

Defense of Self and Others against Culpable Rights-Violators

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Note: This is still a rough draft and I very much welcome criticisms and suggestions for improvement. I know that it will be difficult to read in places!

What enforcement rights does an agent have in response to non-just rights intrusions? I here extend the account in Vallentyne (2011) of enforcement rights against *non-culpable intruders* to include rights against *culpable violators*. I also extend to it to include enforcement rights to *defend others* (and not merely oneself). The extended account holds that an agent has an enforcement right to intrude against another if the defensive intrusion (1) suitably *reduces non-just intrusion-harm* to the agent or others, (2) is no more harmful to the other than *necessary* to achieve the reduction, and (3) imposes intrusion-harm on the other that is *proportionate* in a specified manner to the reduction achieved. The crux of the theory comes from the proportionality conditions, which are sensitive to (1) whether the individual will be intruding upon rights (even if in no way agent-responsible for the intrusion), (2) to the degree of responsibility for intrusion-harm, and (3) to the degree of culpability. A radical feature of the theory is that there are no proportionality restrictions against a rights-violator who is *fully*

culpable and is agent-responsible for intrusion-harm.

1. Background

In what follows, I assume that the permissibility of an action is determined by the facts at the time of action, and not merely by what the agent believes the facts to be, or by what her evidence supports. For example, killing an innocent person with no benefit to anyone else is wrong, even if the agent believes, and her evidence strongly supports, the view that killing the person was permissible because it was necessary to stop her from wrongly imposing enormous harm on others. This, of course, is a controversial view, but I believe it to be the correct view, and I assume it for simplicity of presentation. Much, but probably not all, of my claims could be recast to be compatible with alternative assumptions.

Individuals have, I shall assume, certain basic rights, such as certain rights of bodily integrity (e.g., the right not to be killed or assaulted). For simplicity, I shall assume choice-protecting conception of rights for which consent plays a crucial role, although a similar account can be given for interest-protecting rights.

A person's rights define certain conditions (e.g., that he not be hit) such that, if the conditions are violated without the consent of the right-holder, then the right is *intruded upon*. A right is not intruded upon when the condition is violated with the consent of the holder. The following terminology will be used below:

Non-autonomous intrusion: The intrusion is not the result of a (sufficiently) autonomous choice of the intruder (e.g., an infant striking you) and thus is neither permissible nor impermissible (and neither just nor unjust).

Autonomous Intrusion: The intrusion is the result of an autonomous choice of the intruder (e.g., a normal adult striking you) and is thus either permissible or impermissible (and either just or unjust).

Just intrusion: The intrusion does not wrong the rightholder because there is an undercutting justification (e.g., suitable self-defense).

Unjust intrusion (infringement): The intrusion wrongs the rightholder because there is no undercutting justification (e.g., attacking an innocent person).

Permissible infringement (mere infringement): The intrusion wrongs the right-holder but is permissible because there is an overriding justification (e.g., saving a million lives).

Impermissible infringement (violation): The intrusion is impermissible because it wrongs the right-holder without any overriding justification.

Our core question concerns the conditions under which it is just to defend against a *non-just* (i.e., non-autonomous or unjust) intrusion. We shall focus, that is, on the conditions under which it *does not wrong* the person who is defensively attacked. I will not here address what, if any, overriding conditions might make it *permissible* to unjustly attack a person. For simplicity, readers may suppose that there is no overriding justification present, and that there are no relevant impersonal constraints, and thus that the defensive attack is permissible if it does not wrong the attacked person or anyone else.

In the remainder of this section, I flag some methodological issues relevant to my project. Like most theorists, I hold that the plausibility of a moral theory is determined by how well it captures our judgments in reflective equilibrium. This requires that the theory be sensitive to

issues of plausibility both at the abstract theoretical level and at the level of assessment about particular cases. It leaves open, however, the relative importance of the theoretical level vs. the concrete level. Because I take the theoretical level fairly seriously, my reflective views tend to be more *revisionary* than those of most people. As a result, readers who attach little significance to theoretic virtues are unlikely to find the views defended here plausible.

A related point is that, at the theoretical level, I will attempt to provide a reasonably full *specification* of morally valid enforcement rights. Doing this will involve a fair amount of complexity, and this will, no doubt, put off some readers. The main alternative approach is to specify simpler *pro tanto* principles and to leave open the messy business of how they interact. I believe that both kinds of approach are important and useful, but my interest is in providing a reasonably full specification. Doing so has the disadvantage of complexity and of effectively ensuring that the principles are false in some (if not many) respects. The advantage is that the very real complexity is grappled with and claims are specified carefully enough to be refutable. If all investigation were to end in a year, then the *pro tanto* approach would clearly be more useful. If, however, investigation is to continue for a much longer period, then the specificationist approach will, I believe, be one useful way of making progress over time by uncovering specific errors. In any case, it is in this spirit that I advocate the principles that follow.

2. Self-Defense against a Non-Culpable Intruder

In this section, I articulate and motivate the theory of Vallentyne (2011). In later sections, I strengthen the claims. Readers should consult the earlier article for greater clarification and defense of this starting position.

A core feature of the theory that I will defend is its appeal to intrusion-harm. *Intrusion-harms* are harms from rights-intrusions (as defined above), and thus do not include all harms (e.g., harms caused by illness). The harm is the extent of the setback to the agent's interests (goals) in some suitable sense.¹ Unqualified references to intrusion-harm should be understood as references to *direct* intrusion-harm (i.e., harm to the right-holder) and not to indirect intrusion-harm (e.g., emotional harm to my wife when I am beaten up). Moreover, throughout, intrusion-harm is to be understood as the *objectively expected value* (i.e., probability-weighted value) at the time of assessment of the *net uncompensated* intrusion-harm. Intrusion-harm that is certain to be fully compensated is thus irrelevant. Finally, intrusion-harms include not only primary intrusion-harm (e.g., injury from assault) but also secondary intrusion-harms from the failure to provide any *owed* compensation (or other rectification) for the primary intrusion. Thus, although below only future intrusion-harms are relevant, these include the harms of failing to provide owed compensation for past intrusions.

One motivating idea for the theory I defend is the view that defensive intrusion-harm against another is just when *it suitably reduces non-just intrusion-harms to the defending agent*. In Vallentyne (2011), I defend the following view, where *Agent*, is the agent acting defensively, and *Target* is the person being defensively attacked.

Enforcement 1: In a given choice situation, Agent has a moral liberty, against Target, to perform a specific act of intrusion upon Target, if each of the following conditions holds:

- (1) **Harm Reduction:** Agent's intrusion against Target lowers the (expected value of net uncompensated direct) non-just intrusion-harm to Agent by all other individuals

compared with that value if Agent does not, in that choice situation, intrude autonomously upon Target or others²;

(2) **Necessity:** Agent has no alternative action that (a) achieves or exceeds the above reduction in intrusion-harm to Agent, (b) involves no infringements of rights of individuals other than Target, (c) is no worse for Agent, and (d) is better for Target (i.e., leaves him better off); and

(3) **Proportionality:** The (expected value of the net uncompensated direct) intrusion-harm to Target by Agent's intrusion is no greater than the largest intrusion-harm to Target imposed by one of Agent's *Target-admissible* choices (to be explained below).

Note to readers of this draft: I now see that the above, wrongly I believe, does not give non-autonomous intruders a right to self-defense (as determined by the above conditions). To correct for this, please read “*non-just* intrusion-harm” as “*actionable* intrusion-harm”, where actionable intrusion-harm is non-just intrusion-harm *or just-intrusion-harm against a non-autonomous intruder*. I realize that this may appear ad hoc, but I believe that it is defensible (e.g., because, although the non-autonomous intruder does not, I claim, have any rights, against the defender, to compensation, she does [unlike the autonomous but non-responsible intruder] maintain her rights to self-defense). Still, because I'm uncertain about a related issue below, I'm not making changes to the paper yet. Obviously, I'm very interested in your thoughts on this. (Yes, I know that this particular problem would not arise, if I simply held that non-autonomous intruders aren't liable to defensive attack.)

Stated in this generic form, the principle is relatively uncontroversial. It only states a

sufficient condition for having a liberty-right to intrude against another, and it leaves open the content of the proportionality condition. It should be noted, however, that it allows imposing an intrusion-harm on one person when it suitably reduces the non-just intrusion-harms from other individuals (deterrence). This is, however, subject to the proportionality restrictions for each individual, which are based (as will become clearer below) solely on the intrusion-harms that she is expected to impose. Thus, deterrence is allowed only where it is proportionate (unlike, for example, the utilitarian view).

A *second motivating idea* for the theory I defend is the view that there are no relevant *theory-independent* facts about proportionality. Proportionality is simply a place-holder for whatever limits the correct theory of defensive action places on the harm imposed on individuals. If this is correct, then a theory schema, such as the one above, can't simply appeal to "whatever the correct account of proportionality is", since there is no such thing. A full theory of enforcement rights must specify the relevant limits, and I attempt to do this below.

A *third motivating idea* for the theory I defend is the view that (1) proportionality allows greater defensive intrusion-harm the more the intruder is *agent-responsible* for imposing intrusion-harm, but (2) proportionality allows some defensive action against intruders *even when they bear no agent-responsibility for intruding upon anyone's rights*. Let me explain.

An individual is *agent-responsible* (or attributively/morally responsible) for some outcome (which may be an action) to the extent that it is suitably attributable to her agency. There is, of course, disagreement about what is required for agent-responsibility, but I shall here assume, for illustration, that it depends on the extent to which (1) the outcome is the result of the individual's autonomous choice, (2) the choice is suitably free of duress, and (3) the outcome is suitably foreseeable by the individual. In what follows, I shall assume, more controversially, that

agent-responsibility for a given outcome comes in degrees, between 0 and 1. Moreover, where an agent is, for example, .8 responsible for an intrusion-harm of 10, I shall equate this with being fully (1.0) responsible for intrusion-harm of 8 (.8 x 10).

The crucial content of the theory comes from its theory of proportionality. In this section, we shall focus, as I did in Vallentyne (2011), on non-culpable intruders (i.e., agents who are not agent-responsible for acting wrongly; e.g., because of unavoidable ignorance). The next section extends the view to cover culpable intruders.

According to Proportionality (above), a defensive action by Agent against Target is proportionate just in case the (expected value of the net uncompensated direct) intrusion-harm to Target by Agent's intrusion is no greater than the largest intrusion-harm to Target imposed by one of Agent's *Target-admissible* choices. We shall now to address the conditions of Target-admissibility.

Let us start by considering a case where the intruder bears *no agent-responsibility for any intrusion-harm* (e.g., because he is unforeseeably swept by wind or because he could not have known that his action would intrude upon anyone's rights).

Let the *joint intrusion-harm* of an action by Agent (relative to Target) be the sum of the (expected value of the) intrusion-harm imposed on Target by Agent's action plus the (expected value of) Target's non-just intrusion-harm to Agent in response. For example, if an action of Agent imposes 10 units intrusion-harm on Target and in response Target imposes 5 units of non-just intrusion-harm on Agent, then the joint intrusion-harm of Agent's action (to Agent and Target) is 15.

Consider, then:

Target-Admissible (Version 1a): An action by Agent is *Target-admissible* if the joint intrusion-harm that it imposes is no greater than the *minimum feasible* joint intrusion-harm that Agent could impose without infringing the rights of individuals other than Target.

Suppose, for example, that Agent has only two choices: (1) imposing no intrusion-harm on Target and bearing 10 units of non-just intrusion-harm (i.e., total of 10 to the two of them), or (2) imposing 10 units of intrusion-harm on Target and bearing no non-just intrusion harm (total of 10). In this case, both actions are Target-admissible. Thus, it is proportionate to impose 10 units of intrusion-harm on Target to avoid a 10 units of intrusion-harm from Target—even if Target is in no way agent-responsible for the intrusion-harm that he is (e.g., inadvertently) imposing.³

Suppose now that Agent also has a third option of imposing 1 unit of intrusion-harm on Target and bearing 8 units of non-just intrusion-harm from Target (total of 9). In this case, only the third option is judged Target admissible (since only it minimizes the total). Thus, in this case, imposing 10 units of intrusion-harm on Target is not judged proportionate (since Target suffers more intrusion-harm than on any Target-admissible option). (Target-Admissibility only gives sufficient conditions, since it will be strengthened below. Thus, it does not judge actions disproportionate. It only fails to judge them proportionate.)

Those (e.g., Otsuka 1994, McMahan 1994, 2009) who hold that all intrusion-harm is disproportionate against those who are not agent-responsible for intrusion-harm would, of course, reject this view. I believe, however, that, although the absence of agent-responsibility imposes very strict limits on the intrusion-harm that may be proportionate in defense attack, it

does not impose a limit of zero. Instead, the limit is set by the greatest harm to Target by any of Agent's choices that minimize the total non-just intrusion-harm to the two of them. Thus, even if Target imposes a threat not attributable to his agency (e.g., being unexpectedly being windblown or behavior of a baby), some degree of intrusion-harm can be proportionate. In such cases, Target *does not infringe* any rights (since there is no agency), but Target *does intrude* upon rights and is thus different from an innocent bystander. For a defense, I refer the reader to the earlier article.

Let us now develop the criteria for Target-admissibility (and hence proportionality) to handle the case where Target is *agent-responsible for at least some of the intrusion-harm* that he would impose, if Agent does not act defensively. We continue to assume, however, that Target is not culpable (e.g., he reasonably but falsely believes that he is acting permissibly). In that case, the proportionality limits on Agent's defensive action typically would increase, but how exactly? Suppose that Target would, in the absence of defensive action, be agent-responsible for n units of non-just intrusion-harm to Agent (e.g., he freely and knowingly imposed that harm). My claim is that a defensive action by Agent is Target-admissible just in case it imposes a joint intrusion-harm no greater than the minimum feasible such total (as above) *plus* n .

More formally:

Target-Admissible (Version 1b): An action by Agent is *Target-admissible* if the joint intrusion-harm that it imposes is no greater than the *sum* of (1) the minimum feasible joint intrusion-harm that Agent could impose without infringing the rights of individuals other than Target, and (2) the non-just intrusion-harm to Agent for which Target would be agent-responsible, if Agent were not to intrude defensively upon the rights of Target

or other individuals

For example, in the above three option case, the minimal joint intrusion-harm is 9 (1+8). Thus, if Target would be responsible for the 10 units of non-just intrusion-harm to Agent in the absence of any defensive action, then any action is Target-admissible as long as its joint intrusion-harm is no more than 19 (9 + 10). In that case (unlike the original non-responsible one), imposing an intrusion-harm of 10 on Target is admissible (and hence proportionate), since it imposes a total intrusion-harm of 10, which is less than the minimum of 9 plus the 10 units of non-just intrusion-harm for which Target is agent-responsible. Moreover, suppose now that two additional options are feasible: (1) one in which Agent bears .5 non-just intrusion-harm from Target but imposes 18.5 units of intrusion-harm on him (total of 19), and (2) one in which Agent bears 0 non-just intrusion-harm from Target but imposes 20 units of intrusion-harm on him (total of 20). In this case, the first is admissible (and proportionate) but the second is not judged admissible (and not proportionate).⁴

Obviously, there are many possible way that agent-responsibility for intrusion harm that is non-just might increase the limits of proportionality. I favor the above approach because it has a simple linear approach. Each unit of additional responsibility for intrusion-harm, increases the total joint intrusion-harm that is admissible.⁵ Again, for a defense, I refer the reader to the earlier article.

Before generalizing this approach to cover (1) self-defense against *culpable* intruders, and (2) defense of others, let us note some other more controversial features of this approach, which I defend in the earlier paper. First, there is no appeal to retribution. Harm-reduction (either preventing an intrusion or ensuring compensation for a past intrusion) is the core notion. Second,

the reduction in non-just intrusion-harm need not be reduction in the intrusion-harm imposed by Target. It may be a reduction in the intrusion-harm imposed by others (although subject to individualized proportionality restrictions). Third, there is no requirement that the intrusion against which one defends be imminent or even highly likely. It may be in the distant future. What matters is the expected value of the non-just intrusion-harm, which is determined by the probabilities of the intrusion (which are typically lower the more distant in time it is) and the size of the intrusion-harm. Fourth, proportionality is not based on desert or on an independent theory of proportionality. It is simply a placeholder for a specification of the limits on the intrusion-harm that may be imposed. Fifth, the above approach focuses exclusively on intrusion-harm and is not sensitive to whether it is from intrusions upon rights to one's *person* or upon one's rights to *external things*. These are all controversial features discussed in the earlier paper. My goal is to extend the theory to cover a wider range of cases.

Long (and not especially clear) note to readers of this draft: I here record a deep problem with the above approach (and perhaps for most approaches?) that I do not currently know how to solve. It's a version of the aggregation problem discussed by Rodin and McMahan (aggregation of the intrusion-harms from different intruders).

(1) Intuitively, such aggregation might be relevant for an impersonal constraint against self-defense, even if it wrongs no one. I, however, deny that there are any impersonal constraints. In any case, I am here concerned with (narrow) proportionality that determines when an individual is wronged, and not with overall permissibility.

Aggregation does not seem relevant to that and I do not invoke it above. The lack of such aggregation seems plausible when the intruder is highly responsible for the non-just

intrusion-harm, especially if she is culpable. It seems problematic, however, when the intruder is non-autonomous, or even when she is autonomous but not responsible for any non-just intrusion-harm. (See below for discussion of why there is still a problem even if one holds that holding that non-responsible intruders are wronged still seems problematic.) Perhaps individuals have a right (in addition to their basic rights over their person) not to be harmed when the total harm to all individuals is too great relative to the benefit of the defender. This right might be forfeited when one culpably intrudes, and perhaps when one is highly responsible for non-just intrusion-harm. I'm open to this possibility, but I need to think more about it.

- (2)** Moreover, even if there were no aggregation for narrow proportionality for the case of intruders not responsible for agent-harm, a problem would arise with respect to agents responsible for a small amount of intrusion-harm. Is aggregation appropriate? That seems implausible, since the difference in responsibility is small. But there seems to be no other natural dividing line between the highly responsible agents and the non-responsible ones. Of course, one could make culpability the dividing line, but it seems implausible to invoke aggregation for agents highly responsible for intrusion-harm.
- (3)** A qualification to the above, where for simplicity I focus on non-autonomous intruders:
- (a)** If the causal contribution of each intruder's intrusion to Agent's intrusion-harm is small (e.g., only causes the loss of a pint of blood), then proportionality will not allow Agent to impose a significantly greater harm, even if all the intruders together will ensure a great harm to Agent. No problem here for non-autonomous intruders.
- (b)** If the causal contribution of each intruder's intrusion to Agent's intrusion-harm is great (e.g., death), then proportionality will allow Agent to impose a comparable

intrusion-harm to each. For complex reasons that I can't fully articulate here, however, I deny that this situation is possible. For example, if each of 100 people is virtually certain to fire a working gun at point-blank range at my head, then each, I claim (but highly controversially) isn't fully responsible for my death. Indeed, it seems that, if all fire at the same time, each person has almost no impact on my death, given the facts, including the dispositions of nature and others. If they fire sequentially, then, it seems to me that only the last person radically affects the probability of my death. If so, then I have no problem with proportionality being too lax for non-autonomous agents. I do, however, have a problem with proportionality for highly responsible, and perhaps culpable, agents. It appears that I wrong the first culpable agent, if I kill him. Help!

(4) The following simply ignores these problems. All help would be greatly appreciated.

3. Self-Defense against Culpable Rights-Violators

Let us now consider defensive action against a culpable rights-intrusion. An intrusion is *culpable* just in case the agent is *agent-responsible for wrongly* imposing it (e.g., she freely and knowingly acts wrongly in intruding). It's important to note that a given action may intrude upon more than one right (e.g., my striking you may also intrude upon my wife's right that I keep my promise to her not to strike anyone). One intrusion may be culpable (e.g., if I break my promise to my wife knowing that it is wrong to do so) even if the other is not (e.g., if I strike you because I falsely, but faultlessly, believe that it is a permissible way of stopping you from doing a great evil). Below, we shall address how to aggregate intrusion-harms, some of which are culpable and some of which are not. To start, however, we shall focus on the simple case where there is only culpable intrusion-harm.

Because culpability, as I understand it here, is factive, culpable intrusion entails that the intrusion is wrong and hence a violation (and not merely an infringement or non-autonomous intrusion). There is, of course, the possibility of a “guilty mind” when nothing wrong is done (e.g., the agent falsely believes that she is acting wrongly), but that is not what I mean by “culpability”.

Culpability is here understood in the above strong sense of agent-responsibility for *wrongly* (impermissibly) intruding and not in the weaker sense of agent-responsibility for *wronging someone* (i.e., infringing someone’s rights). An agent who knowingly and freely wrongs someone to save a million lives may be culpable in the weaker sense, but not in the stronger sense, if the action is permissible, or even if it is impermissible but she faultlessly did not believe that it was. I shall assume the weaker kind of culpability does *not* increase the limits of proportionality, but this is far from obvious (and worth greater scrutiny). I will focus on the easier case of culpability in the stronger sense.

A *fourth motivating idea* of the view I defend is that proportionality increases with (strong) culpability for the intrusion-harm imposed. I shall assume that we can assess degrees of culpability, for a given intrusion, ranging from 0 to 1.0. The degree of culpability is based on the degree of agent-responsibility for intruding wrongly (which is sensitive to degrees of belief, degrees of duress, etc.).⁶ This, of course, is a major assumption that brushes over important and complex issues. It is, however, beyond the scope of this paper to address that issue.

How, then, does culpability increase the limits of proportionality? There are, of course, many ways that it might do so, but I shall focus on the simplest ways.

I claim that culpability does *not* increase proportionality in the case where the agent is not agent-responsible for *intrusion-harm*. For example, suppose that I know that it is wrong for me

to trespass on your land, but I do not impose any intrusion-harm in doing so.⁷ In that case, I claim, the proportionality limits are the same as if I were not culpable. Or suppose that I do impose some intrusion-harm, but I am not agent-responsible for doing so (e.g., because I could not have known that taking just one step on your land would damage an expensive plant that you had seeded there). Here too, I claim that the proportionality limits are the same as if I were not culpable.

More generally, a *fifth motivating idea* of the view I defend is that culpability *merely magnifies* the impact of agent-responsibility for intrusion-harm, and thus has no impact where the latter is zero. This is, of course, controversial, but I shall assume it in what follows.

How does culpability magnify the impact of agent-responsibility for intrusion-harm for the purposes of determining proportionality? One possibility is simply to multiply the latter by $[1 + dc]$, where dc is the relevant degree of culpability. This would mean that culpability could at most *double* the agent-responsibility for intrusion-harm factor. Proportionality, I believe, is more sensitive to culpability than that. Of course, an alternative is to multiply the agent-responsibility for intrusion-harm by $[1 + nxdc]$, where n is some specified numeric constant (e.g., 10). This, I believe, is implausible for two reasons. First, any particular value for n seems arbitrary, and this remains so even if n is allowed to take on a range of values (e.g., 9-11). Second, if someone is *fully* culpable for a given intrusion-harm for which he is responsible, then, I claim, proportionality should impose *no limits*. If the only way for an innocent individual to defend herself against a *fully* culpable rights-violator who is agent-responsible for at least some intrusion-harm, then, I claim, there is no proportionality restriction on how much intrusion-harm she may one impose on him. In such a case, an innocent defender should not have to endure any avoidable net intrusion-harm no matter how great the intrusion-harm to her attacker.

A *sixth motivating idea* of the view I defend, then, is that *full* culpability removes all proportionality limits. Combining this with the fifth motivating idea—that culpability merely magnifies agent-responsibility for intrusion-harm—leads naturally to the idea that, in Target-Admissibility, the factor for agent-responsibility for intrusion-harm is *divided by 1-dc*, where dc is the degree of Target’s culpability for the non-just intrusion-harm. Where there is 0 degree of culpability, this has no impact, but as the degree of culpability approaches 1, the magnification becomes arbitrarily large. Let me spell out this idea more concretely before providing some additional defense.

Let us say that, for a given action of Target, the non-just intrusion-harm to Agent for which Target is agent-responsible is *culpability-adjusted*, when it is divided by 1-dc for that action. Below, we shall appeal to the *expected value* of Target’s culpability-adjusted non-just responsible intrusion-harm to Agent, if Agent does not intrude defensively upon the rights of Target or any other individual. Typically, there will be several possible actions that Target might perform, if Agent does not intrude defensively. The expected value of Target’s culpability-adjusted non-just responsible intrusion-harm is the sum, over each such action, of the probability of the action multiplied by its non-just intrusion-harm for which Target would be responsible, divided by 1-dc for that action. Suppose, for example, that Target would perform either (1) a1 with .9 probability, 10 units of non-just responsible intrusion-harm, and .1 degree of culpability, or (2) a2 with .1 probability, 2 units of non-just responsible intrusion-harm, and .9 degree of culpability. The expected value of Target’s culpability-adjusted non-just responsible intrusion harm is 12 ($= .9 \times 10 / (1 - .1) + .1 \times 2 / (1 - .9)$).

Let us now state a revised version of Target-admissibility that is sensitive to culpability. Recall that an action by Agent is proportionate with respect to Target if and only the intrusion-

harm that it imposes on Target is less than or equal to that imposed by some Target-admissible feasible option for Agent. Target-admissibility determines the largest proportionate intrusion-harm.

Target-Admissible (Version 2): An action by Agent is *Target-admissible* if the joint intrusion-harm that it imposes is no greater than the *sum* of (1) the minimum feasible joint intrusion-harm that Agent could impose without infringing the rights of individuals other than Target, and (2) the (expected value of the) non-just intrusion-harm to Agent for which Target would be agent-responsible, if Agent were not to intrude defensively upon the rights of Target or other individuals, divided by [1- the degree of Target's culpability for such intrusion].

This is the same as Version 2, except for the final adjustment for culpability. That adjustment magnifies the adjustment for agent-responsibility for intrusion-harm. Moreover, the magnification is infinite in the special case where Target is fully culpable (thereby eliminating the force of the proportionality constraint). I shall now give a partial defense of this last feature.

Let *Enforcement 2* consist of Harm-Reduction, Necessity, and Proportionality from Enforcement 1 plus Target-Admissibility (Version 2). One objection to this approach is that there is a *discontinuity* in the proportionality limit when Target is fully culpable. Because culpability merely magnifies the adjustment to proportionality for agent-responsibility for intrusions harm, there is no effect, if there is no such responsibility. If, however, there is even the slightest level of such responsibility, then full (1.0) culpability magnifies it to infinity, thereby eliminating any effective proportionality limit. This is indeed a troubling feature. It does not, however, arise, if,

as I shall suggest, no one is ever fully culpable. In that case, the magnification is always finite, and there is no discontinuity (no division by zero).

I believe that individuals are never fully (1.0) agent-responsible for their actions and their results and thus that they are never fully culpable. I believe this because the choices of agents are always influenced by all sorts of factors that do not reflect their agency. Even when an agent's choice is perfectly autonomous, her degree of belief that she is acting wrongly is 1.0 and there is no duress, the agent's choice-making and choice-implementing capacities and opportunities are always due, in part, to factors "external" to the agent (her genetic make-up, early childhood socialization, brute luck events later in life). I believe therefore that an agent's choices, and their results, are always partly attributable to external circumstances and never fully attributable to her.⁸ This is, of course, a highly controversial issue, and here I will simply note that the discontinuity problem does not arise, if, as I believe, agents are never fully culpable.

A possible objection remains, however. Even if agents are never fully culpable, they may be sufficiently culpable for the adjustment for culpability to be so great that proportionality has *no practical force*. Proportionality may impose limits, but they may be so great that, in practice, no action ever exceeds them. Whether this is so depends, of course, on how culpable individuals can be. If they can never be more than 50% culpable, then the magnification is limited to doubling, and the purported problem presumably does not arise. Indeed, the problem may not arise even if individuals can be up to .9 (or even .99) culpable, since the magnification would be limited to multiplication by ten (or one hundred). I suspect that culpability is typically so limited. If, however, it is not (e.g., culpability can get arbitrarily close to 1.0, but can never be 1.0), then it seems plausible that proportionality has no practical limit in very high degrees of culpability (except, perhaps, for extremely small intrusion-harms). I see little reason for an innocent victim

to have to bear a non-trivial cost out of concern for a nearly fully culpable intruder.

Given Harm Reduction and Necessity above, this entails that Agent is at liberty, against such an intruder, to kill him when this is the only way to stop him from stealing her chocolate bar and imposing a very small unjust intrusion-harm.⁹ This certainly seems extreme, but it is worth keeping in mind three limiting factors. First, the justice of killing the culpable intruder only holds where it is *necessary* to reduce non-just intrusion-harm to the defender. It is not just, for example, if merely picking up the bar would suffice. Second, the relevant non-just intrusion-harm is *net of compensation* later obtained. It is not just to kill the culpable intruder if he can be later made to compensate for his wrong. Finally, there is very strong prudential reason not to kill an *apparently* highly culpable intruder to protect one's chocolate bar: the intruder may not be culpable, and may not even be intruding unjustly. In general, given our epistemic limitations, it's not prudentially wise to impose a very large intrusion-harm on another to avoid a small intrusion-harm. If one is mistaken, one may have a large debt of compensation.

A general objection to this approach is that it presupposes unrealistic precision in agent-responsibility for intrusion-harm and in degrees of responsibility. Instead of the ratio-scale measures (generating a number between 0 and 1) that I have invoked, responsibility may only be ordinally measurable and may involve cases of incomparability. I fully agree that it is far from clear that agent-responsibility for intrusion-harm and culpability are fully ratio-scale measurable. Fortunately, however, there is no need to be committed to such precision. If they are not so finely measurable, then there will be a family of ratio scale measures rather than a single one, and Target-Admissibility will be indeterminate where these measures generate different answers. I believe that whatever indeterminacy there is in agent-responsibility and culpability should indeed be reflected in Target-Admissibility, and hence proportionality. I do not view this as a problem. I

see no reason to assume that an adequate theory of proportionality must be perfectly precise. I merely assume precision here for simplicity of presentation.

Let me now sketch one further extension of the above theory.

4. Defense of Others

So far, we have focused on the conditions under which Agent has a liberty-right, against Target, to defend herself against Target's intrusion. Let me now extend this view to cases of defense of others. Throughout, I limit my attention to when one has a *liberty-right*, against another, to defend intrusively. I do not address the conditions under which one owes another a *duty* to defend him. This is a matter of what *primary* rights individuals have, and I here remain neutral on that topic. I focus solely on the conditions under which one person's intrusion upon another gives someone a liberty-right, to intrude against the intruder.

Enforcement 2 allows one to intrude defensively against another when this suitably reduces the expected value of his contribution to non-just intrusion-harm *to oneself*. It is silent about defensive intrusions to protect *others* from such harm. Surely, however, one has enforcement rights to protect one's friends, one's family, and indeed strangers. I shall argue that one has such enforcement rights as long as there is *some group of individuals* that is suitably protected.

A *seventh motivating idea* of the theory I defend, then, is that individuals have a liberty right to enforce the rights of others, when *authorized* by them to do so. There are competing accounts of when an individual is authorized to enforce the rights of another. On one kind of choice-protecting account, an individual is authorized to enforce the rights of another if and only if the other gives valid (e.g., free and informed) consent to being so protected (either in general

or for a particular intrusion). On one kind of interest-protecting account, an individual is authorized to enforce the rights of another if and only if it is in the other's interests. On my preferred choice-prioritizing account, an individual is authorized to enforce the rights of another if and only if either (1) the other gives his valid consent, or (b) the other does not validly *dissent* and it is in his interests.¹⁰ In what follows, I shall leave open what the correct account of authorization is, except that I shall assume that it is grounded in the choice (will) and/or interests of the right-holder. More exactly, I shall assume that there are no impersonal constraints on authorization and thus that one is authorized to enforce the rights of another at least in the case where the other has validly consented to such protection and such protection is in her interests. I reject, that is, the view, that others are never authorized to protect others from intrusion-harm.

In what follows, appeals to intrusion-harms of others should be understood as appeals to intrusion-harms from intrusions to rights that the one is authorized to enforce. For brevity, I shall leave the reference to authorization implicit in the discussion.

I claim that one has a liberty to intrude defensively against another as long as there is *some group of individuals* (any arbitrary collection of individuals, which need not include one) relative to which non-just intrusion-harm is suitably reduced. Thus, for example, the non-just intrusion-harm to me from your attack may not be sufficient for me to have a liberty-right, against you, to perform a certain defensive intrusion, but if your attack also intrudes against my wife, the total non-just intrusion-harm to the two of us may be so sufficient. More generally, the defender need not be part of the relevant group, and the group can be any arbitrary collection of individuals. I shall return to this point below.

Until now, we have implicitly been focusing solely on *direct* intrusion-harm, which is harm to the intrudee from the intrusion. It is time now to consider also *indirect* intrusion-harm,

which is harm to third parties from a given intrusion (e.g., the emotional harm to my wife when I am beaten up). Indirect intrusion-harms on their own do not, I claim, give the indirect intruder any liberty-right to defensive action (since her right have not been intruded upon), but they are relevant for the defensive liberty-rights of the intruder. For example, if you are about to attack me, the reduction in non-just intrusion-harms to myself may be not sufficient to generate a liberty-right for me to perform a certain defensive intrusion. If, however, the intrusion against me also imposes *indirect* intrusion-harm on my wife (her suffering from seeing me bruised), our joint total reduction in non-just (direct and indirect) intrusion-harms may be sufficient for such a liberty-right.

Not all indirect intrusion-harm from an intruder is, however, relevant. Indirect intrusion-harm is relevant only if the associated direct intrusion-harm is taken into account. Otherwise, there might be a liberty-right to defensive intrusion because it reduces the *indirect* intrusion-harm to some, even though *increases* the associated *direct* intrusion-harm. For example, defending against vandalism to a person's front flower garden might protect the neighbors from indirect intrusion-harm (lost enjoyment of viewing the flowers) but increase the direct intrusion-harm to the homeowner (e.g., it leads the vandal to later do much worse damage inside the house). I shall therefore appeal below, for a given group of individuals, to direct and *associated* indirect intrusion-harms to members of that group from a given person. The latter includes all, and only, the indirect intrusion-harm to members of the group *from intrusions against members of this group* by the intruding individual (and not indirect harms from intrusions against individuals not in the group). I shall defend this inclusion of indirect intrusion-harm below.

In order to generalize the harm-reduction requirement, let us generalize the notion of *joint intrusion-harm*, relative to a specified group, of an action by Agent to be the sum of the

(expected value of the) direct intrusion-harm imposed on Target by Agent's action plus the (expected value of the) *total direct and associated indirect non-just intrusion-harms to members of the group, imposed by anyone not in the group*. The previous notion of joint intrusion-harm was simply the special case where the specified group consisted just of Agent.

Consider then:

Enforcement 3: In a given choice situation, Agent has a moral liberty, against Target, to perform a specific act of intrusion upon Target if, *for some group of individuals*, each of the following conditions holds:

- (1) **Harm Reduction:** *for each member of this group*, Agent's intrusion against Target lowers the expected value of the *direct and associated indirect non-just intrusion-harm to her* by all other *individuals not in the group*, compared with that value if Agent does not, in that choice situation, infringe the rights of Target or others;
- (2) **Necessity:** Agent has no alternative action that (a) achieves or exceeds the above reduction in intrusion-harm to each member of the group, (b) involves no infringements of rights of individuals other than Target, (c) is no worse (overall) *for each member of the group*, and (d) is better for Target (i.e., leaves him better off); and
- (3) **Proportionality** (no change): An action by Agent is *Target-proportionate* (proportionate with respect to Target) if and only the intrusion-harm that it imposes on Target is no greater than that imposed by some Target-admissible feasible option for Agent.
- (4) **Target-Admissible:** An action by Agent is *Target-admissible* if the joint intrusion-harm that it imposes is no greater than the *sum* of (1) the minimum feasible joint intrusion-harm (*to Target and members of the specified group*) that Agent could impose without

infringing the rights of individuals other than Target, and (2) the sum, for each member of the specified group, of the (expected value of the) non-just intrusion-harm to that member for which Target would be agent-responsible, if Agent were not to intrude defensively upon the rights of Target or other individuals, divided by [1- the degree of Target's culpability for that intrusion].

This is just like Enforcement 2 except that (1) it appeals to intrusion-harms to members of some group rather than to Agent, and (2) it appeals to both direct and associated indirect intrusion-harms for members of this group. This makes Enforcement 2 significantly stronger. It not only recognizes a liberty-right to intrude defensively on behalf of others, it also strengthens the liberty to intrude defensively to protect oneself. This is because the proportionality requirements that are applicable for the reduction of non-just intrusion-harms to oneself will typically be lower than those that are applicable for the reduction of non-just intrusion-harms to some suitable chosen group of which one is a part. The reductions in non-just intrusion-harms to others will typically increase the maximum Target-admissible intrusion-harm that may be imposed and this gives one greater leeway to protect oneself.

This version of Target-Admissibility is, like utilitarianism, aggregative, but there are at least three important differences. First, it only aggregates non-just intrusion-harms. It is not concerned with gains or losses in wellbeing in general. Second, it allows, but does not require, aggregation over everyone. It merely requires that there be some group, perhaps consisting of just oneself, for which proportionality holds. Finally, it merely sets the limits of proportionality. It does not fully determine permissibility.¹¹

The relevance of some kind of aggregation to proportionality is generally accepted.¹² One

might nonetheless object to the *unrestricted* aggregation involved in Target-Admissibility. One might object that intrusion-harms are irrelevant to proportionality when they are *too small*—either in absolute terms (e.g., trivial harms, such as chocolate bar deprivation) or relative to the intrusion-harm imposed on the intruding intrudee (e.g., a broken finger relative to death).¹³ For example, one might claim one has no liberty-right to impose a great intrusion-harm on someone merely to prevent him from unjustly imposing minor intrusion-harms on a very large number of people. I see no reason, however, to exclude even minor intrusion-harms from the calculation. First, it is only *intrusion*-harms that are at issue, not all losses of wellbeing, and not gains in wellbeing. Thus, small gains and losses in wellbeing that are not intrusion-harms (e.g., headaches) are indeed irrelevant. Second, it is only *non-just* intrusion-harms that are at issue (and not the just intrusion-harms involved in just defense). Third, it is only the non-just intrusion-harms imposed *by the individual to whom proportionality is being applied* (e.g., Target) that are relevant. (Although Harm Reduction takes into account intrusion-harms to Agent by others, Proportionality for a given individual is based solely on the intrusion-harm that she imposes on Agent.)

A different objection to Target Admissibility (Version 3) is that the appeal to *some (arbitrary) group* makes it too easy to justify defensive intrusion. I agree that it makes it much easier to justify defensive intrusion, but I deny that it makes it too easy. One is at liberty to intrude defensively if the conditions are satisfied with respect to the group consisting solely of oneself. Moreover, one is similarly at liberty if the conditions are satisfied with respect to the group consisting solely of oneself, one's family, and some friends. This is also true even when strangers are included in the group. Nor is there any reason that one must be part of the group. Suppose that a defensive intrusion will reduce the non-just intrusion-harm for one's family and

friends, but *increases* the non-just intrusion-harm to oneself by a greater amount (so that the net effect does not reduce non-just intrusion-harms for the group including oneself). One is nonetheless surely at liberty to defend the others, while sacrificing oneself.

It might be objected that Harm Reduction and Target-Admissibility erroneously take *indirect* intrusion-harm into account for both the harm-reduction and the proportionality condition. In reply, a first point to note is that only *associated* indirect intrusion-harm is taken into account. This is indirect harm to someone in the group being defended from an intrusion against someone else *in the group* (as opposed to someone outside of the group). Thus, indirect harm is taken to be relevant only if the associated direct intrusion-harm is also taken into account. It would indeed be inappropriate to take the impact of indirect intrusion-harm into account without taking the associated direct intrusion-harm into account (since the former might be reduced by increasing the latter). With the restriction that only *associated* indirect intrusion-harm is relevant (for a given group) the inclusion of indirect intrusion-harm is very plausible. What matters to a given individual is the net intrusion-harm experienced, and it matters little whether it is direct or indirect. Reductions to the indirect intrusion-harm to my wife are surely relevant to the justification of my defensive action against your attack against me.

Obviously, much more needs to be said in defense of the above conditions, but I will stop here.

5. Conclusion

I have formulated, with a limited defense, a partial theory of enforcement rights. The theory only provides a *sufficient condition* for having a liberty-right, against another, to infringe her rights. I believe that the theory can be extended to a full theory, giving necessary and sufficient

conditions for such a liberty, by including some enforcement rights against those who are agent-responsible for *contributing* to intrusion-harms imposed by others. Thus, I believe, that with respect to cases where no individuals so contribute, the above theory provides necessary and sufficient conditions for having a liberty-right to intrude upon another's rights. Defending that claim, however, is beyond the scope of this paper.

It is important to keep in mind that I have only defended a theory of the *liberty-rights*, against another, to intrude defensively against him. If one has such a liberty right, one does not wrong him in so intruding. Whatever liberty-rights one has against an intruder, it is an open question, whether it is *permissible* to intrude upon him. Even if one has the liberty-right, it may be impermissible because it wrongs someone else (e.g., when one made contract with someone else never to intrude in the given manner) or, perhaps, because it is impersonally wrong (although I would argue that there are no such wrongs). Moreover, even if one does *not* have a liberty-right to intrude upon someone, it may nonetheless be permissible to do so (even though it wrongs him) because there is an overriding justification (e.g., harming an innocent person to save a million lives). In short, I have not addressed the larger issue of permissibility.

The above theory of enforcement rights is based on the following seven motivating ideas: (1) Defensive intrusion-harm against another is just when *it suitably reduces non-just intrusion-harms to the defending agent*. (2) There are no relevant *theory-independent* facts about proportionality (proportionality is merely a placeholder for limits to be specified). (3) Proportionality allows greater defensive intrusion-harm the more the intruder is *agent-responsible* for imposing intrusion-harm, but it also allows some defensive intrusion-harm against intruders *when they bear no agent-responsibility for intruding upon anyone's rights*. (4) Culpability (responsibility for acting wrongly) can increase the limits of proportionality. (5)

Culpability *merely magnifies* the impact of agent-responsibility for intrusion-harm, and thus has no impact where the latter is zero. (6) *Full* culpability removes all proportionality limits (although I claim that no one is ever fully culpable). (7) Individuals have a liberty right to enforce the rights of others, when *authorized* by them to do so.

These are, of course, controversial ideas. Even if they are accepted, however, the particular specifications I give to flesh out these ideas will be controversial. I have attempted to give some motivation for the specifications, but I clearly have not given a rigorous defense. Moreover, given their specificity, they are surely mistaken in many ways. My hope is that the mistakes are correctible within the general approach, but I won't be surprised if certain fundamental aspects of the approach turn out to be mistaken. I believe, however, that the approach is promising enough to be worthy of further consideration. At a minimum, exposing its errors should be instructive.¹⁴

Bibliography

Larry Alexander, "The Doomsday Machine: Proportionality, Punishment, and Prevention," *Monist* 63 (1980): 199-227.

Samantha Brennan, "Thresholds for Rights," *Southern Journal of Philosophy* 33 (1995): 143-68.

Marc Fleurbaey, Bertil Tungodden, and Peter Vallentyne, "On the Possibility of Non-Aggregative Priority for the Worst Off", *Social Philosophy and Policy* 26 (2009): 258-285. Simultaneously published in *Utilitarianism: The Aggregation Problem*, edited by Ellen Frankel Paul, Fred D. Miller Jr., and Jeffrey Paul (Cambridge: Cambridge University Press, 2009), pp. 258-285.

Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33

(2005): 34-66.

Francis Kamm, *Morality, Mortality I* (New York: Oxford University Press, 1993).

Jeff McMahan, "Innocence, Self-Defense and Killing in War," *Journal of Political Philosophy* 2 (1994): 193–221.

Michael Otsuka. 1994. "Killing the Innocent in Self-Defense." *23 Philosophy and Public Affairs* 74-94.

Jonathan Quong, "Liability to Defensive Harm," *Philosophy and Public Affairs* 40 (2012): 45-77.

Peter Vallentyne. "Libertarianism and the State." *Social Philosophy and Policy*, 24 (2007): 187-205.

Peter Vallentyne. "Brute Luck and Responsibility." *Politics, Philosophy & Economics* 7 (2008): 57-80.

Peter Vallentyne, "Enforcement Rights against Non-Culpable Non-just Intrusion," *Ratio* 24 (2011): 422-442. (Republished, along with the rest of the journal issue, in *Developing Deontology: New Essays in Ethical Theory*, edited by Brad Hooker (Wiley-Blackwell: 2012), pp. 73-93.)

¹ In Vallentyne (2011), I mistakenly appealed to only setbacks to *wellbeing*. This is too narrow, since agents care about much more (e.g., the lives of loved ones, or state of the environment) and rights surely protect those interests.

² In Vallentyne (2011), I mistakenly omitted the "or others" qualification.

³ Note that an option can be proportionate without being admissible. Suppose that there are three options with non-just intrusion harm to (Agent-Target) of : 0-10, 10-0, 2-9. Where Target bears

no responsibility for any of the intrusion-harm, only the first two options are Target-admissible. The third option is nonetheless proportionate, since it impose less intrusion-harm on Target than some admissible options (viz., 0-10). Target has no complaint if only 9 units are imposed.

⁴ Note that, unlike the distributive justice view of liability, the proposed view does *not* say that, where either innocent Agent or responsible Target must bear a given intrusion-harm, it is proportionate to impose the entire intrusion-harm on Target (because it better approximates what is distributively just). If Target is agent-responsible for n units of non-just intrusion-harm, then an option is Target-Admissible only if it imposes intrusion-harm on Target that does not exceed the minimum feasible joint intrusion-harm plus n .

⁵ Note that, where Target would, in the absence of Agent's defensive action, be agent-responsible for n units of non-just intrusion-harm, the proposed view increases the *maximum admissible joint intrusion-harm* by n units. An alternative is to increase *the maximum proportionate intrusion-harm to Target* by n units. This, however, would be implausible.

Suppose that the choice is between (1) 0 units of intrusion-harm to Agent and 10 units to Target, or (2) 1 unit of intrusion-harm to Agent and 1000 units to Target. In the absence of Target's agent-responsibility for any intrusion-harm, only the first action is proportionate. The presence of 1 unit of responsibility should not make the second action (with 1000 units of harm to Target) proportionate.

⁶ An agent who is unsure whether her intrusion is wrong will, at least on the simplified model, have some degree of belief that it is wrong.

⁷ Many accounts of culpability are not, I think, sufficiently explicit that (1) culpability requires agent-responsibility for wrongdoing, and (2) full agent-responsibility for intrusion-harm (even if

impermissible) is not sufficient for culpability.

⁸ For an articulation and defense of this position, see Vallentyne (2008).

⁹ For a more radical rejection of proportionality requirements, see Alexander (1980, e.g., p. 209).

¹⁰ For a brief description of my favored choice-prioritizing view, see Vallentyne (2007).

¹¹ The Harm Reduction condition is also aggregative but in a very different way from Target-Admissibility. The former aggregates intrusion-harms *from different people* to a given person, rather than intrusion-harms *to different people* from a given person. The latter is appropriate for proportionality, since proportionality is relative to a given person.

¹² Hurka (2005, e.g., p. 54) defends the claim that aggregation of intrusion-harms is relevant to the justification of defensive intrusion (although he limits this to non-lethal cases of defensive intrusion).

¹³ For arguments that some harms are too trivial to be relevant to aggregation, see Kamm (1993, p. 146) and Brennan (1995). For discussion of problems that arise for such approaches, see Fleurbaey, Tungodden, and Vallentyne (2009).

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