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Self-Defense and the Necessity Condition

Abstract:
Rights forfeiture or liability are not a path to the permissibility of self-defense (not even barring extraordinary circumstances), and the necessity condition is not intrinsic to justified self-defense. Rather, necessity in the context of justification must be distinguished from necessity in the context of rights forfeiture. While innocent aggressors only forfeit their right against *necessary* self-defense, culpable aggressors also forfeit, on grounds of a principle of reciprocity, certain rights against *unnecessary* self-defense. Yet, while culpable aggressors would therefore not be *wronged* by certain unnecessary defensive means, the use of such means against them would still not be *justified*. The underlying rationale of this necessity requirement lies not in the rights of the *aggressor*, but in an agent-relative requirement to take fair precautions against violating the rights of the *innocent*. This concern is also expressed in the necessity criterion defended and formulated in this paper, which is very *harsh* on aggressors. To wit, the necessity condition for justified self-defense must not be interpreted as requiring the employment of literally the least harmful means or of means that the defender reasonably believes to be, literally, the least harmful ones. What he must believe about the properties and possible effects of the means he employs is something that is *much* less demanding. Finally, the necessity condition of justified self-defense is also harsh (on the aggressor) in not implying a "success condition" worth its name.

Key words: aggressor; innocents; necessity condition; precaution; rights forfeiture; self-defense; success condition

Introduction

Philosophers and legal scholars (at least in the Anglo-Saxon world) writing on self-defense often have little to say about the necessity condition. This is surprising, for it is not obvious either *why* there should be a necessity condition in the first place or *what* the condition requires.

The habitual answer to the latter question, namely that the necessity condition requires the defender "to use the least harmful means," obfuscates more than it clarifies. Case law, for one, seems *not* to interpret the requirement as demanding that one use *literally* the least harmful means in one's defense (or the means that the defender or an impartial observer would reasonably believe to be the least harmful). Moreover, and even more importantly, such a demand would also be morally extremely implausible (as we will see below). This, however, then raises the question as to what a plausible interpretation of the requirement is, and answering this question involves some substantive moral argument.

As regards the first question, as to why there should be a necessity requirement in the first place, there is not even a habitual answer – there is (virtually) no answer at all. To be sure,

even many self-defense theorists who try to understand the justification for the self-defensive infliction of harm on an aggressor in terms of the latter's forfeiture of certain rights maintain that the aggressor *only* forfeits the right against measures that are *necessary* (or perceived to be necessary) to harm him. Yet, this is not an argument, but simply a question-begging claim. What one would like to know is *why* someone who culpably tries to murder someone else should not forfeit rights against defensive means that are unnecessary. After all, the aggressor, using unnecessary violence himself, is, it would seem, hardly in a position to complain about unnecessary force.

In this paper, I will argue that rights forfeiture or liability must be distinguished from permissibility and that the correct conclusions from this distinction must be drawn. While some authors explicitly grant the distinction, they nevertheless claim that an aggressor's liability to self-defensive force explains (at least in a large array of cases, that is, barring special circumstances) the defender's permission to engage in self-defense.

The analytical distinction itself 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 owner of the pharmacy. This is shown in the fact that legally (and morally) Pauline would owe him compensation for the smashed window; 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 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 *un*justifiably 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 terminology[1]) 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

[1] See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (1919).

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 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 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, and 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.

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* a path to permissibility (section 1). My focus is on necessity. I contend that the necessity requirement is different in the context of forfeiture than in the context of justification (section 2). In section 2.1. I argue that a culpable aggressor, unlike an innocent aggressor, *forfeits rights* (at least) against proportionate defense, including *unnecessary* proportionate defense.[2] Yet, in section 2.2., I demonstrate that this stance does 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 by an appeal to the aggressor's rights. I will, therefore, provide an alternative explanation of the necessity condition in this case and argue that it has nothing to do with the rights of aggressors but rather with the protection of the innocent. This necessity criterion is based on a principle of precaution, aimed at reducing, in a manner that strikes a fair balance between the interests of the innocent defender and other innocent people, the likelihood of the defender unnecessarily harming other *innocent* people.

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[2] I am also of the opinion that a culpable aggressor loses, at least under some circumstances, his right against necessary defense that is in some sense *dis*proportionate (or that many in *our* society would deem to be disproportionate), but I will not argue this point in this paper, which focuses on the necessity condition.

In section 3, I shall demonstrate that interpreting the necessity condition according to the formula "use the least harmful means" (I will call this the formulaic interpretation) is legally and morally unacceptable (even if moderated by an appeal to "reasonable belief"). I will proceed by first offering some initial arguments for the implausibility of the formulaic interpretation. Taking my clue from German self-defense law, I will then explain and adopt the German interpretation of the necessity condition and defend it against the charge that it is too harsh on the aggressor.

The neatness of the "use the least harmful means" formula explains why many appeal to it. However, it can be doubted that many of those who appeal to it actually do take it literally. Yet, some do so, and explicitly. I have not come across any *argument* in support of such a literal interpretation;[3] nevertheless, in section 4 I will myself adduce a number of arguments against it, thereby bringing my criticism of the formulaic interpretation to its conclusion.

In section 5, finally, I briefly argue, by way of clarifying the necessity criterion defended here, that this necessity criterion does not imply a so-called "success condition." That is, justified self-defense need not succeed in (or even as much as have a chance in succeeding in) averting or mitigating the *harm* threatened by an attack. Self-defense is not "instrumental" in this sense. Rather, self-defense is aimed at *resisting* an *attack*, and this can be done even if there is no hope of averting or mitigating the *harm* threatened by the attack. Unlike "instrumentalist" accounts, the account defended here therefore does not have the counter-intuitive implication of denying that a rape victim who is biting and scratching the rapist although she knows that her resistance will not avert or mitigate the harm is engaged in justified self-defense.

Before going *in medias res*, let me make a methodological comment on the use I make of law and legal scholarship. First of all, it is necessary to refer to law when authors implicitly

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[3] Of course, a number of philosophers have argued that the moral "ought" is purely objective (so that it does not involve any reference to mental states). Yet, what one *ought* to do is not the same as what one is *justified* in doing. Moreover, even if one thinks that justification (including legal justification) is purely objective, that by itself does not mean that one needs to embrace the literal interpretation of necessity – one could also embrace an account that relies on objective probabilities. Montague, arguing for an objective moral ought, indeed acknowledges that objectivism *might* take the form of a probabilistic account, but he rejects this possibility. See Phillip Montague, *Blameworthiness, Vice, and the Objectivity of Morals*, 85 *Pac. Phil. Q.* 68 (2004). One might think, therefore, that his argument might be applicable to the necessity condition. In fact, however, his argument relies heavily on the example of promises. He claims that one can keep a promise only by actually fulfilling it, which in turn is supposed to support an objectivist *and* non-probabilistic ought. However, the logical connection is difficult to see. Promises create rights, and I accept, indeed emphasize, that whether one transgresses against a right is (normally) a purely objective question (there are certain exceptions, but they need not concern us here). Whether one does something *justifiably* (for example infringe a right), however, is not a purely objective matter. At the very least, Montague's promise example is unable to establish otherwise since it seems to overlook this distinction between rights and other kinds of moral obligations, a distinction that is of course at the core of the present paper.

or explicitly use the authority of the law to support their own views, or simply give a certain interpretation of the law, for then it is obviously worth examining whether those interpretations are correct and whether the law really supports the views under discussion. Second, penal law at least in liberal democracies very often reflects our intuitions, since it is shaped by what people actually take to be justified or not. Third, legal scholarship regarding penal law is profoundly philosophical; and the intensity, sophistication, and sheer scale of genuinely philosophical discussions of self-defense in the legal literature of some jurisdictions exceeds the discussion of this topic within academic philosophy by far.[4] This, I submit, does give some authority to the legal scholarship on self-defense. Thus, fourth, the arguments I adduce here for certain interpretations of the concepts of self-defense, necessity, and proportionality are no less philosophical for the fact that they are informed or inspired by legal scholarship.

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

Why should one accept a necessity criterion for self-defense? This seems 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 right to counter-attack, 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,[5] and many subscribe to it even in the case of innocent attackers.[6] The advantage of this view is that it can

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[4] In German legal scholarship, for example, turning trolleys, innocent attackers, justified attackers, non-responsible threats, etc., have been discussed long before this was done in Anglo-Saxon philosophy journals. As *pars pro toto*: Philippa Foot introduced the turning of trolleys into the Anglo-Saxon philosophical discussion in 1967; while Hans Welzel introduced it into German legal scholarship in 1951 (it is still intensely discussed). See Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5 (1967); Welzel, *Das Notstandsproblem*, 63 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 47 (1951). It should also be noted that one does not need trolleys to discuss the underlying moral and legal issue, namely the necessity or "choice of evils" justification. This issue has been discussed in the legal literature for centuries, for example in form of the "ship problem" at least as early as in 1883: "Suppose a ship so situated that the only possible way of avoiding a collision with another ship, which must probably sink one or both of them is by running down a small boat." J. F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, VOL. II 110 (1883).

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

[6] 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. Neither do I think that this permission is grounded in a *right* to self-defense. For the opposing view, see

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 (or apology) 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 that, at least not in any straightforward manner.[7] 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 owe him compensation. There might be an additional necessity justification for not *giving* him the compensation (e.g., the King threatened to kill some innocents if 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 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.[8]

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."[9]

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for instance, SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE ch. 5, esp. 191 (1996); and Sanford Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, esp. 883-888 (1976).

[7] 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,* (Nov. 16, 2014, 8:26 PM), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2381444.

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

[9] Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. OF CRIM. L. & CRIMINOLOGY 421, 454 (1982). Dressler's own "explanation" of the necessity condition begs the question, claiming that unnecessary lethal 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 34 (W. Parent ed., 1986). See also George P. Fletcher, *Right to Life*, 13 GEOR. L. REV. 1371, section III (1979). Rights forfeiture theories of punishment have suffered similar criticisms, see for example DAVID BOONIN'S

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.

While some authors explicitly grant this, they do not draw the right conclusions from it. Kimberly Ferzan, for example, explicitly distinguishes permissibility from liability[10] 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."[11] However, liability is no path to permissibility at all: that someone is liable to attack does not make it permissible to attack him (not even if one bars overriding necessity justifications, e.g.: if one knocked down the unjust attacker, terrorists will blow up a pre-school).[12] For example, if Bill always wanted to shoot Jill, whom he hates, in the arm and has made the decision to carry out his plan now, and culpable Jill, *unbeknownst* to Bill, is about to kill innocent Bob and could only be stopped by Bill shooting her in the arm (which would be necessary and proportionate under the circumstances, as we want to assume), then Bill would still not be *justified* in shooting Jill: after all, he was not aware of the objective justifying circumstances and therefore his act showed a blatant disregard for morality and the law – it is a so-called "impossible attempt" to subject someone to battery and it is therefore

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sustained attack on forfeiture theory in THE PROBLEM OF PUNISHMENT 103-119 (2011).

[10] Kimberly Kessler Ferzan, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing*, 9 OHIO ST. J. OF CRIM. L. 669, 671 (2011-2012).

[11] Kimberly Kessler Ferzan, *Provocateurs*, 7 CRIM. L. & PHIL. 597, 606 (2013). 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" suggest. See Jeff McMahan, *The Conditions of Liability to Preventive Attack*, in THE ETHICS OF PREVENTIVE WAR 121, 123-124 (Deen K. Chatterjee ed., 2013), and *Targeted Killing: Murder, Combat, or Law Enforcement*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 135, 138 (Claire Finkelstein, Jens David Ohlin, and Andrew Altman eds., 2012). For the record, it should be noted that said distinction is already there in Kant, 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 45 (1970), and by George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 320 (1975/76): "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*."

[12] Moreover, forfeiture is not only no way to permissible self-defense, but also not to a *right* (understood as a claim-right) to self-defense. Interestingly, DAVID RODIN, WAR AND SELF-DEFENSE esp. 75, note 11 (2002), is happy to conceive of self-defense as a mere liberty. However, as Kadish, *supra* note 6, at 884, has pointed out, such an understanding of self-defense cannot explain our deep-rooted intuition that the state would *wrong* us if it prohibited us from defending ourselves. After all, while an *aggressor's* forfeiting his claim-right against me that I do not kill him and his liberty-right to resist my attempt to kill him endows me with rights and liberties towards *him*, it does not endow me with any rights or liberties towards *the state.*

condemnable and punishable.[13] Ferzan, in fact, agrees, and therefore – since she wants to find a path from liability to permissibility – needs to claim that someone's liability to attack by some other person P is dependent on P's state of mind, motives, or intentions, that is, the "defender must be acting to repel the attack": aggressors like Jill only "forfeit their claims about actions that are *responsive* to their attacks."[14]

Yet, as Ferzan herself admits, there seems to be something "odd" in the idea that "the aggressor's liability turn[s] on whether the defender is responding to that liability." So why should one accept this idea? She offers the following example:

> *Unknown Attack.* Ned, intending to kill Nedda, points a plastic gun at her. Although the gun appears to be a toy gun, it is real. Nedda believes the gun to be a toy, but hoping to convince a jury that she believed the gun to be real, uses this as an opportunity to kill Ned as she had already planned to do that day. Nedda kills Ned.[15]

And she states:

> I take it that even would-be killers do not forfeit their claims against being killed, used, and the like. They forfeit their claims about actions that are responsive to their attacks. … When one becomes liable to defensive force, one is only liable to force that is intended to repel one's attack.[16]

Yet, again, *why* should one accept this? Ferzan provides only one argument, namely: "Morally, there is simply no reason for us to prefer Ned over Nedda simply because Ned's attack occurred before Nedda's. Indeed, it gets us into questions such as whether Nedda started her plan earlier, such that we can figure out who was 'first.'"[17] Yet, it is irrelevant who started her *plan* earlier, as Ferzan herself should know. After all, elsewhere Ferzan argues at length that self-defense is directed against ongoing or imminent *attacks*.[18] Thus, the actual question is who first becomes an imminent attacker. In her example, however, this is clearly Ned: he points a real gun at Nedda, and only then does she react to it. That *is* morally relevant. Moreover, if Ned and Jill are really not liable to attack by Nedda and Bill, respectively, then it would seem that Nedda and Bill owe Ned and Jill (or the dependents, in Ned's case) compensation. But this is implausible and extremely counter-intuitive, and this implausibility then suggests – Ferzan herself states that it should follow from liability "that the defender would not need to compensate the aggressor for any harm done by the use of defensive force"[19] – that Ned and Jill *are* liable to attack by Nedda and Bill *although* the

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[13] On "impossible attempts," see BOAZ SANGERO, SELF-DEFENSE IN CRIMINAL LAW 235-236 (2006).

[14] Ferzan, *supra* note 10, at 696. For similar moves by authors who try to ground the justifiability of punishment in rights forfeiture, see A. John Simmons, *Locke and the Right to Punish*, 20 PHIL. & PUB. AFF 311, 340 (1991); and Christopher Heath Wellman, *Rights Forfeiture Theory of Punishment*, 122 ETHICS 371, 380-384 (2012).

[15] Ferzan, *supra* note 10, at 695.

[16] *Id*. at 696.

[17] *Id.*

[18] Kimberley Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213 (2004).

[19] Ferzan, *supra* note 10, at 673.

latter two are nevertheless not *justified* in attacking the former two.

Thus, since the attempt to have the conditions of liability account for the conditions of justification seems to be implausible and since even some of the very authors who engage in such an attempt admit that it involves "odd" claims or feel the need to assure the reader that at least to them, the authors, such "claims seem … not unbearably awkward or ad hoc"[20] – something they would hardly feel the need to expressly emphasize if indeed there weren't anything awkward or ad hoc about such claims – we have good reason to search for alternative ways of accounting for the limiting conditions of self-defense (or punishment, for that matter). Moreover, the existence of such an alternative is clearly also interesting for its own sake – even if in the end, for whatever reasons, one prefers "odd" forfeiture theory.

2. Necessity in the Context of Rights Forfeiture or Liability and in the Context of Justification

In the previous paragraphs I have used the subjective element of justification (which in the case of self-defense involves at least the defender's awareness of the objective justifying circumstances)[21] only as an illustration and motivation for the importance of not only making the distinction between liability and permission for analytical purposes but also of realizing its practical implications, one of which is: if liability and justification are different, then there is no reason to assume that conditions like proportionality, necessity, or the subjective element play the same roles in the context of liability as in the context of justification. In the following, however, I will focus on the necessity condition.[22] Moreover, while it is important to take the implication just mentioned into account when outlining the contours of the necessity condition, I am not only interested in the impact of this implication on the necessity condition, but in the necessity condition itself. That is, my questions are: what, exactly, does the necessity condition for *justified* self-defense require, and is there a necessity condition for *liability* to self-defensive force?

2.1 Necessity and Rights Forfeiture

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[20] Simmons, *supra* note 14, at 340. Gerald Lang, *Why Not Forfeiture?*, in HOW WE FIGHT 38 (Helen Frowe and Gerald Lang eds., 2014), tries to defend forfeiture theory against its critics, arguing, among other things, that forfeiture theory is compatible with the necessity and the knowledge requirement. That is correct. However, the critic does not insist on logical or conceptual incompatibility but rather points out that there is also the converse compatibility and that this option is much more plausible since it is very "odd" or "awkward" to think that a murderer only forfeits his rights against *necessary* harm *intended* to be defensive. Lang does not address *this* criticism. He does admit, however, that it "must be conceded .. that some of these problems cast a rather long shadow over forfeiture" (*id*. at 39). This is a good reason to search for a theory which is less overshadowed.

[21] For a useful overview on the debate on the subjective element of the self-defense justification, see Sangero, *supra* note 13, at 231-237. See also Uwe Steinhoff, *Just Cause and Right Intention*, 13 J. OF MILITARY ETHICS 32, section II (2014).

[22] Elsewhere I deal with the deficits of rights forfeiture theory more generally. See Uwe Steinhoff, *The Shortcomings of and Alternatives to the Rights Forfeiture Theory of Self-Defense and Punishment*, unpublished ms.

Immanuel Kant's position on self-defense is instructive here. He makes it very clear that the unjustly attacked person (he talks about a potentially lethal attack) owes his attacker *nothing*. He does *not* owe it to the attacker not to use excessive means in his self-defense – for instance, he does not owe it to him not to kill him if he could also save himself by simply knocking the attacker out. "Moderation" – to do only what is necessary for self-defense, but no more – might be owed to humanity or to himself, but not to the murderous aggressor.[23] Kant also did not accept any proportionality requirement, nor does German law. Even now, there is no explicit proportionality requirement in German self-defense law, there is only a no-gross-disproportionality requirement.[24] Right need not yield to wrong.[25]

I think Kant is making an important distinction, but he is exaggerating with regard to his substantive conclusions (there are limits on what you can do even to someone who unjustly tries to kill you). Be that as it may, at the moment I am only interested in arguing for a certain conceptual framework; the substantive assumptions I will make in this section about what is proportionate under which circumstances, and regarding what a person is liable to under what circumstances, serve primarily illustrative purposes.

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. I think that this is *unjustifiable*, and will explain why in a moment. However, the question before us now is: 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."[26] It is this idea of reciprocity – an idea that has played an important role in

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[23] As Joachim Hruschka (2003), *Die Notwehr im Zusammenhang von Kants Rechtslehre*, 115 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 201, 213, points out with regard to Kant's position on the necessity or (in Kant's words) moderation requirement in self-defense situations: "This 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, THE METAPHYSICS OF MORALS 28 (Mary Gregor trans. and ed., 1996). Seumas Miller, *Killing in Self-Defense*, 7 PUB. AFF. Q. 325, esp. 332-338 (1993), also 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 right to life. See also Helen Frowe, *Self-Defence and the Principle of Non-Combatant Immunity*, 8 J. OF MORAL PHIL. 530, 545, note 31 (2011).

[24] Perhaps one could argue that such a no-gross-disproportionality requirement is also a proportionality requirement of sorts. One should note, however, that this "proportionality" requirement would be extremely permissive.

[25] But does it not have to yield if the consequences for bystanders are too severe? This question misses the point of the self-defense justification: this justification does not concern harms inflicted on bystanders. In other words, "Right need not yield to wrong" means "Right need not yield to wrong for wrong's sake or benefit."

[26] Cf. Helen Frowe, *Jeff McMahan, Killing In War* (book review), 10 J. OF MORAL PHIL. 112, esp. 112-113 (2013).

religion, philosophy, and law[27] – that underlies Kant's view: the unjust aggressor has broken his "contract" with you to respect each other's rights, so you are under no obligation anymore to respect his rights.

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 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."[28] 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."[29] 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."[30] Yet, as we already saw, first, it is unclear why this should be an advantage,[31] 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

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[27] Compare for example MARK OSIEL'S monumental study THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR (2009).

[28] JEFF MCMAHAN, KILLING IN WAR 9 (2009).

[29] *Id.* at 8.

[30] Jeff McMahan, *Proportionality and Just Cause: A Comment on Kamm*, 11 J. OF MORAL PHIL. 428, 434 (2014).

[31] However, McMahan thinks that this instrumental account makes it easer to distinguish liability from desert. HELEN FROWE, DEFENSIVE KILLING 105-106 (2014), while denying that the necessity condition is internal to justified self-defense, agrees with McMahan, however, that one can only be liable to 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 instrumental accounts. 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.

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 an 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 subjective belief in any probability is sufficient, and this belief need not be reasonable."[32] 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 insane 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 which is that permissive hardly functions as a limiting condition anymore,[33] 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.[34]

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."[35] 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; it is merely stipulated.) Yet, as far as the *permissibility* of self-defense is concerned, her response presupposes that only those limitations on self-defense are warranted whose absence would give the aggressor cause for complaint. Yet, 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.[36] Thus, German law

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[32] Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 L. & PHIL. 711, 739 (2005).

[33] Statman also complains that Ferzan's account "seems to make the necessity condition mute as a constraint on self-defense." See Daniel Statman, *Can Wars Be Fought Justly? The Necessity Condition Put to the Test*, 8 J. OF MORAL PHIL. 435, 444 (2011).

[34] Ferzan, *supra* note 32, at 730.

[35] Ferzan, *supra* note 10, at 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 Ferzan, *supra* note 32, at 740.

[36] Günter Spendel, *Überschreitung der Notwehr*, IN STRAFGESETZBUCH, LEIZPZIGER KOMMENTAR, GROßKOMMENTAR, BD. 2, §§ 32-60, §33, Rn. 77-82 (Hans-Heinrich Jescheck, Wolfgang Ruß, and Günther Willms eds., 1985).

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 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.

Furthermore, raising the objection against the view that Frank is liable to your unnecessary force that "Two wrongs don't make a right" (which I indeed have heard) appears to be mere rhetoric. First, we also say "Turnabout is fair play." Second, I do not claim that killing the lethal aggressor is "a right" in the sense of the idiom, that is, I do not claim that it is justified. I merely claim that it does not violate the aggressor's rights. Third, a dying aggressor could also utter the slogan "Two wrongs don't make a right" if he had been lethally wounded in *necessary* self-defense. In other words, to suppose that "Two wrongs don't make a right" is a valid objection against the claim that a lethal aggressor has forfeited his right not to be unnecessarily killed but *not* to the claim that a lethal aggressor has forfeited his right not to be killed in *necessary* self-defense is to simply assume what is precisely in question, namely that a lethal aggressor only becomes liable to *necessary* self-defense.

It should, for what it is worth, also be noted that Kant is not the only author who claims that persons can forfeit their right against unnecessary harm. John Locke had similar views.[37] So do several more recent authors, like Stephen Kershnar or Christopher Heath Wellman. Kershnar is very explicit about this,[38] Wellman less so. However, he does explicitly subscribe to the idea that "if the person being punished has forfeited her rights, it is permissible to punish her for any purpose whatsoever."[39] Given that Wellman is of the opinion (which I do not share) that "[rights] forfeiture is necessary and sufficient to explain the permissibility of punishment,"[40] it logically follows that according to him the culprit has even lost a right against punishment that serves, for example, no other purpose than the satisfaction of the sadistic impulses of the punisher (a view I do share). Yet, interestingly, he nevertheless claims that "in the case of self-defense … one may harm one's aggressor only if doing so is necessary to avoid being harmed oneself."[41] Why there should be this curious difference

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[37] See JOHN LOCKE, TWO TREATISES OF GOVERNMENT esp. 273-274 (§11), 278-280 (§§ 17-18), and 282-283 (§172) (Peter Laslett ed., 2002). This is also Simmons' interpretation of Locke, see *supra* note 14, at 331.

[38] STEPHEN KERSHNAR, DESERT, RETRIBUTION, AND TORTURE 133-135 (2001).

[39] Wellman, *supra* note 14, at 375. In a footnote (*id*. note 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).

[40] *Id*. at 375.

[41] *Id*.

between self-defense and punishment, so that self-defense must serve some valuable goal while punishment need not, he does not explain.[42] Seumas Miller, in contrast, argues explicitly that a lethal aggressor has "suspended" his right to life, period, whether taking his life is necessary for saving the defender or not.[43] Like Kant and me, he believes that the necessity condition (at least in the case of culpable defenders) is *external* in the sense that it is not connected to rights forfeiture (or suspension) itself. Helen Frowe has voiced the same opinion.[44]

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[42] I do not even mean this as a criticism since Wellman is concerned with punishment in the quoted article and only appeals to self-defense for illustrative purposes. I am merely making the point here that not only hard-core Prussians but also some respectable Anglo-Saxon liberals are willing to subscribe to the idea that people can be liable to unnecessary harm.

[43] Miller, *supra* note 23, esp. at 332-338. Miller distinguishes "forfeiture" from "suspension," but this need not concern us for present purposes: he does think that the lethal aggressor lacks a right against unnecessary force (at least during aggression). 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 David Rodin, *The Problem with Prevention*, in PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 143, 165 (Henry Shue and David Rodin eds., 2010). 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 Rodin, *supra* note 12, at 76. Rodin has meanwhile further elaborated his thoughts on reciprocity in *The Reciprocity Theory of Rights*, 33 L. & PHIL. 281 (2014). Again, he seems not to be aware of the fact that this reciprocity theory contradicts his views on liability.

[44] Frowe, *supra* note 23, at 545, note 31; and *supra* note 31, ch. 4. Unlike Miller, however, Frowe does not really make a credible effort to explain where the necessity condition of justifiable self-defense is coming 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." *Id*. at 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 were also 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. Joanna Mary Firth and Jonathan Quong, *Necessity, Moral Liability, and Defensive Harm*, 31 L. & PHIL. 673 (2012), have taken an intermediate position, in effect arguing that aggressors can become liable to *some* unnecessary harm, but not to *serious* unnecessary harm. For a sustained criticism of their views, see Uwe Steinhoff, "Firth and Quong on Liability to Defensive Harm: A Critique," (Nov. 16, 2014, 8:00 PM),

Finally, let me also point out that *critics* of forfeiture theory, such as Dressler and others,[45] at least agree with me on the conditional that *if* a person forfeits her right to life because of her aggressive act, then indeed that person also forfeits her right against *unnecessary* attack (that, indeed, is part of their criticism). Of course, these critics think that this is a devastating blow to the idea that culpable aggression gives rise to rights forfeiture; yet, the blow is only devastating if one accepts the premise, shared by critics of forfeiture and nearly all of its proponents alike, that liability (if it exists) is a path to permissibility. However, once one rejects this premise, one can keep 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 Bill) without thereby incurring counter-intuitive implications about permissibility (for example that Bill acts justifiably). This, in my view, makes the account presented here superior to its rivals.

However, what happens to the rights of *innocent* aggressors? Consider the following case. Innocent Mary has been drugged by a villain and is hallucinating, which is the reason why she now attacks you. You can stop her as easily with your taser as by shooting her in the chest with your revolver. You shoot her in the chest. In this case, I submit, you did wrong her. To be sure, you would not have wronged her by this course of action if shooting her would have been the only means to save your life, but given that it was not, you owed her greater care. Unlike Frank, she did not intentionally break the "contract" with you to respect each other's rights; unlike him, she is not culpable; and this means that she was not liable to your excessive violence. Thus, in *this* case, unlike in the case of Frank, the necessity of the defensive measure is a precondition of the aggressor's liability to it.

But, one might wonder, isn't "Look who's talking" an equally apt reply to both Frank and the innocent aggressor Mary? After all, in both cases an unjust threat was being posed to the defender. Yet, the answer is that it is *not* an apt reply. Whether people are responsible actors or not obviously matters a great deal for moral questions. This is, for instance, also shown in the fact that Mary can justly respond: "What do you mean, 'Look who's talking'? You reproach me of not doing to others as I 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.

These considerations, I submit, speak for a principle of reciprocity that could be formulated as follows:

> *Reciprocity*: If a responsible actor unjustifiably harms interests of others that are protected by their rights, then he or she has (all else being equal) no valid complaint against acts[46] that harms equal or less important interests of the actor (but he does have

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362549.

[45] See *supra*, note 9.

[46] Irrespective of whether those acts stem from the very people whose interests he disregarded or from third parties.

> a right against acts that harm his or her interests unnecessarily *and* disproportionately[47]). Accordingly, the actor's own relevant interests are not protected by rights anymore due to his or her own culpable or responsible violation of the rights of others.[48]

This principle appears to have considerable intuitive traction – at the very least it is no less plausible than its denial and therefore presents a viable alternative to accounts that claim that bullies can violate the rights of others and still justly complain if people respond in kind. We can also note in support of its intuitiveness that even some authors who claim that the necessity condition of self-defense or the requirement that people inflict harm for the right reasons are internal to rights forfeiture (and not only to justification) nevertheless on occasion (inconsistently) *endorse* the reciprocity principle and in fact, quite rightly, emphasize its plausibility.[49]

Let me emphasize two (additional) important features of this principle of reciprocity. I already stressed that if a person forfeits a moral right, then another agent does not wrong the person if she harms interests of this person that would normally be protected by the person's moral rights, independently of what reasons (e.g. defensive, punitive, sadistic) the agent has for acting as she does. This "unlimited-reasons account" of rights forfeiture is also rightly advocated by Stephen Kershnar.[50] However, he thinks that a right-violator forfeits his own respective rights only with regard to the right-holder – he calls this the "narrow account" of rights forfeiture.[51] I disagree and thus support the "wide account." If someone does not have a valid complaint against another person who has harmed his interests, then his rights have not been violated. However, how could someone who tries to kill an innocent person have a valid complaint (extremely unusual circumstances perhaps aside) against a third person trying to kill him? What could he say: "How dare you kill me? Did *I* try to kill *you*?" The obvious

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[47] I think that there are two proportionality conditions: an internal one, connected to the aggressor's rights, and an external one. The proportionality condition is beyond the scope of this paper.

[48] Note that this principle is purely a principle of rights forfeiture, not rights possession. Rodin, *supra* note 43, also defends reciprocity as a theory of rights possession. I think that is mistaken, partly for reasons that have been pointed out by Cécile Fabre, *Rights, Justice and War: A Reply*, 33 LAW AND PHILOSOPHY 391-401 33 (2014).

[49] As already mentioned above (see *supra* note 43 for the references), Rodin states 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," but elsewhere argues that a would-be murderer has only forfeited his right to life to a person "who knows of his threatening status and acts in defense" and only if killing the aggressor is necessary to defend others. Simmons also subscribes to the latter view, while nevertheless elsewhere stating that protection under the moral rules "is contingent on our obeying them" and that "[s]urely no one could reasonably complain of being deprived of privileges under rules he refuses to live by." See Simmons, *supra* note 14, at 340, and *The Principle of Fair Play*, in READINGS IN SOCIAL AND POLITICAL PHILOSOPHY 60-61 (Robert M. Stewart ed., 1986).

[50] Kershnar, *supra* note 38, at 133.

[51] *Id*. at 130-132, 135, (4).

reply of the third person would be: "No, you did not. But this guy you are attacking did not try to kill you either – yet, you tried to kill him anyway. So who are you to complain? You are a damn hypocrite." This reply seems entirely appropriate.

Kershnar also thinks that the wide account cannot (as he thinks a plausible account should) allow both for "a moral right against disproportionately harsh punishment" and a victim's "right to punish the person who victimized her, unless she contracted out the right to another."[52] Why not? Kershnar gives the following example: "Mike rapes Jane. If Mike forfeits his right against everyone, whether temporarily or permanently, then everyone gains the right to punish Mike. If several persons give Mike a proportionate punishment, then Mike's aggregate punishment will be disproportionately severe. If instead Mike's punishment is proportionate, then the first person to punish Mike will prevent later punishments [for example punishment done by the victim] from being morally permissible."[53]

Again I disagree with Kershnar. However, before proceeding, it might be wise to replace the rape example (which tends to elicit emotional responses that are not conducive to rational argument) with a somewhat more palatable example: let us replace Mike the rapist with Mike the batterer, who likes to beat up people. Now, according to the principle of reciprocity stated above, Mike, having beaten Jane for the fun of it, would not lose his right, for example, not to have his arms cut off. But if he is a culpable batterer, he has lost his right against being battered by others.[54] There is, in particular, no violation of his right involved (again, whether it is *permissible* is another question, to which I will return below) if Bob beats him up on Tuesday, and he is beaten up again on Thursday and Saturday by Frank and Bill, respectively. (The reference to individual acts in the formulation of the principle of reciprocity excludes the possibility of aggregation, that is, of adding the harm suffered through one act to the harm suffered through another – quantity does not turn into rights-violating quality here.) He simply has no valid complaint against any of these batterers. If he were to say to Frank: "But I only have beaten up Jane once," then Frank can well reply: "*I* also have beaten you up only once."

The validity of this reply can also be seen from another angle. The universal right against being beaten up that Mike has before beating up his innocent victim is in fact a conjunction of rights he holds against different people: a right not to be battered he holds against Bob, a right not to be battered he holds against Frank, etc. It is, however, mysterious how Bob's doing something to Mike that Bob can do to him without violating any of his rights should, by itself, make Mike reacquire his right not to be battered by Frank. In my view, Mike only reacquires his right not to be battered if he is subjected to proportionate punishment (and Bob's beating him for Bob's own pleasure instead for making him suffer for what he did to Jane is no punishment at all) *and* makes the honest decision not to beat up people again. This latter condition is indispensable. For example, suppose finally someone did punish Mike for what he did to Jane, let's say by imprisoning him for a sufficient amount of time. Mike, however, never repents, and as soon as he comes out goes on the rapist's prowl for victims again. Yet, ironically, he himself falls prey to a stronger batterer before he can execute his

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[52] *Id*. at 130.
[53] *Id*.
[54] Seumas Miller (while using a murder example) agrees. See *supra* note 23, at 336.

evil plans. If he complained to the attacker, it would obviously again only be hypocritical.

It also speaks against the narrow account that, as Kershnar notes, it "appears to conflict with the current state practice of prosecuting persons for acts, e.g., acts of domestic violence, even when the victim prefers not to have the culpable wrongdoer punished."[55] Yet Kershnar thinks there are two ways to account for this apparent conflict. "On one account, if the permission to punish has been contracted out to the state before the wrongdoing, then the power to waive it might also have been granted to the state" – and thus does not lie with the victim anymore. "On a second account, the state by ignoring the victim's preference may be infringing upon the culpable wrongdoer's right but doing so in an attempt to bring about a better state of affairs." And Kershnar states: "I suspect that the second account is the better description and that such infringement is morally impermissible. As evidence, I note that a victim who wishes to forgive her attacker and yet is forced to cooperate in prosecuting him may feel as if her dignity is being sacrificed in the pursuit of broader social interests."[56] Kershnar applies this same approach also to the issue of other-defense, which on his account can be made impermissible by the victim if the victim refuses the defender's help.[57]

I find Kershnar's account implausible. First, whether coercing the victim into helping the prosecution is justifiable or not is neither here nor there; rather, the question is whether attacking and punishing the aggressor is justifiable. Whether witnesses, including the victim, can be coerced into helping the prosecution is an entirely different question – and I do not see, for that matter, why the victim should be more privileged in this respect than other witnesses. Furthermore, is the victim's "dignity" or autonomy violated by others' attacking or punishing the aggressor? Let us discuss an aggressor engaged in an attempt at the victim's life. As far as autonomy is concerned, one needs to distinguish here between a person's autonomy over her *life* and a person's autonomy over her *right* to life. A third party who defends a victim who does not want to be defended violates neither. To wit, the defender does not keep the victim from disposing of her life. If the victim wants to commit suicide, she is free to do so. In fact, the defender is not interfering with the victim *at all*, she merely interferes with *the aggressor*. Therefore it is unclear how the defender can violate her autonomy. Accordingly, the defender most certainly also does not interfere with the victim's *right* to life: the victim can waive or relinquish her right to life and her rights against aggression anytime. The defender is not keeping her from doing this at all. Moreover, the state could and should also confirm its respect for the victim's autonomy later on: if the victim had validly waived or relinquished her right against aggression, and the aggressor succeeded in killing the victim, then the state, out of respect for the victim's autonomy, should refuse to admit any later attempt of the victim's relatives to bring a wrongful death suit against the aggressor. The state should say: "We respect the victim's autonomy. The

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[55] Kershnar, *supra* note 38, at 132.

[56] *Id*.

[57] *Id*. at 131-132. Christopher Finlay also thinks that the victim would be wronged if he is defended against his will. See Finlay, *Legitimacy and Non-State Political Violence*, 18 J. OF POL. PHIL. 287, esp. 289-294 (2010). For a criticism of his account, see Uwe Steinhoff, "Finlay on Legitimate Authority: A Critical Comment," ," (Nov. 16, 2014, 6:30 PM), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445879.

victim waived her right against aggression. Therefore the aggressor did not violate any rights of the victim, and you therefore cannot sue him."

In fact, if anybody's autonomy is being violated by a demand not to attack an aggressor, it is the defender's autonomy. (I believe, with thinkers as different as Kant and Locke, that persons have a fundamental – that is, underived – natural right to attack aggressors.) If the victim does not want to attack the defender, fine, but that does not give the victim a right against the defender that he or she not interfere with the attacker.

Moreover, according to law in many continental European jurisdictions, an *attack* is any rights-violation (that is, any injustice) stemming from human action – and people have a *right* to defend themselves against attacks. This is also the correct stance to take from a moral point of view: persons not only have a right to defend themselves against violence directed against there bodily integrity, they have a right to defend themselves against all kinds of right violations. Without such a right, all other rights would not be worth very much.

But then, it seems, Kershnar's view would imply that the victim who has refused assistance has a right to attack the defender who is attacking the aggressor. He could even enlist others to help him defending his rights against the defender. This, I submit, is extremely counter-intuitive. In fact, it would seem that if the victim tried, for instance, to taser the defender in order to keep him from attacking the aggressor, the defender would thereby acquire a right of self-defense against the victim (turned aggressor), too. This speaks against the victim having the right against the defender that the latter not attack the aggressor.

Even more counter-intuitive is Kershnar's idea that the aggressor himself has a right to counter-attack the defender, or that the defender, as Kershnar's correct view that rights-violations generate a duty to compensate their victims implies,[58] would have to compensate a would-be murderer for knocking him out instead of allowing him to murder somebody.

The counter-intuitiveness of Kershnar's view can also be demonstrated by the following example: A group of pacifists who have publicly and to everybody's knowledge waived their rights to life, absolved non-pacifists from any special duties towards them, and enjoined all people from abstaining from helping them against aggressors have a convention on some meadow. A group of police officers watches the scene because some militarists have made credible death threats against the pacifists. And, indeed, the militarists appear on the scene, draw their machine pistols, and start mowing the pacifists down. The police interfere, forcibly stopping the aggressors.

Did the police violate the rights of the pacifists by attacking and stopping the aggressors? It does not appear so.[59] In fact, if the pacifists disabled the weapons of the police with their remote non-violent police weapons deactivator, they could be arrested and imprisoned for obstruction of justice, and it seems that this is not only legally, but also morally fair. Moreover, to claim that the police were not *justified* in attacking the aggressors seems to be

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[58] Kershnar, *supra* note 38, at 101.

[59] It has been suggested to me that a mother who has been attacked by her child and asked not to be defended against him would be wronged if someone defended her anyway. I find this entirely implausible, especially if the child is a 30-year-old culpable aggressor. I would also like to know if the mother would be wronged if the state decided to punish the aggressor later on – against the will of the mother. If not – what is supposed to be the difference?

not only counter-intuitive but downright absurd.

Thus, I conclude that the principle of reciprocity stated above, which combines the unlimited-reasons account with the wide account, is a very plausible principle of rights forfeiture.

2.2 Necessity and Justification

What is to be said about the two cases if we turn to the question of justification? It is quite clear that your killing of Mary was unjustified. I think, however (and all Western jurisdictions seem to concur[60]), that it was also unjustified in the case of Frank. But why, if he really was *liable*, if he really had *forfeited his right to life*?

The answer is that there is no reason to assume that the limits imposed on justifiable self-defense are all about the rights of guilty people. Instead, their underlying rationale might well (also) be the protection of *innocent* people. How does the necessity requirement protect innocent people? Well, there is obviously the risk that you misinterpret the situation and the allegedly culpable lethal aggressor is innocent (maybe, as in our example of Mary, she had a psychotic break due to the drugs a villain slipped into her drink). Abiding by the necessity criterion reduces the risk that innocent people get unnecessarily killed. In other words, what the necessity condition, as far as justification is concerned, tells you in the original Frank case is not: "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 himself getting what he wanted to dish out to others" – it does not tell you this partly because many people will not find it particularly convincing. Rather, it tells you this: "No, please, don't kill Frank *unnecessarily* because you might not have the whole picture and 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 Bill, its underlying ethical rationale is the protection of *innocent* people like Mary. 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.[61] Insofar as morality requires agents not to impose unfair and

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[60] In addition to my own knowledge of the self-defense statutes of several states, I rely here in particular on Sangero, *supra* note 13, which is probably the most comprehensive comparative study of self-defense in Western jurisdictions. He reports no exception to the necessity requirement, see *id*. at 143.

[61] Compare also Fletcher, *supra* note 11, esp. at 301. However, Fletcher's hint 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*. *ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS* 83-87 (1998), 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). Incidentally, while 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,

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.*

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.

"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 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." (*Id*. at 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 get fired, but that does not yet make firing them unjustified (and, of course firing – or killing – X 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 that *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.

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 to be confronted with a culpable attacker without having to be certain). Thus, given how the necessity criterion is formulated 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 already 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.[62] Another possible justification would, of course, be precisely the 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 in order to kill another innocent person, without anybody able to intervene and stop him, then this could provide a justifying emergency justification to kill or otherwise incapacitate him with an amount of force that was not necessary by the standards of self-defense.

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 and reasonability. After all, the defender or the people he or she defends are *ex hypothesi* also

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[62] 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 to many absolutist positions, is deeply implausible. For a criticism of absolutism, see UWE STEINHOFF, ON THE ETHICS OF TORTURE 149-150 (2013). For defenses of some forms of private punishment and "vigilantism," see Travis Dumsday, *On Cheering Charles Bronson: The Ethics of Vigilantism*," 47 S. J. OF PHIL. 49 (2009); 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*, 47 AM. U. L. REV. esp. 1252-1253 (there the author argues for a "justified vigilantism defense") (1998); Elizabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. OF GENDER, SOC. POL'Y & THE L. 141 (1995); Uwe Steinhoff, *Does the State have an Exclusive Right to Punish?*, unpublished ms.

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.

Incidentally, the same distinction between the context of justification and the context of liability also has to be made with regard to *proportionality.* It is, for example, 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. If this happens to them, they cannot complain. On the other hand, it is also not unreasonable to assume that the risk of misunderstandings, escalations, and the risk 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 allows for.[63]

3 For a Harsh Necessity Condition

I propose the following rendering of the necessity condition for justified self-defense:

> *Necessity*: A defender fulfills the necessity requirement of justified self-defense if and only if he or she chooses a way of defending himself or herself that would in the eyes of a reasonable person under the conditions of the self-defense situation be (one of) the *mildest means* among those means that promise a *safe, instant and conclusive defense* against the attack or – if this is not possible under the circumstances – among those means that *promise the best possible defensive results*. The defender, however, is free (but not required) to forego the *best* defensive results for the purposes of choosing an even milder means even if this heightens his or her own risk of being harmed.

This formulation of the necessity criterion is based on, but modifies, a formulation (which I will quote shortly) provided by Volker Erb in the *Münchener Kommentar*, one of the most influential commentaries on the German penal code. The philosophical reasons for my endorsement of the formulation above will become clear in the following.

A first thing to note about *necessity* is that the necessity requirement in self-defense law is not to be taken *literally*. To wit, if I can stop a culpable aggressor either by knocking him out or by shooting him dead, my knocking him out would not have been literally necessary: I could have shot him dead, after all. Thus, some authors think that the necessity condition requires the use of the *mildest* means. But why? Some jurisdictions do not even mention "necessity" but instead talk of "reasonable force" or use some other qualifier.[64] And even

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[63] Thus, it is wrong to claim, as David Rodin does in *Justifying Harm*, 122 *Ethics* 74, 79, 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] Examples are the self-defense statutes of the British Criminal Law Act 1967, Switzerland,

those jurisdictions that do talk of "necessity" in their self-defense statutes seem not to interpret this, in case law, as referring to *literally* the mildest means. German jurisprudence certainly does not: an authoritative statement of the interpretation of the necessity condition in German law emphasizes that necessity refers to the "measures that a reasonable observer would under the circumstances of the self-defense situation consider necessary for a secure defense against the attack."[65] (However, there has to be an *actual* self-defense situation, that is, the defender has to be *actually* faced with an ongoing or imminent attack – merely putative attacks do not count). And it further clarifies:

> What is meant with this [the necessity condition; *Erforderlichkeit*] is that *among several alternatively available means* that promise a *safe, instant and* conclusive *defense* (*Abwehr)* against the attack or – if this is not possible under the circumstances – that *each promise in the same way the best possible defensive results* – the defender must choose *the mildest* means.[66]

In other words, according to this formulation, a defender has to consider milder means *only* if they promise to be at least *as effective as* the harsher means.[67] Even if milder means would only minimally heighten the risks for the defender but significantly diminish the harm to the aggressor, the defender still need not choose the milder means. On the formulaic interpretation of the necessity condition ("use the milder means"), in contrast, the defender *must* choose that milder means. (One can distinguish an epistemic version of the formulaic interpretation from an ontic one. The epistemic interpretation refers to the agent's state of mind and would say that the agent has to choose what he *believes* to be the mildest means or what he *reasonably believes* to be the mildest means, while the ontic version states that the agent has to choose what actually *is* the mildest means.)

But is what I call the formulaic interpretation of the necessity condition perhaps preferable from a moral point of view? Certainly not. Even if one were of the opinion (which I am not) that the German rendering of the necessity condition is *too* lenient towards the defender, the formulaic interpretation of the necessity condition is absurdly lenient towards the *aggressor* and imposes unreasonable and unacceptable burdens upon the defender. This is at least true with reference to a defender facing a *culpable* aggressor, and the reasons for this are *moral* reasons, reasons of fairness: why, after all, should the *innocent* defender incur a higher risk of being harmed *for the benefit of the aggressor*?

This question is not answered by those who simply declare, as does Seth Lazar, that "such

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Sweden, and Indiana (IC 35-41-3-2, which mentions necessity only in special circumstances).

[65] Volker Erb, *Notwehr*, in MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH, VOL. 1 1249, 1296 (Wolfgang Joecks and Klaus Miebach eds., 2003).

[66] *Id*., original emphases changed from bold to italics. The other commentaries concur. As Erb's discussion of the rape case makes clear (*id*. at 1303-4), the "best possible defensive result" might sometimes consist in no more than interfering with or resisting the attack – even its mitigation might not be possible. See also section 5 below.

[67] Again, Anglo-Saxon law also rejects the "mildest means" reading of the necessity requirement, although it might not be as harsh on the aggressor than German law. See for example the references to risks and equal effectiveness in PAUL H. ROBINSON, CRIMINAL LAW DEFENSES, VOL. 2 4-5, 77, 79 (1984).

a uniformly absolute discount" of the aggressor's interests as the German model implies "is implausible."[68] Lazar rests content with this statement, providing no explanation as to *why* that is supposed to be "implausible." Such an explanation is needed, however, especially since the idea that a defender defending his life against culpable aggressors *can kill as many of them as necessary* is *not* deemed to be implausible by Lazar.[69] Such a permission also exists in Anglo-Saxon jurisdictions; and it discounts the lives of aggressors obviously no less than the German necessity condition.

For further illustration, let us define a *Type R* attack as an attack where the defender can be pretty much certain to survive if he uses lethal defense against the culpable aggressor but has only a 99% chance to survive such an attack if he uses a taser, and where he only has these two options of defense. Thus, the prohibition on using lethal force here means that one innocent person will have to die for every 100 *Type R* attacks. Hence the question arises: if an innocent defender may kill 100 culpable aggressors in defense of his life, why may he not kill one culpable aggressor in order to have a 100% survival chance instead of only a 99% one? Or, to put it still another way: if one and the same aggressor attacks me every day with a *Type R* attack, this means that the injunction of making allowances for the aggressor will leave him occasionally tasered and me dead for good. It seems that it is actually the innocent person's interests, not the aggressor's, that are discounted here, and this indeed *is* implausible. Thus, from a moral point of view as well the German rendering of the necessity condition is correct in the case of culpable aggressors.

Ironically, by the way, Lazar's formulation of his own necessity criterion is, due to its formalism, entirely compatible with the substantive interpretation given here (as well as with other substantive interpretations). His criterion reads:

> Defensive harm H is necessary to avert unjustified threat T if and only if a reasonable agent with access to the evidence available to Defender would judge that there is no less harmful alternative, such that the marginal risk of morally weighted harm in H compared with that in the alternative is not justified by a countervailing marginal reduction in risked harm to the prospective victims of T.[70]

Self-defense law, too, often refers to reasonable agents, but reasonability is invoked there – in contradistinction to Lazar's approach here – with regard to judgments concerning *facts,* not *norms* or *moral judgments*. The rationale for this is that reasonable agents can often widely disagree about normative questions (so that a criterion referring to normative

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[68] Seth Lazar, *Necessity in Self-Defense and War*, 40 PHIL. & PUB. AFF. 12 (2012).

[69] Seth Lazar, *The Responsibility Dilemma for Killing in War: A Review Essay*, 38 PHIL. & PUB. AFF. 205-206 (2010). Elsewhere (*supra* note 68, at 6) Lazar also invokes risks that self-defense may pose on innocent bystanders. However, these risks have nothing to do with the question before us, namely to what degree the interests of the *aggressor* can be discounted. Contrary to the way Lazar frames the issue, the self-defense justification covers harms and risks imposed on aggressors; the harms and risks that may befall bystanders ("collateral damage") are dealt with by other justifications, like necessity. This, at least, is how German law explicitly deals with these issues, and I have found no indication that Anglo-Saxon case law differs. It also seems to be the morally and conceptually appropriate approach.

[70] *Id.* at 13.

reasonability is useless in law since it cannot guide action). Thus, whether Lazar's criterion excludes the harsh interpretation of necessity I support depends on what counts as "reasonable." If Lazar wants to suggest that only his own substantive moral stance is reasonable – a stance, again, for which he provides no argument – this might itself be unreasonable.[71]

What about an innocent aggressor, though? German law demands a certain "minimal solidarity" between fellow subjects of law (or, more precisely, between those subjects of law that do not culpably breach the law). This minimal solidarity requires citizens to tolerate, for instance, certain (but not unlimited) damages to their property if another (innocent) citizen cannot protect much weightier interests, for example his life, in any other way than by damaging the property. In other words, it requires citizens to tolerate acts of other citizens that are covered by a necessity justification.

However, there are stringent limits to this solidarity: in particular, citizens are not required to sacrifice their lives or to acquiesce to severe detriments to their health for the survival of others, not even *many* others.[72] These limits – in fact, even stronger limits – are also to be found in the provisions for self-defense against innocent persons.[73] While here there exists a duty to retreat (which does not exist with regard to culpable aggressors), and the defender might, for the benefit of the innocent attacker, be required to suffer infringements of his otherwise legally protected interests that are more serious than what he would have to suffer if attacked by a culpable aggressor, the defender is *not* required to risk his life or bodily integrity for the sake of the innocent attacker. That is, once the threat he is facing is a threat to life, freedom, or bodily integrity, the defender is not required to take on greater risks for the benefit of the attacker. Thus, in such cases "necessity" is again interpreted as leniently as it is in the case of self-defense against a culpable aggressor.

Some, without a doubt, will find this too harsh, but I find it intuitively compelling: I am not obliged to sacrifice my arm or life if one hundred innocent attackers try to cut off my arm or to take my life. If I can only defend my life or bodily integrity by killing them all, I am allowed to do this (this is compatible, by the way, with claiming that others might – under a *necessity* justification – be permitted to use lethal force against me to stop me from doing this).[74]

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[71] Lazar's criterion is also co-responsible for another unappealing feature of his account: necessity and proportionality are not logically separate criteria any more, see *id.* at 17-22.

[72] Volker Erb, *Rechtfertigender Notstand*, in MÜNCHENER KOMMENTAR (*supra* note 64) 1346, 1387-1388. The Leipzig commentary concurs, see Frank Zischang, *Rechtfertigender Notstand*, in STRAFGESETZBUCH: LEIPZIGER KOMMENTAR, GROßKOMMENTAR, BD. 2: §§ 32-55 581, 630-632 (Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan, and Klaus Tiedemann eds., 2006).

[73] See Erb, *supra* note 65, at 1321-3; Thomas Rönnau and Kristian Hohn, *Notwehr*, in STRAFGESETZBUCH (*supra* note 72) 353, 526. It has to be noted, however, that Rönnau and Hohn as well as some other commentators are unwilling to consider a person who "attacks" another innocent person in putative self-defense due to unavoidable error as really being an attacker in the relevant legal sense in the first place. This need not concern us here.

[74] Schopp, *supra* note 61, at 80, seems to concur.

It should also be noted, moreover, that if one thinks that people have to sacrifice themselves for the significantly greater good, then the obligation to sacrifice one's life or limb is only the tip of the iceberg (leaving the obligation to not resist people who want to slowly torture you to death for the greater good aside). One would also have to sacrifice one's *property*. Thus, if people from a poor country (or people acting on their behalf) break into your house to steal some of your valuables in order to give them to the poor and to thereby save lives, you would not be allowed to resist. The police would not be allowed to resist them either (your valuables do not become more valuable than life only because the police defend them). Consequently, if thousands, ten thousands, millions of poor people or people acting on their behalf came into the rich countries to steal some of the property of the people living there, sell it, and make the money available to save the poor, we would not be allowed to resist them, as long as the harm they inflict is proportionate in relation to the good they achieve (which is, given the property vs. life comparison, not a high hurdle). Maybe some of those who think that one has to sacrifice one's life and limbs to a multitude of innocent aggressors will actually embrace such an implication (how they would react when Robin Hood actually comes for their laptop is another question), but I suspect that many of them are not even aware of this implication: if taken seriously and acted upon, the view criticized here leads to the complete collapse of property systems as we know them (in fact: it leads to the abolition of property until such a time when basic needs are met for all) and would certainly revolutionize all jurisdictions and penal systems on this planet.

4 Against the Formulaic Interpretation of the Necessity Condition and for Reasonableness

Thus, the harsh necessity criterion of German self-defense law is preferable to, for example, Lazar's rendering of the necessity condition. Note, however, that even Lazar's rendering of it, while more lenient towards the aggressor than the one endorsed here, is different from the formulaic interpretation. However, some of Russell Christopher's arguments against the *imminence* criterion clearly rely on the formulaic interpretation (in its ontic form) of the *necessity* requirement, and so does Philipp Montague's rejection of the imminence requirement.[75] Yet the formulaic interpretation is highly counter-intuitive. Consider, for instance, a case where an innocent cowboy is sneaked up on from behind by a hired killer who is ready to shoot. The cowboy sees the killer at the last moment in a mirror. Let us further assume that any reasonable observer of the scene would have said that the cowboy's only way of successfully defending himself were to swirl around and shoot the attacker. Yet, surprisingly, later it turns out that the killer suffered from a rare condition: whenever somebody said "Boo" to him, he got so frightened that he ran away in panic. Thus, shooting the killer was not literally necessary to avert the harm: it would have been quite sufficient to simply say "Boo."

Thus, if measures taken in self-defense are only justified if the attack could not have been averted in any milder way, then the cowboy's shooting the hired killer was unjustified. This,

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[75] Russell Christopher, *Imminence in Justified Targeted Killing*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 253 (Claire Finkelstein, Jens David Ohlin, and Andrew Altman eds., 2012). Phillip Montague, *Defending Defensive Targeted Killing*, in *id*. 285.

however, is implausible and seems not to match the way we usually speak about self-defense. In fact, a moral requirement to use the *objectively* mildest means would amount to condemning the cowboy to death. After all, he does not *know* (and in the example has no means of knowing) that saying "Boo" would be sufficient; nor does the objectivist morality require him to say "Boo" – the cowboy is at liberty to get himself killed. Instead, it requires him, negatively, *not* to shoot. Under the circumstances, that is, given the cowboy's epistemic situation, this requires him to forgo the only means he knows will save him. It effectively requires him to allow the attacker to shoot him dead.

There are further problems regarding the implications of deeming the act unjustified. If it was indeed unjustified, then suddenly the killer himself was under unjustified attack by the cowboy and would therefore be allowed to defend himself against him. He could now kill the cowboy justifiably. Or, in case he succumbs to the cowboy's skill, the hitman's family could sue the cowboy for wrongful killing. But these implications seem absurd. To be sure, one could try to avoid them by making some additional assumptions – something, however, defenders of the formulaic interpretation have so far failed to do. The burden of proof, in any case, appears to be on them, and so far they have not met this burden.[76] Christopher, for example, simply assumes the formulaic interpretation without argument (while I just have provided arguments against it).

But let us speculate a bit. What additional assumptions could one appeal to in order to avoid the noted counter-intuitive implications? It is difficult to find good candidates. Perhaps one might think that in this case of the cowboy and the killer the cowboy's act is justified not by the self-defense justification but by some other justification, or that self-defense is only permissible if one did not provoke the attack one is now defending oneself against in the first place. However, in law the first assumption does not work, because there is no other justification available that the cowboy could use here – and it is also anything but clear what *moral* justification the cowboy would have here if he does not have the self-defense justification. As regards the second assumption, it is simply not true that self-defense against provoked defense is unjustifiable.[77] The only possible exception are provocations where the provoker intentionally provokes the defender with the aim of then using force against him.[78] However, our example is different: the killer sneaks up from behind with the obvious intention of *avoiding* any defensive measures on the part of the cowboy.

Another way to avoid unwanted implications might be to distinguish between the aggressor's liability and the defender's justification (a distinction I do in fact endorse, as we saw, albeit for other purposes): one could say that the aggressor, who, with murderous intentions, is about to attack the gun-fighter becomes thereby liable to attack and forfeits his right to life. And therefore, one might claim, he is no longer allowed to defend himself against the cowboy, even though the cowboy's counter-attack is unnecessary (in the formulaic sense) and therefore allegedly unjustified, although excused.

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[76] See also n. 3.

[77] See Larry Alexander, *Causing the Conditions of One's Defense: A Theoretical Non-problem*, 7 CRIM. L. & PHIL. 623 (2013). For an overview over the debate, see Sangero, *supra* note 13, section 5.4.

[78] *Id.*; Erb, *supra* note 65, at 1327-1332.

The problem with this "solution" is that the distinction between justification and excuse, to make sense, must have some practical implications. To wit, one such consequence is expressed in our thinking that someone who is merely excused for inflicting harm on others but not justified owes somebody – and be it only abstractly "the moral community" – an apology.[79] In this case, however, the cowboy obviously does not owe his murderous attacker any apology – after all, *ex hypothesi*, he hasn't violated his rights at all. So what should he apologize for?

A potential answer would be that he might have to apologize to other people. Consider the following example: Robert, who always wanted to randomly kill a person in a theater, goes into a theater, draws his gun, and randomly shoots 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 gun when Robert's bullet surprisingly hit him. Does Robert owe the hitman an apology? Hardly. Due to the fact that the hitman was about to murder Robert, 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. But the other theatergoers do, in fact, all innocent persons do. Why? Because Robert, by drawing his gun and randomly shooting a theatergoer, did not take reasonable precautions to avoid unnecessarily harming innocent people and thereby failed to show them proper respect. His act was certainly unjustified, and even though he does not owe the hitman an apology, he certainly owes an apology to the other theatergoers: "Sorry, I really shouldn't go into theaters and randomly shoot people. I won't do it again."

However, does our cowboy owe an apology to others for killing the aggressor unnecessarily (in the formulaic sense)? It does not seem so. The theatergoers would be entirely justified if they went up to Robert and screamed in rage: "Are you crazy to randomly shoot at people?" But what complaint have third parties against the cowboy? Going up to him and saying, "How dare you use force against a culpable aggressor that any neutral observer would have considered reasonable under the circumstances?" does not sound particularly convincing as far as complaints go. Moreover, the cowboy can reply: "I could not know at the time that the force I used was not literally necessary. And *you* wouldn't have acted any differently. So you have quite a nerve to complain." Thus, the fact of the matter is that the cowboy, unlike Robert, did not impose unreasonable risks on third parties and therefore need not apologize to them; nor need he apologize to the culpable aggressor who, *ex hypothesi*, has forfeited his right to life and self-defense. However, an act for whom the agent does not owe any excuse to anybody is not only excused but *justified.* It is difficult to see how it could be any different.

Thus, we can summarize one result of sections 3 and 4 by concluding that there seems to be no reason to accept the formulaic interpretation of the necessity condition (neither in its epistemic, nor in its ontic form), and a number of reasons to reject it. Western jurisdictions agree: there is no hint that case law in Western jurisdictions would accept the formulaic

[79] Since I do believe in necessity justifications, that is, in justified rights violations, I do not claim here that the converse is also true: that is, that once A's act is justified, he cannot owe anybody an apology for this act.

interpretation of the necessity requirement. As a result of the overall discussion we can conclude that the harsh necessity criterion, in its epistemic form and combined with a reasonableness requirement, and hence the necessity requirement stated at the beginning of section 3, is vindicated. At the very least, it would now be up to opponents of such a rendering of the criterion to provide counter-arguments.

5 A Final Note of Clarification: The Necessity Condition Does Not Imply a "Success Condition"

Daniel Statman thinks that the necessity requirement implies a "success condition" since "[f]or some course of action to be a last resort [that is, necessary for achieving a certain goal], it must first be a resort, as it were."[80] And he thinks that this success condition leads to the following "normative problem":

> … assume that [a woman targeted as a rape victim] is attacked by a group of five and has only two bullets in her gun. Assume further that her shooting is unlikely to frighten the other criminals or drive them away. If anything, it could make her situation worse, as they are likely to treat her even more cruelly. On S [the alleged success condition], we are to say that using her weapon in these grim circumstances would not only be unwise but morally forbidden, which is very hard to accept.[81]

However, by killing two of the five, the woman obviously extremely successfully averts the threat of being raped by *them*, the two, and there is, *pace* Statman, not one Western jurisdiction whose necessity criterion would imply that because of the fact that the remaining rapists would then rape her particularly brutally the woman cannot justifiably kill two of them in self-defense. This, of course, is also the morally correct stance to take. Thus, Statman's "normative problem" does not arise in this case at all.

Moreover, even if one insisted on considering the five *only* as a group (and thus, without any legal or moral reason, disregarded the threats posed by its individual members) the woman would still have achieved *defensive results* (although "the group," now only embodied in its three surviving members, would still rape her). The reason for this is that, in contrast to what Statman assumes, one can *defend* oneself against an *attack* without *averting or mitigating* the *harms* threatened by the attack.

Consider the following example. Someone has thrown Sally to the ground and now tries to sink his knife into her chest while she has grabbed his wrist, trying to keep the knife away. For reasons of his own, the attacker is determined to have the knife enter his victim's chest exactly 20 seconds (not earlier, not later) after he has thrown the victim to the ground. He is stronger than Sally, so Sally could at best slow down the pace at which the knife is unstoppably approaching her chest. And, indeed, she *would* slow the attacker down if he pushed down the knife with all his strength, but he does not do this because of his 20 second rule. What he does do is adapt his aggressive efforts to her resistance: the harder she resists, the harder he needs to push in order to keep his schedule.

Thus, Sally's defense does not even *mitigate* the aggressor's attack: whether she resists or

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[80] Daniel Statman, *On the Success Condition for Legitimate Self-Defense*, 118 *Ethics* 659, 663 (2008).
[81] *Id.* at 664.

not, the knife will enter her chest at the same time with the same result in both cases. In this sense, her self-defense is entirely futile. Yet, to say of a woman who has grabbed the wrist of her murderer and applies all her strength to keep the knife away that she is *not* defending herself seems to be extremely odd. It does not, in my view, become less odd if we assume that the woman actually *knows* that she cannot slow down the murderer. Her resistance *is* self-defense.

There are two possible objections to this argument. First, one could simply deny that what the woman is doing here amounts to self-defense. As already stated, however, this is implausible, and at the very least one would like to see an *argument* in support of such a denial. So far, no one has provided one.[82] The other objection might be that the woman even in my case still has to satisfy some success-condition: if she does not even succeed in *resisting* the aggressor (so that he needs to adapt his aggressive efforts to her countermeasures), then her act is not self-defense anymore. On my definition of self-defense, however, this would be wrong.[83] But let us grant the definitional point of the objection for the sake of argument: if the woman does not succeed in resisting the aggressor at all, her actions are not self-defense but at best *attempted* self-defense. Yet, first, that would not necessarily make the act unjustified, and second, I do not see why one should call this a "success condition." One could also claim that acts of purchasing goods must fulfill a "success condition": if they do not succeed in actually transferring the ownership of something from one person to another, they are not really acts of purchasing. However, what gain in knowledge is achieved by using such a terminology?

A last objection that I have heard is that acts with which one inflicts harms on an aggressor (let's assume the woman has a very tight and painful grip) need to serve some "further purpose" besides resisting the aggressor. But why? It seems to me quite obvious that the woman has a *right* to resist the aggressor, and she is permitted to exercise this right, whether it serves some "further purpose" or not.[84] Moreover, why should this further purpose not simply be that the woman feels better harming the aggressor while she is being raped than not harming him?[85] Since the aggressor should not rape her at all but owes her compensation

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[82] In contrast, I have at length provided an argument for my own definition of self-defense elsewhere, see Uwe Steinhoff, *What Is Self-Defense?*, PUB. AFF. Q, forthcoming.

[83] On my definition, an act token is self-defense if it is directed against an ongoing or imminent attack and belongs to an act type that usually functions as a means to resist an attack, or if the actor correctly believes that the act token is an effective form of resistance. I will not defend this precise definition of self-defense here, but have done so *id.*

[84] See on this also Kadish, *supra* note 6, who actually, quite correctly, identifies the right to resist one's attacker with the right to self-defense; and more recently, Kamm, who, incorrectly, distinguishes the two. See Frances Kamm, *Self-Defense, Resistance, and Suicide: The Taliban Women*," in HOW WE FIGHT (*supra* note 20) 75. For further argument in support of my claim that this is one and the same right, see Steinhoff, *supra* note 82.

[85] See Gerhard Øverland, *On Disproportionate Force and Fighting in Vain*, 41 CANADIAN J. OF PHIL. 235 (2011). Referring to an example similar to the one Statman gave in the quote above, Øverland states that "one may kill some of the many culpable aggressors in vain for whatever comfort it brings to the victim" (*id*. at 250).

given that he does rape her, why should she not make him pay (part of) this compensation already right now, while he is raping her? In any case, even if, counter-intuitively, we denied a right to resist and the woman's resistance could only be justified if it served some such "further purpose," elevating this to a "success condition" seems to be rather misleading. Thus, the necessity condition of justified self-defense does not imply a "success condition" worth its name.

Conclusions

Rights forfeiture or liability are not a path to the permissibility of self-defense, and the necessity condition is not intrinsic to justified self-defense. Rather, necessity in the context of justification must be distinguished from necessity in the context of rights forfeiture. While innocent aggressors only forfeit their right against *necessary* self-defense, culpable aggressors also forfeit, on grounds of the principle of reciprocity stated above, certain rights against *unnecessary* self-defense. Yet, while culpable aggressors would therefore not be *wronged* by certain unnecessary defensive means, the use of such means against them would still not be *justified*. Thus, there is a necessity condition that is not intrinsic to rights forfeiture but only belongs to justification. The underlying rationale of this necessity requirement lies not in the rights of the *aggressor*, but in an agent-relative requirement to take fair precautions against oneself violating the rights of the *innocent*. This concern is also expressed in the necessity criterion defended above, which is very *harsh* on aggressors. To wit, the necessity condition for justified self-defense must not be interpreted as requiring the employment of literally the least harmful means or of means that the defender reasonably believes to be, literally, the least harmful ones. What he must believe about the properties and possible effects of the means he employs is something that is *much* less demanding. To repeat by way of conclusion:

> *Necessity*: A defender fulfills the necessity requirement of justified self-defense if and only if he or she chooses a way of defending himself or herself that would in the eyes of a reasonable person under the conditions of the self-defense situation be (one of) the *mildest means* among those means that promise a *safe, instant and conclusive defense* against the attack or – if the former is not possible under the circumstances – among those means that *promise the best possible defensive results*. The defender, however, is free (but not required) to forego the *best* defensive results for the purposes of choosing an even milder means even if this heightens his or her own risk of being harmed.

This necessity condition of justified self-defense is harsh (on the aggressor) also by not implying a "success condition" worth its name.[86]

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