

## PROPORTIONALITY IN DEFENSE

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The suggestion that there is a proportionality restriction on the right to defense is almost universally accepted. It appears to be a matter of moral common sense, for example, that it would be morally wrong to defend one's right to a soft drink by killing someone who is attempting to steal it. Accurately defining "proportionate defense," however, is no easy task. Nor is it easy to explain precisely why the line between proportionate and disproportionate defense falls where it does. Upon close inspection, proportionality turns out to be very puzzling in a variety of ways, and this paper addresses three puzzling questions about it.

### 1. What is proportionate defense?

I think that to define proportionality accurately, it is helpful to first define necessity. No one doubts that the right to defense is, in some sense, limited to the infliction of necessary harm. Often, however, "necessary harm" is defined too narrowly. Sometimes, for example, it is suggested that in order for self-defense or other-defense to be justified the defender must inflict the minimum amount of harm necessary for successful defense. Consider, however, the following two examples:

*Procrustean Possibility.* Smith sets out to murder Jones. Jones is innocent in the sense that she is in no way responsible for the threat to her life. There are two ways to prevent Smith from killing Jones. One is to take Smith's life. The other is to take Jones's life before Smith can.

*Limited Time.* I am rushing to the hospital because I am the only one who possesses an antidote to a rare and deadly poison that was accidentally consumed by a child. On the way, I notice Smith attempting to kill the innocent Jones. I know that I could save Jones's life without seriously harming Smith, for I could use my expertise in marital arts to simply disarm and restrain Smith. However, that would mean arriving at the hospital too late to save the life of the child. So I save Jones's life in the only other way available to me: I shoot Smith with my handgun.

It is perfectly clear that killing Smith in defense of Jones is permissible in each of these cases. In both *Procrustean Possibility* and in *Limited Time*, however, it is not necessary to kill Smith to prevent him from murdering Jones; for in the former case one can prevent Smith from murdering Jones by beating Smith to it, and in the latter case one can simply disarm and restrain Smith to prevent him from killing Jones.

The following definition of "necessary harm" accommodates our intuitions about these cases:

Necessary harm is the minimum amount of harm necessary to either (i) prevent the relevant unjust harm or (ii) ensure that, as much as possible, the costs of preventing that harm fall on someone who is more responsible (or at least more accountable) for the relevant threat of unjust harm than the potential victims of that harm.

So understood, Smith's death in *Procrustean Possibility* and his death in *Limited Time* are instances of necessary harm. In the former case killing Smith is necessary to ensure that the costs of my preventing Smith from murdering Jones fall on Smith rather than Jones. In the latter case killing Smith is necessary to ensure that the costs of preventing Smith from murdering Jones fall on Smith rather than the innocent child who needs my immediate assistance.

Given my definition of "necessary harm," "proportionate harm" cannot be understood, as it often is, as harm the magnitude of which is proportionate to the seriousness of the relevant threat. To see why, consider

*Limited Time II.* I am rushing to the salon because I am the only one who possesses the dye needed to achieve precisely the hair color sought by a wealthy patron. On the way, I notice Smith attempting to kill the innocent Jones. I know that I could save Jones's life without seriously harming Smith, for I could use my expertise in marital arts to simply disarm and restrain Smith. However, that would mean arriving at the salon too late to prevent an inferior dye from being used instead. So I save Jones's life in the only other way available to me: I shoot Smith with my handgun.

In this case no less than in *Limited Time I*, ensuring that Smith rather than some less culpable party bears the costs of preventing Smith from killing Jones requires killing Smith; for the alternative of merely disarming and restraining Smith is costly to the wealthy patron of the hair salon who would benefit from the timely arrival of my dye. Nevertheless, it is clearly

impermissible to kill Smith in *Limited Time II*. I want to say that in this case killing Smith is disproportionate, but it is not disproportionate to the threat posed by Smith since that threat is a threat of unjustly killing Jones. It is, however, disproportionate to the magnitude of the specific cost that it is necessary to avoid, namely, the cost to the wealthy patron of the salon of not getting exactly the hair color he wants.

My suggestion is that we define “proportionate harm” as follows:

Proportionate harm is harm the magnitude of which far exceeds neither (i) the magnitude of the unjust harm to be prevented nor (ii) the magnitude of the costs of preventing that harm in some other way.

Given this definition of “proportionate harm,” the harm I inflict on Smith in *Limited Time II* is disproportionate, for its magnitude far exceeds the magnitude of the “prevention costs” of disarming and restraining Smith, which amount to someone’s hair color not being exactly what he wants it to be.

## 2. Does disproportionate defense infringe upon rights?

I will consider an objection to this definition of “proportionate harm” in section 3 below. First, however, I want to address the question of whether disproportionate defense infringes upon the rights of an unjust aggressor. I assume here that in standard cases of justified self-defense or other-defense, defense does not infringe upon the rights of the unjust aggressor who suffers it. I doubt that this assumption will encounter much resistance. Consider the case in which the only way to prevent the burglar from murdering me in my own home is to use my handgun to shoot

him in self-defense. Intuitively, it seems absurd to suggest that I infringe upon the burglar's rights by shooting him. Rights shield interests, but surely a burglar's interest in violating my right to life is not shielded by his right to life. Moreover, even justifiable infringements upon rights ordinarily require compensation to the right-holder, but no one would suppose that I would be required to compensate the burglar for any injuries he might sustain if I do shoot him.

Given my assumption, any complete account of the right to defense will identify (at least implicitly) a "liability principle" that specifies a set of conditions under which harm can be inflicted upon someone in defense of self or other without infringing upon rights. Elsewhere I defend an account of the right to defense that contains the following liability principle:

*The defense liability principle:* If (1) X poses a threat of unjust harm to Y (i.e., unless prevented from doing so, X will infringe upon a basic right held by Y and thereby damage an interest protected by that right), or X takes part in a group G's posing such a threat, and (2) X is more responsible, or at least more accountable, than Y for that threat, then (3) (ceteris paribus) it would not infringe upon X's rights to inflict necessary and proportionate harm on X to prevent X, or G, from unjustly harming Y.

The accuracy of this particular liability principle is not the issue here, and I offer the principle primarily for the purposes of illustration. My interest here is in whether such a principle, if true, would remain true if it were broadened by eliminating "and proportionate" from its consequent.

To see why the answer to this question is not immediately obvious, notice that X's being liable to necessary and proportionate defense does not mean that inflicting necessary and

proportionate harm on X in defense of X's potential victim (or victims) would be morally justified. It only means that inflicting necessary and proportionate harm on X in defense of X's potential victim would not infringe upon X's rights. This means that it is an open question whether disproportionate defense is unjustified because aggressors are not liable to it or because, although they are liable to it, it would nevertheless be wrong to inflict it. If the latter is the case, then it seems likely that the wrongness of disproportionate defense is to be explained in terms of the value of the unjust aggressor's wellbeing. The question, then, is whether to explain the wrongness of disproportionate defense by reference to the unjust aggressor's rights—"disproportionate defense is wrong because it would infringe upon the unjust aggressor's rights"—or by appeal to the value of unjust aggressor's well-being—"disproportionate defense would not infringe upon the unjust aggressor's rights, but it would wrongly ignore the value of his well-being." Elsewhere<sup>1</sup> I have defended the latter option, but I now believe that I was mistaken to do so. Consider again the example of the thief who tries to take Joe's soft drink. I think Joe would infringe upon the thief's rights to kill him in a necessary act of self-defense. My primary reason is this. The right to defense is a right to prevent unjust harm and, as defined in my defense liability principle, unjust harm requires an infringement upon a right. Thus, if we say that Joe's killing the thief would not infringe upon the thief's rights, then when Joe picks up his gun and aims it at the fleeing thief, Joe himself does not pose a threat of unjust harm and hence cannot justifiably be killed in defense of the thief. That seems to me to be clearly wrong: killing Joe in defense of the thief can be justified on grounds of defense. Thus, I want to say that Joe does pose a threat of unjust harm to the thief and hence the thief does have a right against others that they do not inflict disproportionate harm on him.

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<sup>1</sup> Kai Draper, "Defense," *Philosophical Studies* (July 2009)

It might be objected that I have been wrongly led to this conclusion by misconstruing the right to defense as a right to address only threats of unjust harm when in fact it is a right to address any impermissible threat of harm. Consider, however, the following example: Suppose that I want to prove to you how fearless I am and so I freely and knowingly consent to be struck. Then in spite of my consent, you (morally) ought to refrain from striking me; for there is nothing of significant value to be gained by striking me, and doing so would harm me and might even seriously harm me. Nevertheless, my striking you to prevent you from striking me would be an unjustified act of defense. That is easy to explain if the right to defense is limited to defense against threats of unjust harm, for by consenting to be struck, I waive my right not to be struck, and so preventing you from striking me would not prevent you from unjustly harming me. If, however, we say that the right to defense includes the right to defend against any impermissible threat of harm, it appears that we are forced to say that it would be permissible for me to strike you in self-defense.

### 3. Do the numbers count?

The result that disproportionate defense does infringe upon the rights of the unjust aggressor will prove useful in addressing a further question about proportionality in defense, one that has been raised and discussed by Jeff McMahan.<sup>2</sup> Notice that someone might raise the following objection to my definition of proportionate harm: “Your definition is too broad, for in cases of multiple aggressors, the number of aggressors who must be harmed in order to successfully defend their potential victim is irrelevant. It is permissible, for example, to kill 10,000 evil assassins to secure the life of a single innocent person who will otherwise be killed

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<sup>2</sup> In a paper delivered at a conference at UCSD in March of 2013.

by them. (To fill out the example a bit, suppose that each assassin puts an individually harmless amount of poison into someone's food because 9,000 of those small doses are collectively not only toxic but lethal and each assassin wants to take part in the assassination.) The total harm that successful defense would inflict in such a case (10,000 deaths) far exceeds the total harm that would thereby be avoided (one death), and so on your definition the total harm inflicted in defense would be disproportionate. That is a mistake: because the harm to any single individual (one death) does not far exceed the harm to be avoided, defense in such a case is proportionate."

Even if I agree about the example, I can overcome the objection by pointing out that my definition of "proportionate harm" is intended to be an adequate definition of that expression as it is used in the defense liability principle. On that principle, each of the 10,000 assassins in the example would be liable to lethal defense and so the example does not threaten my definition.

There is a further issue, however. McMahan points out that at least in those cases where the unjust aggressors are just barely culpable, or responsible but not culpable, for the threat of unjust harm they pose, it can seem disproportionate to harm large numbers of aggressors in defense of a single person. Intuitions may differ here, but I am inclined to agree with McMahan that at least in cases where, individually, each aggressor is minimally responsible for the threat of unjust harm, the numbers do count: it is impermissible to kill, say, 10,000 minimally responsible aggressors who collectively threaten the life of a single person.

Notice, however, that it does not follow that I need to modify my definition of proportionate harm. This is because the proposition that it would be impermissible to kill 10,000 minimally responsible aggressors is consistent with the proposition that it would not infringe upon the rights of any individual aggressor to do so. My liability principle entails the latter proposition but not the former. Moreover, that result seems correct to me. I would find it

difficult to take seriously any particular aggressor in such a case who claimed that, because of the number of aggressors who must be killed to save their potential victim, it would violate his individual rights to be killed in defense of that potential victim. Nor do I see any reason to suppose that there is some collective right in such a case that would be violated by defense.

I don't find it implausible, then, to claim that in assessments of proportionality for the purpose of determining who is liable, the numbers don't count. Nevertheless, McMahan's worries are not thereby resolved; for even if the numbers don't count in that respect, we can still ask the question, "Is there a sense of proportionality not tied to liability, and is proportionality in that sense sensitive to the number of aggressors who must be harmed for successful defense?" I believe there is, for although in cases of multiple and minimally responsible aggressors there is a consideration of justice that favors permitting necessary defense, that consideration can be overridden by weighty enough considerations of wellbeing, and considerations of wellbeing get weightier as the number of person who might be harmed as a consequence of preventing unjust harm get larger.

Ultimately, then, I want to say this: Regardless of how many aggressors there are, if one or more aggressors must be killed to save a single individual, then justice will typically favor the costs to fall on the more responsible parties (an exception might be a case where someone else consents to bear the costs). However, that consideration of justice is relatively weak when the responsible parties are minimally responsible. Accordingly, only if the number of minimally responsible aggressors is relatively small will justice take precedence over beneficence, for then what justice wants to allow will be only weakly opposed by beneficence. If, however, successful defense requires killing a large enough number of minimally responsible aggressors, then beneficence will so strongly oppose what justice wants to allow that justice will yield. Thus,

although in such a case all of the aggressors are liable to being killed, considerations of wellbeing make it impermissible to kill them. If we want, we can say that killing them would be disproportionate.