vincent's collecting compensation to be his preventing the transport company from mooring. Rather, the analogue is doing $500 worth of damage to the ship to spare the damage to his dock. Provided these defensive acts would impose no additional danger on the intruders—as collecting compensation after the fact would not—neither act seems disproportionate, so in fact there is no asymmetry between the two forms of liability.

We can make the same point from the opposite direction. The compensatory analogue of the homeowner preventing the backpacker from taking refuge is not collecting compensation from him afterward. It is preventing the backpacker's life from being saved to recover the damages to his property. The compensatory analogue of Vincent preventing the moorage is later preventing the ship and its crew from being saved in order to recover $500 from them. Since virtually everyone would agree that a moral theory which permitted either way of exacting compensation is implausibly draconian, again, there is no asymmetry here.

3. From Proportionate Defense to Proportionate Compensation

Recall that according to the stringent view of compensatory liability, no compensatory cost is ever disproportionate relative to the compensatory benefit it would provide. Establishing the substantive symmetry should be enough to conclusively undermine the stringent view. For both morality and the law leave little doubt that some defensive harms are disproportionate relative to the harm they prevent. Incidentally, since almost everyone accepts that a threatener can be liable to *more* defensive harm than he threatens, the substantive symmetry also undermines the lenient view according to which a compensation claim is disproportionate *whenever* compensatory cost exceeds compensatory benefit.

Most importantly, however, the substantive symmetry also provides the resources to stake out a position between those two extremes. Suppose, for instance, that we want to know the maximum compensatory cost that one person can be liable to incur in order

to fully compensate another for breaking her wrist. Now assume that we judge it not typically disproportionate for one person to break someone's leg to prevent him from wrongfully breaking her wrist. If so, the substantive symmetry tells us that it not typically disproportionate to hold a person liable to bear a cost equivalent to a broken leg in order to compensate somebody for breaking her wrist.

Suppose next that we think it is typically *disproportionate* for a victim to break *both* of a perpetrator's legs to stop from him breaking her wrist. From this judgment and the preceding one, we can estimate the compensatory damages that proportionality permits a victim to claim for having had her wrist broken: at least as much as the equivalent of a broken leg, but less than the equivalent of two broken legs.

I have intentionally put this in general terms. Whether a token act of self-defense is proportionate will depend on the circumstances of the perpetrator and victim. But that is what we should want, for the same circumstances are surely relevant to a perpetrator's liability to compensate. It is also true that, even taking account of the circumstances, it is uncertain what compensatory cost is equivalent to a broken leg, for example. But this can be no objection to a determination of compensatory liability, since we already assign financial values to *victims'* non-pecuniary injuries when determining what it would take to offset harm they have suffered.

4. How Overall Liability Depends on the Possibility of Partial Compensation

The most straightforward examples of self-defense are those in which only one defensive act is available to the victim. Provided the defensive act meets the necessity condition, to test for liability we compare the harm the act would inflict with the harm it would avert. Likewise, when only one compensatory act is available to a perpetrator, determining whether he is liable to pay is a matter of comparing compensatory cost and compensatory benefit. In reality, however, a perpetrator can usually offset his victim's harm to greater and lesser degrees. Here, I will explore two ways in which the possibility of paying partial compensation may affect the overall cost a perpetrator is liable to incur.

Suppose that if you do nothing at all to defend yourself, your attacker will break your arm. By breaking your attacker's leg, you can avert his attack completely. Alternatively, by breaking his toe,

you can ensure that you escape with just a badly sprained finger. About this case we might make the following two judgments. Your attacker would have been liable to have his leg broken to prevent his breaking your arm, had that been your only way to defend yourself at all. But since you can avert nearly all of the harm he threatens by inflicting much less harm on him, your attacker is liable only to have his toe broken. Even though he is the one threatening you, it is still asking too much of him, we may think, that he suffer a broken leg rather than a broken toe so that you can avoid a finger sprain.

There is some disagreement over how to conceptualize this comparative dimension of defensive liability, but that is only a technical issue.[16] What matters for our purposes is that we can infer from it, via the substantive symmetry, that a perpetrator can escape liability to provide a greater compensatory benefit by having the option to provide a somewhat lesser benefit but at a far lower cost. Suppose that fully compensating your victim by 10 units of wellbeing would require you to give up 40 units of wellbeing yourself. If that is your only compensatory option, you are probably liable to incur the 40-unit cost. But imagine that, rather than benefiting your victim by 10 units at a cost to you of 40, you could benefit her by 9 units at a cost of only 10. In parallel to defensive liability, here you might be liable to provide only 9 units of compensation. Once you have given up the 10 units that are necessary to benefit your victim by 9, it may be asking too much of you that you sacrifice a further 30 units of wellbeing so that your victim can enjoy the remaining 1.

What is distinctive about this example is that the ratio of compensatory cost to compensatory benefit is smaller for a lesser benefit than it is for a greater one. And one might expect that it is only in such a case that a perpetrator can get away with providing a lesser compensatory benefit than the one he would be liable to provide were doing so his only compensatory option. After all, consider a perpetrator who would have been liable to give up 40 units in order to benefit his victim by 10 if that were the only way

---

[16] Some would construe it as a feature of the necessity constraint. See Seth Lazar, "Necessity in Self-Defense and War", *Philosophy and Public Affairs* 40(1) (2012): pp. 3–44; Jeff McMahan, "The Limits of Self-Defense", in C. Coons and M. Weber (eds.) *The Ethics of Self-Defense* (Oxford: Oxford University Press, 2016), pp. 185–209. Others construe it as a kind of proportionality. See Thomas Hurka, "Proportionality in the Morality of War", *Philosophy and Public Affairs* 33(1) (2005): pp. 34–66 at p. 37; Alec Walen, "Targeted Killing and the Criminal Law", in L. Alexander and K. Ferzan (eds.), *The Palgrave Handbook of Applied Ethics and the Criminal Law* (New York: Palgrave, 2019), pp. 753–771 at pp. 759–761.

to compensate her. If we accept that this perpetrator would have been liable to sacrifice even 4 units to benefit his victim by 1, then, provided the ratio of compensatory cost to benefit is constant across all of his options, we seem forced to conclude that he is liable to give up the full 40 units *whatever* other options he has. Once he has paid 4 to provide 1, he would seem unable to complain if asked to instead pay a total of 8 to provide 2, and then to instead pay a total of 12 to provide 3, and so on. For at each successive stage he is only being asked to pay another 4 to provide 1, which by hypothesis he is liable to do.

Nevertheless, there is reason to think that having the option to provide less compensation can release perpetrators from their liability to pay more even when the ratio of cost to benefit is constant across all of their compensatory options. According to the theory of prioritarianism in distributive justice, the injustice of a reduction in a person's wellbeing is greater the worse off it will leave her overall.[17] In analogous fashion, it seems to me plausible that the compensatory cost a perpetrator is liable to bear can depend not only on the size of the compensatory benefit it would bestow, but also on how badly off its bestowal would leave him in absolute terms.

To see how it would follow that partial compensation options can release perpetrators from their liability to fully compensate, suppose that regardless of how much you decide to compensate me for a wrongful injury, the cost to you of doing so will always equal the benefit to me. For simplicity, assume, as well, that if not for the injury, you and I would have been equally well off. Now, if compensating me had to be all or nothing, it seems plain that you would indeed be liable to bear the entire cost of full compensation. Then, full compensation really would simply shift a burden from the victim onto the perpetrator. But suppose that you can compensate me to virtually any degree between none and full. As you compensate me more and more, your wellbeing decreases as mine increases, eventually crossing the juncture at which we are equally well off. There is little doubt that you are liable to go beyond that. But if the total compensatory cost you are liable to incur can depend on how badly off its incurrence would leave you, then once you have continued to compensate me up to a point, to compensate me further might leave you sufficiently badly off overall that you are not liable to do it. Indeed, that point would be reached doubly fast, since presumably each marginal benefit to me matters less by the

---

[17] See Derek Parfit, "Equality and Priority?", in M. Clayton and A. Williams (eds.), *The Ideal of Equality* (New York: St. Martin's Press, 2000), pp. 81–125.

same token that each marginal cost to you matters more. In this way, you might be able to escape liability to fully compensate me because it is possible to compensate me only partially, even when the ratio of my compensatory benefit to your compensatory cost is the same across all of the compensatory options available to you.

5. Conclusion

I hope to have demonstrated the significance of the problem of proportionality in compensation, to have offered some conceptual resources for approaching it, and to have given some indication of the questions that a complete account of compensatory liability must address. I hope, too, to have established the existence of a proportionality constraint on compensatory liability. I have also had a more ambitious aim. Establishing the substantive symmetry of compensation and self-defense provides a clear path for determining when a compensation claim is disproportionate and the perpetrator therefore not liable to meet it. (This is to say nothing about the possibility the thesis opens for drawing on independent judgments about compensation to inform the ethics of self-defense.) Different readers may have different ideas about the limits of proportionate defense. But each should now have the resources to settle upon a well-defined view about proportionality in compensation.