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Self-Defense as Claim Right, Liberty, and Act-Specific Agent-Relative Prerogative*

Abstract
This paper is not so much concerned with the question under which circumstances self-defense is justified (I use the term self-defense to include other-defense), but rather with other normative features of self-defense as well as with the source of the self-defense justification. I will argue (as has been done before) that the aggressor's rights-forfeiture alone – and hence the liberty-right of the defender to defend himself – cannot explain the intuitively obvious fact that a prohibition on self-defense would wrong victims of attack. This can only be explained by conceiving of self-defense also as a claim-right. However, I will also argue (more innovatively) that a claim-right cannot ground the self-defense justification either. Rather, what grounds the self-defense justification and its particular strength and scope is the fact that self-defense is an act-specific agent-relative prerogative: a defender is allowed to give particularly grave weight to his interest in engaging in self-defense, which distinguishes self-defense from most other acts. This is not the same as saying that he has a right or a liberty to engage in self-defense. Thus, self-defense, understood as a normative concept, is a claim-right, a liberty-right, and an act-specific agent-relative prerogative.

Key words
act-specificity; agent-relativity; claim-right; justification; liberty-right; prerogative; rights-forfeiture; self-defense

Introduction

This paper is not so much concerned with the question under which circumstances self-defense is justified (I use the term self-defense to include other-defense), but rather with other normative features of self-defense as well as with the source of the self-defense justification: does it stem from the aggressor's forfeiting certain rights, or from a prior claim-right or liberty-right of the defender to defend himself against aggressors, or from still some other source? I will argue (as has been done before) that the aggressor's rights-forfeiture alone – and hence the liberty-right of the defender to defend himself – cannot explain the intuitively obvious fact that a prohibition on self-defense would wrong victims of attack. This can only be explained by conceiving of self-defense also as a claim-right. However, I will also argue (more innovatively) that a claim-right cannot ground the self-defense justification either. Rather, what grounds the self-defense justification and its particular strength and scope is the fact that self-defense is an act-specific agent-relative prerogative: a defender is allowed to give particularly grave weight to his interest in engaging in self-defense, which distinguishes self-defense from most

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other acts. This is not the same as saying that he has a right or a liberty to engage in self-defense. Thus, self-defense, understood as a normative concept, is a claim-right, a liberty-right, and an act-specific agent-relative prerogative.

1. Rights-Forfeiture Cannot Ground the Self-Defense Justification

Many authors try to explain the permissibility of self-defense (understood as including other-defense) in terms of rights-forfeiture (at least in paradigmatic cases involving an innocent victim and a culpable aggressor). The basic idea of such an approach is that the aggressor through his aggression forfeits his right to counter-attack, that is, he becomes liable to counter-attack: the aggressor 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,[1] and many subscribe to it even in the case of innocent attackers. 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 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.[2] This is a valid reason to conceive of self-defense against culpable aggressors in terms of a liberty-right as well: due to the aggressor's rights-forfeiture the defender gains a liberty to use force against the aggressor, that is, he would not wrong the aggressor by using such force (at least not if this use of force is proportionate and necessary).

However, while the rights-forfeiture and liberty-right approach to self-defense indeed explains certain normative features of self-defense, it nevertheless cannot explain the *permissibility* of self-defense: A person's mere *lack* of a right not to be harmed provides by itself no *justification* or *permission* to harm her. This problem has been noted by a number of critics of the rights-forfeiture account; rights-forfeiture theorists themselves, however, seem to largely ignore the problem or at least to completely underestimate its severity.

A case in point is David Rodin, who claims that the charge that forfeiture on the side of the aggressor cannot ground a right to or a justification of self-defense on the side of the defender reflects "a confused way of proceeding."[3] In fact, however, it is Rodin who proceeds in a confused and confusing way. One confusion lies in his often using the term "right" where he means a mere liberty. For example, he quite correctly states, referring to

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[1] Philosophers as diverse as Judith Jarvis Thomson, Kimberly Kessler Ferzan, Jeff McMahan, David Rodin, Yitzhak Benbaji, or Jonathan Quong, to just name a few, subscribe to it.

[2] 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," *Philosophia* (Online First, 2015), DOI 10.1007/s11406-015-9666-7.

[3] Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), p. 75.

the Hohfeldian framework on which he officially relies,[4] that if the aggressor forfeits his right to life, then "the defender has the right (liberty) to kill him."[5] True, but the point of the above-mentioned charge against rights-forfeiture theory is, of course, that the defender does not thereby have a *claim-right* or a *justification* to kill the aggressor.[6] And indeed, in a footnote Rodin then admits, using an example of Suzanne Uniacke, that "a cat may not possess a right to life, but this does not necessarily imply a positive right to kill it."[7] (I would add that it simply does not imply it, whether "necessarily" or not.) However, Rodin replies that

> [T]he liberty to kill in self-defense is properly described as a right for a number of related reasons: it consists in a liberty to kill in the context of a background presumption against such action, serves to demarcate and protect a legitimate interest of individual persons, and it acts as a precedent for deliberation of future action. The broader context is thus relevant to when a liberty constitutes a positive right. None the less self-defense fundamentally consists of a simple liberty to kill and is thus perfectly correlative with the status of the aggressor's right to life.[8]

It is unclear how these remarks address the objection, let alone overcome it. In fact, they are rather obscure.[9] The first thing one would need to know is what a "positive right" is supposed to be here. Libertarians distinguish between positive and negative rights, where the latter are rights against interference (for example, a right not to be killed) and the former are rights to the provision of some goods or the right to be helped by others.

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[4] Ibid., esp. pp. 17-21.

[5] Ibid., p. 75.

[6] That a person A has a *liberty*-right (a Hohfeldian "privilege") towards another person B to do x means that A is under no duty towards B not to do x. If she has a *claim*-right towards B that B do x, this means that B is under a duty towards her, A, to do X. But what about a claim-right of A against B that A himself does x? Hohfeld himself does not really consider a claim-right of this form, but such a claim-right is now usually understood as A's claim against B that B does *not interfere* with A's doing x. A mere liberty of A against B to do x, in contrast, is compatible with B's liberty to keep A from doing x. Incidentally, when in this text I talk about "rights" without further specification, I am referring, as is common practice (which is why Rodin's own idiosyncratic practice is so confusing), to claim-rights.

[7] Rodin, *War and Self-Defense*, p. 75, note 11.

[8] Ibid.

[9] I am not the first author to notice this. As Phillip Montague points out, "Rodin's argument for this position [that a liberty can function as a justification] is extremely obscure and, to the extent that it is comprehensible, it is probably fallacious." See Montague, "War and Self-Defence: A Critique and a Proposal," *Diametros* 23 (2010), pp. 69-83, at 71, n. 5. Montague's article is probably the most devastating criticism of the curious and rather confused use Rodin makes of Hohfeld and the concept of forfeiture in support of his own theory of self-defense.

However, my right to self-defense is clearly *not* a positive right in the sense of a right that *other* people help me. It is rather the right that *I* may defend myself.

Yet, Rodin seems to be taking the term "positive right" from Uniacke here, and her claim that "the fact that someone does not have a right to life does not in itself give me a positive right to inflict lethal force on him or her," seems for her to be another way of saying that it "cannot ground the *justification* of homicide in self-defence."[10] But, contra Rodin, a Hohfeldian liberty to kill is and remains a mere liberty to kill. It cannot be magically transformed into a justification to kill, and nothing is able to change this, least of all a background presumption *against* killing: if we are to assume that we *are not permitted to kill*, then we should certainly not suddenly feel permitted to kill only because we have a *mere liberty* to do so.

2. A "Positive Right to Self-Defense" Cannot Ground the Self-Defense Justification Either

There are further problems with Rodin's remarks, but I will address those problems in the next section. For now, it is noteworthy that Uniacke's own solution of the justification problem does not work either. She states that the "right of self-defence . . . grounds the justification of the use of force in self-defence against culpable and non-culpable, active and passive unjust threats."[11] She defines: "My having a positive right . . . means that I am wronged (treated or interfered with unjustly) by being deprived of the relevant interests without my consent."[12] Unfortunately, a small variation of her own cat example undermines her position as much as it undermines Rodin's. To wit, suppose all human beings (and other rational agents, if there are other ones) had promised you not to interfere with your killing a cat. Then we would wrong you if we interfered anyway, for we would have broken our promise (our promise created your right that we not interfere). So you have, on Uniacke's account, a positive right to kill a cat. But this certainly does not show that you are *justified* in killing the cat. Likewise, if I, out of gratitude (you saved my life) and since you asked for it, promise you not to resist your slapping me (maybe you suffer from psychotic breaks that induce you to slap other people and you are afraid of their violent reactions), then I would wrong you if I resisted. But that still does not make your slapping me justified. In others words: Uniacke is quite right that it is mysterious how the mere lack of some being's right not to be killed should provide you with a justification for killing it. However, it is equally mysterious why *our* duty *not to interfere* with your killing the being should give *you* a *justification* to kill it. The fact that our interference would wrong you does not make your act of killing justified. After all, as several authors have pointed out, there is (at least conceptually) a "right to do wrong." For example, the state and your fellow citizens would wrong you if they tried to interfere with your cheating on your spouse; however, that hardly makes your cheating *justified.*[13]

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[10] Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1996), p. 191, emphasis added.
[11] Ibid., p. 157.
[12] Ibid., p. 181.
[13] Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92(1) (1981), pp. 21-39; Ori J. Herstein, "Defending the Right To Do Wrong," *Law and Philosophy* 31 (3) (2012), pp.

Thus, it is simply wrong that a *claim-right* to self-defense, understood as a right that others do not interfere with one's self-defense, can ground a *justification* to engage in self-defense.

3. But a Right to Self-Defense Can Obviously Explain Why Interference Would Wrong Us – the Rights Forfeiture Approach Can't

Let us return to Rodin. He also makes the claim, as already quoted, that the "liberty to kill in self-defense . . . [also] serves to demarcate and protect a legitimate interest of individual persons."[14] In fact, however, a liberty to kill does *not* protect legitimate interests of individual persons, if for Rodin the protection amounts to enjoining third parties not to interfere with the exercise of the liberty.[15] The defender's Hohfeldian liberty to defensively kill an aggressor, after all, is by definition perfectly compatible with the liberty of others to keep him from killing the aggressor in self-defense.[16] Thus, as Sanford Kadish already pointed out a long while ago, appeals to rights-forfeiture cannot explain why the state would *wrong* us (as we certainly intuitively and quite rightly think it would) if it prohibited us from defending ourselves.[17] A *basic right* to self-defense, on the other hand, can explain that.

Moreover, the liberty to kill an aggressor does not even imply that the aggressor himself does not have the liberty to, or must not, defend himself against the defender's attack in turn. The defender's claim right against interference by the attacker can indeed arise by the attacker forfeiting his *liberty* to defend himself against the defender, however. (Curiously, Rodin does not discuss this point.) Yet, that would still not solve the challenge posed by Kadish: a claim-right against interference by the aggressor is not the same as a claim-right against interference by third parties or the state. More generally, the *aggressor's* forfeiture of claim-rights, liberties, or powers simply cannot explain why the defender comes to have claim-rights against *third parties*. The basic right to self-defense, again, can.[18]

4. The Right to Self-Defense Is Basic, Fundamental, That Is, It Is Not Derived from Other Rights

By a basic right, I mean a right that is not derived from other more fundamental rights.

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[14] Rodin, *War and Self-Defense*, p. 75, n. 11.

[15] Incidentally, Hohfeldian liberties are – if it matters – also not "precedents" of any sort.

[16] Hohfeld himself uses the term "privilege" to denote a liberty. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1919), esp. p. 36 and pp. 40-50.

[17] See Sanford Kadish, "Respect for Life and Regard for Rights in the Criminal Law," *California Law Review* 64(4) (1976), pp. 871-901, at 884.

[18] I have come across the objection that a "richer account" of right-forfeiture could be able to explain why the third parties may not intervene or why the aggressor may not defend himself. It is unclear how that would then still be merely an account of rights-forfeiture; and, in any case, lacking (as we do) an example of such a "richer account," this objection is merely an unsubstantiated and not particularly credible claim.

But could one not derive the right to self-defense from the liberal right of self-ownership, for example, that is, from the right to life, to one's body, or to one's property? One indeed hears people sometimes say: "If I have a right to property, I must also have a right to defend it." However, within a Hohfeldian framework this is simply wrong. It is neither logically nor conceptually impossible for people who enter into a social contract to *completely* waive their liberty and their right to *defend* their property without also waiving the right to their property. They might think, for example, that giving the state the exclusive right and liberty to defend their property will have better consequences than retaining a residual right and liberty to defend their property themselves if the state does not do its job. (Likewise, many people seem to think that even if the state does an imperfect job in punishing criminals, citizens nevertheless do not have a right or liberty to punish criminals themselves.) Thus, it is not the case that a right to property implies a liberty or a right to defend that property. The same holds for a right to life or a right to bodily integrity.

Appeals to more complicated rights seem also to be to no avail. For instance, it has been suggested to me that innocent persons have a natural, as it were, claim-right to do whatever will preserve their lives, unless doing so transgresses the rights of others.[19] Thus, if they can only preserve their life by defending themselves against an aggressor, they not only have a liberty but a claim-right (also against third parties) to defend themselves. Yet, it is unclear what the explanatory advantage of this suggestion is supposed to be. In order to apply it, that is, in order to identify its implications, one needs to already know (due to the "unless"-clause) what rights people have. I suppose that it would be presupposed that they do have a right to life or a right to property, for instance. However, if one is allowed to simply presuppose that there is a right to life or to property, why should one not likewise be allowed to presuppose a right to self-defense? The answer is: we should. The right to self-defense is a widely accepted part of "our" moral framework, it is simple, and it does the required explanatory work. In contrast, the complex right to self-preservation discussed above is an unnecessary and unestablished complication which by itself cannot even do the required explanatory work. Thus, we should apply Occam's razor and stick to a basic right to self-defense.

There is a further problem. Remember that the claim-right to self-defense is needed to explain why the state would wrong us if it prohibited self-defense (or why third persons would wrong us if they kept us from defending ourselves). Suppose now that some super-villain threatens to kill the members of the legislature of a country unless they pass and enforce a law prohibiting self-defense. The villain also credibly threatens to kill every law enforcement officer who does not enforce the law in circumstances where he has a chance to do so (for example, in circumstances where he is present when someone tries to defend herself against an attack). Suppose now further that Aggressor shoots at Victim to kill her. Victim draws her gun to shoot back, but Officer tries to wrest the gun from Victim's hand. Intuitively it is quite clear that Victim has a right to defend herself against both the original aggressor and against the police officer turned aggressor – after all, through his action Officer becomes complicit in Aggressor's attempt at Victim's life. Likewise, it is clear that Victim is not transgressing the rights of the police officer by

[19] This suggestion has been made by an anonymous reviewer.

defending herself against Officer's attack. Thus, Officer is transgressing Victim's right to self-defense, while Victim is not transgressing against any right of the police officer turned aggressor. By itself, the suggested right to self-preservation is incapable of explaining this asymmetry given that Officer needs to try to keep Victim from defending herself just as much as Victim needs to defend herself against both Officer and Aggressor. At this point one might be tempted to resort to the right to life, claiming that by trying to keep Victim from defending herself Officer is violating Victim's right to life, which would activate the "unless" proviso of the putative right to self-preservation, while, conversely, Victim is not violating the right to life of Officer by trying to defend herself against Aggressor. As already suggested, this explanation has no explanatory advantage over the alternative explanation, according to which there is a right to self-defense, which, of course, is only violated by Officer, not by Victim.

More important for present purposes, however, is that one cannot only waive one's right to self-defense while retaining one's right to life; one can also, conversely, waive one's right to life while maintaining one's right to self-defense. A painting of Van Gogh does not lose its value only because its owner waives his property right over it, and the fact that it is unowned therefore does not provide someone else with a justification for destroying it.[20] If someone does try to destroy it for the mere fun of it, the former owner seems to be justified in defending the painting within the limits of necessity and proportionality. Hence, likewise, a person's life does not lose its value only because the person waives her right to life. If she waives her right to life, someone who tries to kill her would not violate that right by trying (and not even by succeeding) (just as the would-be destructor of the Van Gogh would neither wrong the former owner nor the picture), but given the value of her life and given that she has *not* waived her right to self-defense, the person is still intuitively justified in defending herself. In addition, since the person's waiving her right to life provides the aggressor only with the *liberty* to attack the person, but not with the right to do so, the aggressor cannot complain if the person defends herself.

Thus, there is simply no reason to assume that a person's right to self-defense depends on her right to life (or her right not to be harmed, for that matter). This is further confirmed by the intuition that Victim would be wronged by Officer's attempt to keep her from defending herself even if Victim had indeed waived her right to life. Again, this waiver would not diminish the value of her life, nor would it give the aggressor any justification to attack her. Why then should Victim not be justified in defending herself? If she is, however, and if, furthermore, it is the case (as it intuitively clearly is) that even under these circumstances Officer violates the right to self-defense of Victim while Victim, by defending herself against him, does not violate a right of Officer, then the problem arises that this asymmetry cannot be explained by the putative general right to do what one needs to do to preserve one's life in conjunction with the presupposition that Victim has a right to life.[21] Rather, it is explained by a specific right to self-defense –

[20] Compare section 1 above.

[21] Note also that the asymmetry cannot be explained by an appeal to the means/side-effect distinction or an appeal to intentions. Officer need not intend Victim's death (nor any harm to Victim) any more than Victim need intend the death of Officer. Victim's death

which is violated by Officer, not by Victim. Thus, it is the right to self-defense that is doing all the explaining here.

It therefore seems that we have to accept that if there is a claim-right to self-defense, it is a basic, fundamental right. Trying to derive it from other, allegedly more fundamental or comprehensive rights is either mistaken or offers no explanatory advantages.

5. Even the Conjunction of Rights-Forfeiture and "Limiting Conditions" Cannot Explain Certain Features of the Self-Defense Justification

Uniacke argues that the "moral limits of the right of self-defence," like necessity, proportionality (and, as I would argue, imminence and a certain subjective element, namely reasonable belief in the presence of the objective justifying circumstances) "cannot *ground* a positive right of self-defence." This is because "[u]nlike justified killing . . . in circumstances of necessity, the use of necessary and proportionate force against an unjust threat *in self-defence* does not violate its victim's right to life."[22] On the next page, she then introduces the right of self-defense as a remedy for this problem. Obviously, however, if the aggressor has *forfeited* his right to life, then killing him would *not* violate his right to life. Thus, it would seem that an approach *combining* the limits of the right of self-defense with the aggressor's having forfeited his rights against attack might well provide a justification of self-defense. But if this combined approach really succeeds, then Uniacke's motivation for introducing the right of self-defense vanishes (setting aside the issue that the right to self-defense cannot explain the self-defense justification anyway, as we already saw in Section Two).

Does it succeed? Uniacke nowhere shows otherwise; in fact, she does not address this question, and as far I can see, other theorists of self-defense have not addressed it either. So let us address this issue now.

Consider, for instance, the following situation. Norbert, perhaps for religious reasons, but in full possession of his mental capacities, states: "If ever someone needs to kill me to save his own life, then he may do so. I waive my right to life under such circumstances."[23] Imagine further that Catherine needs 100,000 dollars to save her life via an expensive medical treatment, and her only way of getting the money and thus her treatment is to kill innocent Norbert, since someone who dislikes Norbert has offered

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will only be a side effect (in case the aggressor does the killing) of the law-enforcement, not its intended aim. (If Officer enforces the law *by* killing Victim, then killing Victim is a means to his ends. But likewise, if Victim secures her ability to defend herself against the aggressor *by* killing Officer, than killing Officer will also be a means to Victim's ends). Of course, what Officer does to Victim does *in fact* (if successful) prevent Victim from saving his life; but what the Victim does will also (if successful) prevent Officer from saving his life.

[22] Uniacke, *Permissible Killing*, p. 156.

[23] Some, of course, might claim that it is not possible to waive one's right to life. I see no reason to accept such a claim, however. In any case, the example can easily be adjusted (for example, Catherine might only be able to avoid pain by inflicting it on Norbert, where Norbert has waived his right that such pain not be inflicted on him). I think the doubts about the permissibility of inflicting this pain on Norbert would remain.

Catherine the money in return for murdering him. Thus, killing Norbert would in a straightforward way be proportionate if we assume (as we want to do in the context of this example) that the lives of Norbert and Catherine are of equal value. Let us also further assume that Catherine is aware of the fact that killing Norbert is a proportionate and necessary means for her to save her life and of the fact that Norbert does not have the right not to be killed under such circumstances (since he has waived this right). Is Catherine now justified in killing Norbert?

This is doubtful. For example, one might think that there is a moral prohibition to kill an innocent person in order to save one's own life – whether that innocent person has waived her right to life or not. Consider also that waiving a right to life is not the same as consenting to be killed. To vary the example, suppose Norbert needed Catherine's kidney to survive, and in order to get it signed a contract in which he explicitly waives his moral right not to be killed under the circumstances described above. Yet, when the time comes, he says: "Don't kill me, don't kill me" – that is, he does *not* consent (which does not undermine his previous signing of the contract and thus his rights waiver). Is it really so clear that Catherine may kill him?

A further problem is that the combined approach does not quite render the kind of justification that we usually connect to self-defense. To wit, let us change our example so that now Norbert is a famous scientist on the brink of inventing a drug to save thousands of people from Ebola (and there is no alternative way of saving those people). By killing innocent Norbert, Catherine would prevent many people from being saved from succumbing to Ebola. It seems to me here that Catherine is *not* morally allowed (she certainly isn't legally) to kill Norbert and cash in on her hit.

Yet, if Norbert had *attacked* Catherine or someone else, for that matter, it seems she would be morally allowed (she certainly would be legally) to defend herself or the other person. In fact, it seems that would be true even if Norbert had been an *innocent* attacker (for example, if he had attacked under the influence of a mind-altering drug that a villain slipped into his drink). The proportionality constraint of the legal and moral self-defense justification does *not* require a defender to forego self- and other-defense and sacrifice her life or the life of another attacked person for the greater good. This constraint is not some kind of consequentialist calculus, either in morality or in law.[24] The self-defense

[24] This is not very surprising, of course. If self-defense were a consequentialist calculus, then this, it seems, would imply that in all cases (all else being equal) where a defender can only save his life by killing the aggressor the defender should allow himself to be killed if the aggressor is a happier person than the defender but kill the aggressor if the aggressor is a less happy person than the defender. A consequentialist calculus, after all, demands the maximization of happiness (or some equivalent like utility), and while, all else being equal, killing unhappy aggressors for the sake of the survival of happy defenders does maximize happiness, killing happy aggressors for the sake of the survival of unhappy defenders does not. Indeed, the very talk of a right of self-defense could be taken to suggest that the proportionality constraint cannot be a consequentialist calculus, since rights are usually understood as "trumping" consequentialist considerations – at least up to a point. However, a claim-right to self-defense is a right against the interference of others and can therefore at best trump *their* consequentialist reasons for

justification does not compare all social harms threatened by the attack with all the social harms that the defense would produce, but it seems to in fact merely compare the severity of the attack with the severity of the counter-measures.[25]

But this, of course, requires some explanation. To recapitulate, the problem is that there seems to be a constraint against killing persons, even if the persons do not have a right not to be killed (because they waived it, for example), and this constraint becomes stronger if killing the innocent person would have dire consequences for third parties. Yet, in the case of aggressors, even of innocent aggressors, this constraint is overcome and, moreover, the dire consequences for third parties of killing or harming the aggressor may largely be ignored. The combined approach cannot explain this and is therefore inadequate.

6. Self-Defense is Also an Act-Specific Agent-Relative Prerogative

What, then, could the explanation be? One might think that being killed by aggressors is a greater evil than, for instance, accidental drowning, so that, all else being equal, justified defenders avert a greater evil than persons who save others from threats that do not come in the form of aggression. Yet, it is in fact not very likely that death by aggression is *much* more evil than death by accident or natural forces. Victor Tadros, for instance, invites us to consider a situation where you have to choose between taking a way home where bandits will set their wolves on you and you will be seriously injured, and another way home where a wild pack of wolves will attack you on their own and seriously injure you.[26] He states that this difference might make the second way home preferable to the first one – but only slightly so. "A relatively small reduction in the risk of being harmed can outweigh the interest that we have in others recognizing our moral status."[27] In other

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interference but not one's own consequentialist reasons for abstaining from self-defense.

[25] Uwe Steinhoff, "Jeff McMahan on the Moral Inequality of Combatants," *Journal of Political Philosophy* 16 (2008), pp. 220-226, at 224-225. See also Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), pp. 41-42, and note 3; and Magnus Reitberger, "License to kill: is legitimate authority a requirement for just war? *International Theory*, 5(1) (2013), pp. 64-93, at 79. Of course, that self-defense is not a consequentialist calculus does not imply that consequences do not count at all. If the number of people who are prevented from being saved by killing Norbert becomes high enough, killing Norbert might well become unjustifiable.

[26] Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), p. 105.

[27] Ibid., p. 106. See on this issue also Peter Singer, "Bystanders to Poverty," in N. Ann Davis, Richard Keshen, and Jeff McMahan (eds.), *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (Oxford: Oxford University Press, 2010), pp. 185-201, at 195-197. Singer, of course, believes that in the end we ought to help the larger number of victims of poverty instead of helping a smaller number of victims of genocide. I think, however, that we are neither under an obligation to help genocide victims if this means risking our own lives, nor it is clear to me that we are obligated to help the victims of poverty at all. At the very least, Singer's famous shallow pond analogy does not show that we are, or so I have argued elsewhere. See Uwe Steinhoff, "Drowning the Shallow

words, if the first road home where only slightly safer, we would probably prefer that road. Of course, one might claim that what happens on the first road is still the far greater evil, regardless of what our preferences are. Yet disconnecting the concept of evil in this way from our actual preferences and aversions seems to amount to little more than a dogmatic and quasi-religious stipulation.

Another potential explanation would appeal to the concept of *retribution*. According to (certain forms of) retributivist theories, proportionately punishing culpable wrongdoers is a value in itself; the fact that someone is a culpable wrongdoer hence provides one with a (of course defeasible) reason to punish him. One might ask what this has to do with self-defense, since self-defense is often strictly distinguished from punishment. In fact, however, acts of self-defense will empirically often also be acts of punishment: the defender will intend both to defend himself and to punish the aggressor.[28] Moreover, one can also adopt a wider account of retributivism, holding that proportionately *harming* culpable wrongdoers or making them *suffer* is a value in itself, whether this suffering is produced by intentional *punishment* or not. Most self-defensive acts will harm their targets or make them suffer. Thus, part of the difference between killing or harming an aggressor in self-defense and killing or harming an innocent non-threatening person like Norbert who has waived his right to life could perhaps be explained by the fact that the former act has the added value of making culpable wrongdoers suffer, and this added value might be sufficient to tip the scale in favor of harming the aggressor.

Yet, while this idea (depending on how plausible one finds the idea that the suffering of wrongdoers is intrinsically valuable) might have some traction in the case of self-defense against aggressors, it only applies to *culpable* wrongdoers, but not to innocent ones (like psychotic attackers or mistaken attackers – people who reasonably but wrongly believe that they are under attack and must therefore "defend" themselves, thereby turning into aggressors).

Thus, we are still in need of an explanation for the full scope of the self-defense justification. I suggest that the reason why one may kill or harm an innocent or culpable aggressor in self-defense even if killing or harming him has dire consequences for third parties, while one may not kill non-threatening Norbert in the examples above, is that there is a specific "agent-centered prerogative" of self-defense.[29] Samuel Scheffler has postulated what could be called a *general* personal prerogative. He states: "[A]n 'agent-centered prerogative' says that each agent is permitted to devote a certain proportionately greater weight to his or her own projects than would be licensed by an exclusive appeal to

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Pond Analogy: A Critique of Garrett Cullity's Attempt to Rescue It," available at http://philpapers.org/rec/STEDTS.

[28] Steinhoff, *On the Ethics of War and Terrorism*, pp. 49-50. Compare also George P. Fletcher, "Punishment and Self-Defense," *Law and Philosophy* 8(2) (1989), pp. 201-215.

[29] Compare also Michael S. Moore's concept of "strong permission." See his *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2010), pp. 39-40. Moore does not discuss the difference between this concept on the one hand and liberty-rights, claim-rights, and justifications on the other. In my view, the prerogative *explains* the justification or "permission."

an impersonal calculus."[30] However, there might be prerogatives tied to specific *kinds* of acts, so that a person engaging in *those* acts might be permitted to give even greater weight to "projects" in the form of such acts than to most of her other projects, and she might hence be permitted to impose *even more* costs on others than the general personal prerogative would allow. Such act-specific prerogatives are not particularly mysterious entities. Rather, they are the mirror image of a certain interpretation of rights that is not part of Hohfeld's analysis but compatible with it. On a Hohfeldian account, a claim-right against another person (for example, the claim-right not to be killed) imposes a duty on that person. The Hohfeldian analysis, however, says nothing about the strength of that duty. Yet, most people are not rights-absolutists, that is, they think that at least some rights can be overridden and hence the duty against the right holder justifiably infringed. But even then, it seems that the very fact that the other person has a claim-right of a certain strength would obligate one to give one's duty not to infringe the right in question the proper *weight* (according to the strength of the right).

Thus, a justification to infringe the right in question would not be valid if it had not accorded the right its proper weight. In other words, while a claim-right *obliges* the duty holder to give the right holder's interest in exercising her right the proper and thus considerable weight when deciding to override it or not, a prerogative *allows* the prerogative holder to give her interest in exercising her prerogative considerable weight. Thus, if there can be act-specific rights (for example a right to self-defense), there can also be act-specific prerogatives (which, of course, can be overridden if the stakes are high enough, just as rights can be overridden.) It seems to me that self-defense is just such a kind of act. In fact, there might be many acts of this sort, connected to prerogatives of varying strength. The important point, however, is that there are also acts that are not connected to a prerogative: there is *no* prerogative for killing innocent persons who have no right not to be killed.

It is this distinction between acts that come with a prerogative and acts that do not that explains the normative difference between acts of killing or harming in self-defense and acts of non-defensively killing or harming people who have waived their right not to be killed. This difference cannot be satisfactorily explained by the former avoiding more evil than the latter, nor by the fact that the former can be retributive while the latter cannot. Nor can it be explained by a liberty or a claim-right to self-defense. The liberty only means that by defending oneself against aggressors one does not violate their rights. It

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[30] Samuel Scheffler, *Human Morality* (Oxford: Oxford University Press, 1993), p. 103-104. That a prerogative is agent-relative does not mean that it is egocentric: the agent's projects can involve caring for other people, for example his children. Thus, a prerogative cannot only exist for literal self-, but also for other-defense. Note also that unlike Jonathan Quong, "Killing in Self-Defense," *Ethics* 119 (2009), pp. 507-537, I do not claim that the permission to give special weight to one's own interests or projects can override an innocent person's right not to be killed. Moreover, there is no evidence that Quong is aware of the problem that I have identified here, namely that the prerogative is already necessary for justifying the killing of non-attacking people who have *no* right not to be killed. For a critique of Quong, see Uwe Steinhoff, "Justifying Defense Against Non-Responsible Threats and Justified Aggressors."

cannot make harm inflicted on others more acceptable. Nor can a claim-right: it merely implies that others must not interfere with a self-defender's infliction of harm on an aggressor (they might well interfere with his inflicting harm on bystanders[31]). Other and better explanations, however, do not really suggest themselves – apart from the explanation in terms of an act-specific agent-relative prerogative, and this explanation does indeed do the required work. Thus, as long as we do not have a better explanation, this explanation wins out by default. Moreover, it seems that this explanation is quite plausible in its own right.

Conclusion

Conceiving of self-defense as both a claim-right and a liberty-right is necessary to explain certain important features of self-defense. However, neither a claim-right nor a liberty right nor a combination of them can *justify* self-defense. Combining a liberty-right with the limiting conditions (turning them also into justifying conditions), however, might go some way towards justifying self-defense. However, it does not go far enough: it cannot account for the particular strength and weight of the self-defense justification. To wit, the fact that a defender may defend himself and others even if this prevents many others from being saved calls for an explanation, and the only viable explanation seems to be one in terms of an act-specific agent-relative prerogative. Thus, self-defense, understood as a normative concept, is neither only a right and a liberty, nor is it satisfactorily explained by rights-forfeiture or by a combination of rights-forfeiture and the limiting conditions. Rather, to grasp the normative dimensions of self-defense one must also, in addition to all these elements, conceive of self-defense as an act-specific agent-relative prerogative.[32]

[31] See on this point Steinhoff, *On the Ethics of War and Terrorism*, pp. 95-97; "Rights, Liability, and the Moral Equality of Combatants," *The Journal of Ethics* 13 (2012), pp. 339-366; and "The Liability of Justified Attackers," unpublished ms.

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