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Forfeiture and Self-Defense

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Self-defense theorists distinguish between acts of permissible defensive force that depend upon the liability of the aggressor and acts that do not. Liability-based accounts rely on some sort of conduct by the aggressor such that defender does not wrong the aggressor by using force against him. In contrast, some instances of self-defense may still be permissible even if the aggressor does not lose rights. For instance, Jonathan Quong argues that permissibility is sometimes grounded in the agent-relative permission to give one's own life greater weight.¹

Although the language on the surface is "liability," the moral principle at work is one of rights forfeiture. For instance, Jeff McMahan claims that "To attack someone who is liable to be attacked is neither to violate nor to infringe that person's right, for the person's being liable to attack *just is* his having *forfeited* his right not to be attacked, in the circumstances."² As one might expect, forfeiture, although perhaps neither necessary nor sufficient for the employment of permissible defensible force,³ does go a long way towards making an act permissible.

Forfeiture views, however, have been subject to sustained criticism. Judith Thomson famously raised three objections.⁴ First, why is it that the moment the aggressor stops being a threat he regains his right? Second, if the aggressor forfeits his right to life, then one should be permitted to use his organs to save others. But this does not seem permissible. Third, the forfeiture view cannot comfortably explain the permissibility of killing innocent aggressors. (This complaint, however, is a virtue, not an objection to the forfeiture view.⁵) In addition, within punishment theory, the claim that

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¹ Jonathan Quong, "Killing in Self-Defense," 119 *Ethics* 507 (2009).

² Jeff McMahan, *Killing in War* 10 (Oxford: Clarendon Press (2009)), p. 10.

³ I return to this question below.

⁴ Judith Jarvis Thomson, "Self-Defense and Rights," in *Rights, Restitution, & Risk: Essays in Moral Theory*, William Parent, ed. Cambridge, Mass. and London: Harvard University Press (1986), pp. 34-36. Thomson later adopted a forfeiture view.

⁵ See Kimberly Kessler Ferzan, "Culpable Aggression: The Basis for Moral Liability to Defensive Killing," 9 *Ohio State Journal of Criminal Law* 669 (2012).

criminals forfeit rights against being punished has been called into question.⁶ As Christopher Wellman summarizes the challenges with respect to rights forfeiture for punishment:

The standard objections include (1) the problem of justification, (2) the problem of status, (3) the problem of indeterminate authorization, (4) the problem of relatedness, (5) the problem of suitability, (6) the problem of duration and breadth, and (7) the problem of rights type.⁷

In response to such critiques, it is not sufficient simply to stipulate that liability *just is* this limited forfeiture. Rather, what is required is a more thorough articulation of forfeiture, its grounding, and its boundaries, an articulation that ties these pieces together in a normatively defensible way. That is the goal for this paper.

Liability and Forfeiture as the Invocation of Negative Normative Power

The general claim behind liability is that once the criteria for liability are met, the aggressor is no longer wronged by the defender's use of force. It is most perspicuous to see the aggressor's action, in meeting the criteria for liability, as exercising a *negative normative power*. That negative normative power is forfeiture; forfeiture is an appropriate and fitting consequence of a voluntary action.

Generally, the types of normative powers we typically think of are what I call *positive normative powers*. One can promise, consent, or abandon, and thereby change one's normative relation with others. But aggression in self-defense is likewise the exercise of a normative power. Although the actor does not will the end result (thus why it is a *negative power*), the result is properly seen as the consequence of the aggressor's exercise of her ability to change her normative relations with others.

Forfeiture is a bit of a black sheep of normative powers. Worse still, the literature seems somewhat muddled on how it labels normative powers generally. For example, Stephen Kershnar uses "waiver" as a general category and casts promises, consent, and forfeiture under it.⁸ C.S. Nino talks about "consenting" to punishment.⁹ T.M. Scanlon deems *volenti non fit iniuria* to be about forfeiture.¹⁰ But the *volenti* principle is one of consent.

Here is an attempt to clean up the terrain. Admittedly, this is a bit rough and ready and subject to refinements and qualifications. But my only goal here is to draw some basic distinctions.

⁶ Indeed, these were points that my own work echoed. See Arlette Grabczynska and Kimberly Kessler Ferzan, "Justifying Killing in Self-Defence," 99 *J. Crim. L. & Criminology*, (2009) pp. 235-253 (reviewing Leverick's *Killing in Self-Defence*).

⁷ Christopher Heath Wellman, "The Rights Forfeiture Theory of Punishment," 122 *Ethics* 371-393 (2012), pp. 375-376.

⁸ Stephen Kershnar, "The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing," 29 *Philosophia* 57-88 (2002).

⁹ C.S. Nino, "A Consensual Theory of Punishment," 12 *Phil. & Public Aff.* 289-306 (1983).

¹⁰ T.M. Scanlon, *What We Owe Each Other* 259 (Belnap/HUP 1998).

Waiver and consent are both positive normative powers by which we alter our claim or liberty rights. We typically employ the term waiver when we voluntarily relinquish a liberty right. We use the term consent when we voluntarily relinquish a claim right. I waive my right to remain silent; I consent to your using my car. When you know what you are consenting to, and you have sufficient freedom, there is a wide berth as to that to which you can consent. Consent and waiver do not carry proportionality limits because it is a question of what *you* choose to do to *you*.¹¹ When someone consents to a result, the person sees this result as something he is willing to accept given what he wants. So, the aggressor does not consent to the defender's use of force.

Assumption of risk involves a voluntary action that brings with it the risk of other possibilities, some of which the actor may find undesirable. One wants to ski but not to break one's leg. One wants to have surgery but not get an infection. One would love to play football and be immune from tackling.

Both assumption of risk and forfeiture therefore have a structure where one engages in act *a* and *x* is an undesirable consequence that one may face. The difference, I take it, is with respect to assumption of risk, the risk assumed is a consequence for some sort of empirical or factual reason. So, the rationale that grounds holding one to have acquiesced to the risk has to do with the "package deal" to which one must acquiesce.¹² I will not attempt to specify the conditions under which one acquiesces to the package deal. There are normative constraints on the package that do not exist for consent. That is, an account of the package deal must explain why a woman who walks through Central Park at 2 a.m. has not assumed the risk of being assaulted.¹³ I think that challenge can be met, but it need not detain us here.

Now take the case where an aggressor attacks a defender. When we say that the aggressor forfeits rights as a consequence, we are not talking about an empirical relation, but a normative one. There is a notion that the consequence is fitting and appropriate, not that it is likely or possible. Thus, one must ground forfeiture in a different way than one grounds assumption of risk. It is not an argument that "you knew this could happen" but that "this is the right thing to happen."

Moreover, because it is a normative consequence that follows, one need not appreciate that this consequence follows. You need not think that killing another means you deserve punishment for it to be the case that you deserve it. Similarly, so long as the actor recognizes the moral (un)worth of his conduct, he need not fully appreciate the penalty that attaches vis-à-vis forfeiture. Still, one retains the full ability to determine whether one exercises one's power. Just as one cannot consent involuntarily,

¹¹ Nino (1983)(arguing that punishment can be justified because offenders consent); Larry Alexander, "Consent, Punishment, and Proportionality," 15 *Phil. & Public Aff.* 187-182 (1986)(arguing that consent does not have a proportionality limitation). In his reply to Alexander, Nino mentions in a footnote that he bases self-defense on a similar consent by aggressor view. C.S. Nino, "Does Consent Override Proportionality?" 15 *Phil. & Public Aff.* 183-187 (1986).

¹² I owe the term "package deal" to Ken Simons. Kenneth W. Simons, "An Exploration of the Relationship Between Consent, Assumption of Risk, and Contributory Fault" (ms on file with author).

¹³ Heidi M. Hurd, "Was the Frog Prince Sexually Molested? A Review of Peter Westen's *The Logic of Consent*," 103 *Michigan Law Review* 1329-1346 (2005).

forfeiture can take seriously that one cannot have one's rights simply fall out of one's pocket. Forfeiture is a power; the action that invokes forfeiture is voluntary even if the consequence is not.

Returning to the self-defense, then, the argument is not one that says, "Hey, by attacking someone, you assumed the risk he would defend himself." It is not an empirical claim. It is certainly not a claim that aggressors lose rights in Texas but not in Australia because of the difference in gun control. Rather, it is a claim that having attacked someone, the aggressor loses rights against the force, not because it is predictable, but because it is a fitting consequence.

Now, one question is whether we need to see forfeiture as a power at all. We might simply view forfeiture as the sort of normative consequence that follows from engaging in act *a* without invoking the Hohfeldian apparatus of powers. That is, although it is rather commonplace to define powers in a way that would include what I am calling negative powers, Joseph Raz's conception of a normative power is far narrower. Raz maintains that one does not exercise a normative power unless it is the case that generally the alteration of rights and duties is something that someone wants.¹⁴ When one consents to an act, one typically wants to grant a permission. When one abandons property, one typically wants to relinquish ownership and control. That is, Raz believes that normative powers include only those acts that I have dubbed positive normative powers.

It is certainly true that forfeiture does not operate in this way and that our typical use of normative power has been of the positive variety. But that is not yet an objection to seeing forfeiture as a negative normative power. It fits the Hohfeldian bill in the following way: the actor engages in a voluntary act and that act affects a change of rights and duties. This is a power's classic definition. According to Hohfeld, "the person...whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations..."¹⁵ Judith Thomson likewise sets forth a broad definition, "Following Hohfeld, I will say that a power is an ability to cause, by an act of one's own, an alteration in a person's rights, either one's own rights or those of another person or persons, or both."¹⁶ So what is Raz's objection to such a broad application?

I want to sort Raz's objection into three distinct questions. The first is what I will call the *performative* requirement. To Raz, the pure cases are ones in which the movement of rights and duties directly results from the very exercise of the power. A promise, for instance, is a case where saying makes it so. The very act of will that is voluntary is the one by which the normative power obtains. The second objection is the requirement of *positivity*. Raz simply stipulates that powers are the sorts of things that one typically wants to bring about, and thus the result is one that one brings about intentionally. The final objection is *promiscuity*.¹⁷ For instance, if I move from New Jersey to Florida, then I change my legal relations with both governments. Is this the invocation of a power? If I run over

¹⁴ Neil MacCormick and Joseph Raz, "Voluntary Obligations and Normative Powers," *Proceedings of the Aristotelian Society*, Supplementary Volumes, Vol. 46 (1972), pp. 59-102.

¹⁵ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 36 (Walter Wheeler Cook ed., Greenwood Press 1978) (1919), pp. 50-51.

¹⁶ Judith Jarvis Thomson, *The Realm of Rights* 57 (HUP 1992).

¹⁷ MacCormick and Raz, p. 80.

your foot and owe you damages, have I again exercised a normative power? Given that there are normative implications to many of our acts, are we far more powerful than we even know?

The reason to reject the *performative* requirement is that even actions that are paradigmatic instances of the exercise of a normative power do not operate as Raz requires. Take consent. Raz assumes that consent is a performative, like promising, so it is also a case of when saying makes it so.¹⁸ However, such an approach ignores how consent operates and by whom. Consent is an internal act of will. The autonomy interest from which consent is derived is most consistent with viewing consent as something that may be immediately exercised by an actor the minute that she wants or acquiesces to a boundary crossing. If A consents to B's use of her swimming pool, it is A's very act of will that makes B's conduct permissible. Abandonment likewise operates like this. If C decides that she no longer wants her bike in the bike rack, then the minute she decides to leave it there, she has relinquished her rights to the bike, irrespective of whether she communicates this to the world or not. Thus, in both of these cases, there is an internal act that shifts rights and duties. Neither requires the saying of some statement that makes it so.

Raz also argues for the positivity requirement:

An action is the exercise of a legal power only if one of the law's reasons for acknowledging that it effects a legal change is that it is of a type such that it is reasonable to expect that actions of that type will, if they are recognized to have certain legal consequences, standardly be performed only if the person concerned wants to secure these legal consequences.¹⁹

This would rule out many instances of assumption of risk. As noted previously, in some instances, one is said to assume the risk of harms that one does not desire, but that are empirically linked to something that one does desire. It is hard to believe that our conception of normative powers should rule out assumption of risk. Thus, if paradigmatic normative powers involve a fact that has an effect on normative relations, and thus fail the positivity requirement, there is reason to doubt that there is a positivity requirement.

As for the *promiscuity* objection, I do not see why we ought to opt for the narrowest definition of a normative power. Granted, it is in some sense true that by moving I am changing my rights and duties. Why not vest me with a power? After all, if I don't like the high taxes in Jersey and I opt to move to Florida for lower taxes, I am voluntarily changing to whom I owe what. Why not see that as a power I have?

Moreover, normative powers will not be quite as broad as they first appear. For instance, corrective justice accounts (and indeed, some versions of self-defense) do not require powers because the existing duties already do the work. The duty of corrective justice may arise as the result of the unfulfilled duty not to injure in the first place.²⁰ So, too, does the duty to rescue. Consider a case in

¹⁸ Joseph Raz, *The Morality of Freedom* 81 (OUP 1986, reprinted 2009).

¹⁹ MacCormick and Raz, p. 81.

²⁰ John Gardner, for example, advocates the continuity thesis: "the reasons why one must pay for the losses are the very same reasons why one must not occasion those losses in the first place, when it is true that one must not

which a E culpably causes E, F, and G to be stuck on a lifeboat (perhaps E was trying to kill F and knew he was risking harm to G). The reason why E ought to suffer the harm first is because E has an affirmative duty to rescue. One need not say that E does not have a right against being harmed in such a case because we do not need E to forfeit any claim right he has. E already has the positive duty that arises out of the breach of the negative duty. Thus, even if we are inclined to recognize an agent's ability to shift rights and duties in the broad sense I have advocated, such a power would not be all encompassing because other normative relations may exist to do other work.

In addition, there are positive benefits to recognizing a distinct category of negative normative powers. It is true that much of the justifying work for forfeiture comes from the claim that the loss is the fitting and appropriate response to the actor's voluntary action. The fittingness argument need not rely on seeing forfeiture as a power. However, the voluntariness aspect is ignored if we just focus on the fittingness, and not that the fittingness is in response to the actor's voluntary choice. An emphasis on powers allows us to clearly see that we don't forfeit rights willy nilly; we forfeit rights by what we choose to do. Aggressors choose to act in a way that causes the relinquishment of their rights.

Normative Grounding for Forfeiture

What makes forfeiture a fitting and appropriate response to the actor's choice? I am skeptical that there is just one account for all forfeitures. I do not think that should trouble us. After all, the reason I would deserve to go to jail for killing someone may not be the same reason I deserve a medal for winning a race.²¹

Here is an account to get us started. The baseline of rights and duties allow us to lead full, autonomous lives as people worthy of respect and concern. In particular, our fenced off perimeters demarcated by our claim rights give us security. Having powers to shift our fences derives from our autonomy.

What some wrongdoers do is that they attempt normative land grabs. And, these land grabs include not only failing to respect certain claim rights but also relying on claim rights to protect them. Oftentimes, what forfeiture does, then, is to restore the normative balance. It is a form of normative disgorgement.

Take the Confrontation Clause. Criminal defendants are vested with particular positive rights as to how trials are conducted. When a defendant kills the witness and then seeks to stand on his positive right to confront her, he is benefiting from the wrong. He seems to have gained greater entitlements

occasion them. One's reparative act is in at least partial conformity with the original reasons, and if one was bound to conform to the original reason then *ceteris paribus* one is now bound, in turn, to engage in the reparative act. Obligation in, obligation out." John Gardner, "What Is Tort Law For? Part 1. The Place of Corrective Justice," 30 *Law and Philosophy* 1-50 (2011), p. 34. Victor Tadros, *The Ends of Harm: The Moral Foundations of the Criminal Law* 276 (OUP 2011)("we can say that if a person has a duty to *v* and he breaches that duty, he retains a duty to do the next best thing").

²¹ See generally George Sher, *Desert* (Princeton 1987).

from his wrongdoing than he ought to have. Denying him his confrontation right reestablishes the status quo.²²

Asset forfeiture looks similar. If you steal someone's property, then irrespective of whether you ought to go to jail for it, it seems you ought not to be allowed to keep it. You are literally seeking to profit from your wrong.

We simply could not make sense of a system that grants people rights while allowing them to then benefit from culpably violating the rights of others. As John Simmons notes, "to extend such privileges to those who break the rules would seem to involve serious and straightforward *unfairness* to those who limit their own liberty by obeying the rules."²³ Therefore, what forfeiture doctrines do is to redraw the normative perimeters. Importantly, I am not claiming that forfeiture is a form of actual annulment of tangible benefits, nor am I claiming that it is about correcting harm to the victim. A defendant who forfeits his confrontation right may be worse off at trial (perhaps the witness would have cracked); he should compensate the victim's family; he will deserve to go to jail. Yet, the forfeiture of the confrontation right operates simply because if he did not lose his right, he would normatively benefit from a set of rights and entitlements that he has created by killing the witness.

How can self-defense possibly look like this? In the typical case, the aggressor likewise seeks a land grab. He denies that the defender has a claim right against being harmed while simultaneously seeking to retain his right against being harmed. The way to recast his normative relation with her is to allow her to defend herself against the attack. The aggressor culpably denies the defender her full moral status; he thus loses his rights to prevent the attack.

Now, one might object that the aggressor does not really get greater entitlements. It is not that the aggressor truly gets to benefit from (1) no claim right against harm on the part of the defender and (2) a claim right against harm on his part. After all, it is not the case that the defender has lost his right. Rather, what is at foot is a rights *violation*; for there to be a rights violation, there still has to be a right.

This is undoubtedly correct but we can accommodate it within our land grab analogy. What the aggressor does is to treat the defender as if the defender does not have such a right. He acts as if her claim right not to be injured does not apply to him. If his interference with her right could not be stopped, such that he effectively denies her right while standing on his own, he winds up being better situated because he ignores his duties of noninterference but others lack the ability to stop him.

Notably, we do not need the commission of a rights violation to get this forfeiture off the ground. When punishment theorists confront the question of normative grounding, their case appears to be both easier and more difficult than that of the self-defense theorist. It is easier because the criminal has already engaged in a rights violation. Alan Goldman notes, for instance, that "[w]e must say that by violating the rights of others in their criminal activities, they have lost or forfeited their

²² Giles v. California, 554 U.S. 353 (2008).

²³ A. John Simmons, "Locke and the Right to Punish," 20 *Phil. & Public Affairs* 311-349, 335 (1991).

legitimate demands that others honor all their formerly held rights.”²⁴ It would be at best unhelpful to try to pigeon hole aggression into a sort of rights violation. It is a threatened rights violation.

This difference works in self-defense’s favor. Once a right has been violated, one must employ strong reciprocity notions to explain why the criminal, having already completed the offense, now loses his rights. I do not claim that such an argument cannot work, but that the sort of after-the-fact loss of something ultimately leads to the significant skepticism of forfeiture accounts. In contrast, what self-defense does is not to claim that the actual rights violation grounds the forfeiture but rather that the threatened rights violation grounds the forfeiture. How can one expect to be protected by the very rights that one fails to respect *at this very moment*? How, with a gun raised at an innocent defender’s head, may the aggressor maintain that she may not be harmed in response?

We can directly see the fairness at work as between the aggressor and the defender. If culpable aggressors could aim to harm the defender while simultaneously shielding themselves from injury because of their claim rights against harm, something would be seriously out of whack with our moral entitlements. It would positively reward culpable wrongdoing. The appropriate and fitting response therefore is the loss of a claim right against injury.

Forfeiture’s Relation to Permissibility

Because forfeiture is the loss of a right against being harmed, one question is whether forfeiture is itself necessary or sufficient for all-things-considered permissibility. Christopher Wellman argues that forfeiture is necessary and sufficient to explain the permissibility of punishment: “I understand the rights forfeiture theory of punishment as the view that we should concentrate on which rights wrongdoers forfeit because this forfeiture is necessary and sufficient to explain the permissibility of punishment.”²⁵ To my mind, self-defense need not be so bold. Forfeiture is not necessary for permissible defensive force; forfeiture is defeasibly sufficient.

First, there are good reasons to think that forfeiture is not a necessary condition for self-defense. Imagine that a rabid dog is about to bite me. If I kill it, I may call this “self-defense” but the reason that it is permissible for me to engage in this action is not because the dog has forfeited any rights. Indeed, imagine that the famous falling fat man is large enough to kill five people stuck at the bottom of a well. If one disintegrates the fat man, one can justify this on the numbers, irrespective of the fact that the fat man has not forfeited any rights.

Second, there are good reasons to think that forfeiture is defeasibly sufficient. Part of the reason why this is the case is the fact that the very facts that ground the forfeiture also provide positive

²⁴ Alan H. Goldman, “The Paradox of Punishment,” 9 *Philosophy and Public Affairs* 42-58 (1979), p. 43.

²⁵ Wellman (2012), p. 375.

reasons for action. A culpable aggressor's attack not only yields that he loses his rights; his attack gives the defender a reason to defend.²⁶

There are some instances in which circumstances render defensive force impermissible even though the aggressor lacks a right not to be killed.²⁷ One question is how to characterize such circumstances. In a critique of Cecile Fabre's *Cosmopolitan War*, Daniel Statman argues that it can be distorting, and indeed dangerously distorting, to focus on one necessary condition for a permissible act when other conditions are likewise necessary. Thus, in the case of self-defense, he argues, "If Aggressor is fully culpable for some unjust attack, she is liable to defensive attack, that is to say, she might in-principle be defensively attacked *if certain other conditions held true* (success, necessity, and proportionality). But *qua* necessary condition for self-defense, the liability condition has no privileged status in comparison to these other conditions."²⁸

Although I think this is a fair general objection to actions that have a number of jointly necessary conditions for them to be permissible, my own inclination is to reject Statman's enumerated conditions as specifying additional necessary conditions. I will not attempt a robust defense of my view here, but let me say this much. If one takes the view that (narrow) proportionality is internal to liability, such that an aggressor only forfeits up to some maximum proportional amount, then liability— forfeiture—will subsume narrow proportionality.²⁹ As for necessity and success, as I will argue below, the defender must intend to act defensively—this rules out cases in which the defender knows that the force she is employing either will not be successful at all or is gratuitous because no harm will come to her. Moreover, it is possible to take a nuanced view of what the defender believes she is protecting. If she knows that she can kill the aggressor to prevent herself from being killed or that she can step on the aggressor's instep to prevent herself from being killed but the latter increases the probability that she will break a heel, then the defender is fully aware of the fact that she cannot kill someone to protect a shoe.³⁰

This leaves cases in which the defender may believe her action is necessary, but a lesser harm could actually stop the aggression. I maintain that once the aggressor is culpably responsible for creating the defender's belief that defensive force is necessary, the aggressor is not wronged up to the ceiling established by proportionality even if the defender estimates the probability of that culpably risked harm to be slight.³¹ What this would mean is that defensive force is defeasibly permissible when forfeiture is established, and would only be impermissible when defeated by concerns such as impact on bystanders (wide proportionality).³² Thus, with self-defense at least, there are good reasons for focusing so squarely on the conditions under which aggressors forfeit rights. Statman's general

²⁶ Cf. Suzanne Uniacke, *Permissible Killing: The Self Defence Justification of Homicide* (CUP 1996), p. 185.

²⁷ Kai Draper, "Defense," 145 *Philosophical Studies* 69-88, 83 (2009).

²⁸ Daniel Statman, "Fabre's Crusade for Justice: Why We Should Not Join" (forthcoming *Law and Philosophy*).

²⁹ For an excellent argument along these lines, though not one I fully endorse, see Jonathan Quong, "Proportionality in Defensive Harm" (ms).

³⁰ See Seth Lazar, "Necessity in Self-Defense and War," 40 *Phil. & Public Affairs* 3 (2012).

³¹ See Kimberly Kessler Ferzan, "Justifying Self-Defense," 24 *Law and Philosophy* 711 (2005).

³² Cf. Uniacke (1996), p. 182.

objection still stands against myopic focus on one of many jointly necessary conditions, but it misses the mark as applied to defensive force where liability is in fact defeasibly sufficient.

What Does One Forfeit?

Thus far we have established that forfeiture is a negative normative power. It is grounded in the aggressor's culpable decision to harm others unjustifiably.³³ We have also found forfeiture to be defeasibly sufficient for permissibility. But what exactly is it that one forfeits? Within the punishment literature, Richard Lippke calls this question of status.³⁴ Does one lose one's basic moral rights?

Some theorists take very strong positions. For instance, in the punishment context, Christopher Morris argues:

Inflicting pain or deprivation of property or liberty on wrongdoers as a response to their acts is not unjust for they have lost, through their acts, the moral rights that would otherwise stand in the way of such treatment. Their status is analogous to exile; they are punished, not from a physical space but from a moral space. They have lost, at least in part, their membership in a moral community.³⁵

And George Fletcher, in objecting to a forfeiture view for self-defense, analogizes forfeiture to outlawry. He states, "There is no wrong – no violation of a norm protecting life – in killing an outlaw. Killing an outlaw is like killing a wolf or a fly."³⁶

Not only is it counterintuitive to think that one loses one's rights full stop such that anything can be done to one willy-nilly, but it is also normatively unattractive for a view to have such implications. Instead, what one forfeits has to relate appropriately to the harm threatened. As Gideon Yaffe succinctly expresses: "the content of the right forfeited must be normatively explicable by appeal to that which triggered forfeiture; the explanation must show why it is fitting or appropriate for the person to have lost such a right given the trigger."³⁷

Let me begin my answer by drawing from Wellman who notes that "human beings qualify for rights that can be forfeited by bad behavior," and "[g]iven this, perhaps we should say that our fundamental moral status as a person or rational/autonomous being is what makes us the type of thing that qualifies for moral rights in general, but which specific moral rights we currently enjoy is a function

³³ It is alternatively grounded in a decision to culpably cause the defender to believe that defensive force is necessary. I argue for this alternative ground in "The Bluff." (ms.)

³⁴ Rex Martin, *A System of Rights* (OUP 1993), p. 281; Richard Lippke, "Criminal Offenders and Right Forfeiture," *Journal of Social Philosophy* 32 (2001): 78-89, p. 79.

³⁵ Christopher Morris, "Punishment and Loss of Moral Standing," *Canadian J. of Philosophy*, 21 (1991): 53-79, 69.

³⁶ George P. Fletcher, "The Right to Life," 13 *Georgia Law Review* 1371 (1979), p. 1381.

³⁷ Gideon Yaffe, "On Ferzan's 'Beyond Crime and Commitment'" (ms).

of our behavior.”³⁸ As Wellman observes, we have the ability to change other rights and duties without changing our fundamental moral status.

The same is most certainly true with self-defense. We certainly need not deny that the aggressor is a person who is entitled to respect as a person. And, indeed, it is somewhat misleading to think that what an aggressor forfeits is his “right to life.” All that is required to get forfeiture off the ground is to note that certain claim rights can be lost such that the defender does not violate the aggressor’s rights. Admittedly, it means that the defender is, in some cases, allowed to kill the aggressor without violating his rights.

However, what is interesting is that forfeiture is not a denial of one’s moral status but an implication of it. Agents consent; agents abandon; and agents forfeit. A woman’s consent to sex does not undermine her status as a moral agent; it is an implication of it. It is in fact respectful to view someone as being able to alter her rights and others duties.

For this reason, I find Jonathan Quong’s recent moral status account of self-defense somewhat curious.³⁹ Quong maintains that only some agents who are evidence-relative justified, but fact-relative unjustified, are liable to defensive killing. The individuals who are not liable include those who take full account of another’s moral status in deciding what they should do. So, for instance, if A drives his car conscientiously and maintains his car reasonably, but the car suffers a bizarre malfunction, then even though A should not have driven from a fact-relative perspective, he has taken full account of those who might be harmed by his car in determining that driving under these conditions is justified. Accordingly, the agent is not liable to defensive killing.⁴⁰

In contrast, Quong believes that when you act in an evidence-relative justified, but fact-relative unjustified, manner and the mistake you make is about another’s moral status then you can be liable. This means that if you make a reasonable mistake and believe someone is aggressing, you are liable. If you make a reasonable mistake and believe that someone is consenting, you are liable. If you make a reasonable mistake and believe that someone has abandoned their property, you are liable.

Before pinpointing the root of my disagreement, let me grant this. Of course, if someone mistakenly believes you are trying to kill him and tries to kill you, you may shoot back. But this is because I think one has an agent-relative permission to prefer one’s own life to that of an innocent aggressor. What I dispute is that it is fitting or fair to lose rights by making a reasonable choice.⁴¹

³⁸ Wellman (2012), pp. 377-78.

³⁹ See Jonathan Quong, “Liability to Defensive Harm,” 40 *Philosophy and Public Affairs* 45-77 (2012).

⁴⁰ Contra Jeff McMahan, “The Basis of Moral Liability to Defensive Killing,” 15 *Phil. Issues* 386, 391 (2005).

⁴¹ My view is exactly stronger than this because I doubt that even unreasonable choices, if not subjectively culpable, are sufficient for forfeiture. And I am dubious that we can specify who the reasonable person is from which to make these assessments. But since Quong, along with broader views like those of McMahan and Otsuka, take us far beyond what even the law would hold us accountable for in almost all instances, there is no need for me to defend my further claim here. See, e.g., Kimberly Kessler Ferzan, “Can’t Sue, Can Kill,” in Robinson, Garvey, and Ferzan, eds., *Criminal Law Conversations* (OUP 2009).

The problem, as I see it, is that taking full account of another's moral status is not simply a matter of getting the answer right about whether the person has exercised a normative power. Rather, taking full account of another's moral status necessarily includes asking whether they have exercised a normative power. Take consent. Giving due respect to the consentor is not a matter of defaulting to a no consent position. If one makes a full and searching assessment of the woman's behavior and concludes (reasonably) that she is consenting, then one is not denying her her moral status. Reasonable assessments about the exercise of normative powers by others should not result in a loss of one's own rights.

In summary then, forfeiture is not a denial of moral status. It is simply this: the aggressor loses a claim right against harm. It is true that the implication of this loss of claim right is that in some cases, it is permissible for the defender to kill the aggressor. But this is not because the aggressor has lost his right to life. He is not a fly. Indeed, the aggressor's forfeiture is best seen as giving the defender an exclusionary permission; a permission to exclude the aggressor's interests from the defender's practical deliberations. But the forfeiture does not result in cancellation of the reason.⁴² The defender may still only act as he believes is necessary to stop the attack, and the aggressor can fully regain his claim right simply by abandoning his attack. The aggressor retains the power to shift the rights and duties back.

To Whom Does One Forfeit? Addressing the Problems of Authorization and Relatedness

To whom does one forfeit? It is perhaps worth putting this question in the context of punishment first. One worry about forfeiture with respect to punishment is the problem of "indeterminate authorization." The problem, raised by Quinn, is whether a criminal may be punished by anyone, and if not, how a restriction to state punishment is possible.⁴³

Because my answer to this puzzle invokes the intentions of the actors, let us introduce a second problem: the question of relatedness.⁴⁴ What if the aggressor is attacking the defender, but the defender does not know it? Rather, the defender just wants to harm the aggressor. In the criminal law literature this is the problem of unknowing justification.

The insight that aggression is the exercise of a Hohfeldian power will help us to locate precisely where the pressure point is. Some normative powers are "in personam," and are exercised only vis-à-vis a certain person. In contrast, other normative powers are "in rem" – they are vis-à-vis the world. If I decide that I hate my sweater and toss it on the ground, it is fair game for *anyone* to take it (following, of course, the correct rules of property acquisition: finders keepers?).

⁴² Cf. Michelle Madden Dempsey, "Victimless Conduct and the *Volenti* Maxim: How Consent Works," *Criminal Law and Philosophy* (published online May 27, 2012).

⁴³ Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy and Public Affairs* 14 (1985): 327-73. Wellman is untroubled by indeterminate authorization, as he does not want to rule out anarchism. Wellman (2012). Lippke concedes that this critique of forfeiture is not particularly damning, finding Simmons' argument that we all possess a natural right that we transfer to the state to be plausible. Lippke (2001), p. 80.

⁴⁴ This problem was also raised by Quinn, though labeled by Lippke. Quinn (1985); Lippke (2001), p. 79.

What about self-defense then? I believe that self-defense lies between the two. It is somewhat in rem, but not fully. What self-defense does is to create a liberty to harm another *for defensive reasons*. Thus, the forfeiture applies to any and all who are acting to stop the threat that the culpable aggressor appears to be presenting. As a first pass, let us say that all who aim to stop the defender may defensively harm him. I will qualify this slightly below.

Why would forfeiture be so constrained? Because of what grounds it and makes it appropriate in the first place. Recall again the rationale for forfeiture. The attacker loses rights so that he does not benefit from the constraints that respecting his rights imposes on others while simultaneously refusing to respect those rights himself. It is appropriate, then, for the forfeiture to be limited by those who would otherwise be so constrained.

Punishment theorists take divergent views on the relevance of intention, as they address the relatedness problem. Wellman maintains that criminal defendants have lost rights against harming full stop, independent of the punisher's purpose.⁴⁵ The act is justified but the actor is culpable.

To my mind, Simmons has the better argument. He claims, "If we may voluntarily create a situation where others have rights to act only for certain reasons, it seems plausible to suppose that nonvoluntary forfeiture might result, as I have claimed it must, in right to harm another only for certain reasons. And the fairness account of forfeiture defended above seems to push us naturally in just this direction."⁴⁶ Applying this to self-defense, defenders without defensive intentions do not get to kill attackers. That would create a windfall for the defender. The defender would gain greater entitlements than she had prior to the aggressor's attack. She doesn't get that. She just gets to mend the fence.

Notably, identifying exactly what we require, even in terms of a defensive intention, is somewhat more complicated than it may first appear. The first issue is whether the defender must intend to defend *against a culpable aggressor* or whether an intention to defend against other types of actors should count as well. It seems that the defender does not wrong the aggressor if the defender believes the aggressor is, say, an innocent aggressor. That is, if the aggressor is actually culpable and does give rise to a defensive belief and the defender does believe that she has, at the very least, an agent relative permission to defend against the attack, then it is difficult to see why forfeiture vis-à-vis such a defender would not be fair or appropriate. In contrast, however, what if the defender believes that the aggressor is an undercover cop, when the aggressor is actually a thug?⁴⁷ Here, it seems that the defender is going beyond "fence mending." She believes that she is thwarting a just or justified actor. In such cases, I am inclined to say, albeit tentatively, that the defender would wrong the aggressor in harming him, *despite the fact that the culpable aggressor is not, in fact, justified*.

Let us now turn to a second question and that is whether third parties also need defensive intentions. To start, note that losing a claim right does not yield a duty of noninterference by others, a fact that has troubled some scholars. So, for instance, in punishment theory, the fact that A may punish

⁴⁵ Wellman (2012), pp. 382-84.

⁴⁶ Simmons (1991), p. 340.

⁴⁷ Thanks to Alex Leone for raising this puzzle.

B does not seem to yield that C has no duty of noninterference.⁴⁸ With respect to self-defense, this worry disappears. In self-defense cases, if C attacks D such that D does not wrong C by harming him, this change yields certain further facts: E must recognize that D is not wronging C; E may likewise act defensively toward C; and if E prevents D from saving himself, E may himself be acting wrongly. There is no reason to think that a full assessment of the moral terrain will not yield the right answers.

But this is a rocky terrain. Assume that a defender is aware of the fact that a culpable aggressor is attacking her, but she is not motivated to defend herself against the attack. She is, however, motivated by the strong desire to kill her attacker. This is not a case of unknowing justification; this is a case of knowing, but unmotivated, justification. Is this enough? For the defender, there are reasons to think not. If the defender were entitled to kill the aggressor, she would, in some sense, get a windfall. She would get to kill someone she wants to kill. She isn't interested in fence mending; she just wants to use the aggressor's act to vindicate her own impermissible intentions. It is hard to see why the equities between the aggressor and the defender should favor the defender in such a case.

In contrast, we might think that third parties are differently situated. For instance, if A sees that a culpable aggressor is about to kill an innocent victim, and A is only motivated by the fact that she hates the culpable aggressor, we still might think that the culpable aggressor is not wronged by A, so long as A is aware of the justifying facts. Although an asymmetry between defenders and third parties may seem odd at first, this may just be an implication of normative powers. Imagine that Aunt Betty gives Drew permission to use her car only for the purpose of getting Drew's sister to a doctor's appointment. Drew's sister needs to go to the hospital, but as Drew is about to leave, he realizes that he just took cold medication and should not drive. May Edward, who does not care at all about Drew's sister, but wants to drive Aunt Betty's "sweet ride" of a Mustang, take Drew and his sister to the doctor?

I would be inclined to say that Aunt Betty's permission makes it acceptable for Drew to drive the car, and that Drew's finding of a substitute driver does not wrong Aunt Betty even though the new driver is not acting with the required intention. The effect of a promise or consent on a third party is neither exactly the same as the effect on the promisee or the consentee nor is it wholly irrelevant to that third party. It is therefore unsurprising that forfeiture vis-à-vis third parties might operate slightly differently than it does vis-à-vis the defender himself. Once the third party recognizes the permissible reason of fence mending, the third party may be able to avail himself of the opportunity in a way that the defender herself could not.

As I continue to fine-grain this analysis, the worry, as expressed by Lippke, is that once we refine the right so precisely, it seems as though we never had the right at all. He notes, "it seems odd to claim that anyone ever has a right not to have losses inflicted on him by authorized authorities for the purpose of punishing him for his crimes. Surely no one has a right not to have losses inflicted on him *for such purposes*—that is, in response to his criminal offending."⁴⁹

⁴⁸ Simmons (1991), p. 337.

⁴⁹ Lippke, (2001), p. 81. See also Draper (2009), p. 81.

I think this concern is misplaced. First, we certainly can execute our powers in ways that make others' intentions relevant. So, I generally have a claim right that you not use my car. I can give you permission to use my car full stop. Or I can give you permission to use my car on Saturdays when it is snowing to get your sick aunt to the hospital. Second, we generally have claims rights against others intentionally harming us, and indeed, intentionally harming us for defensive reasons. That is, if Carl believes that Doug is aggressing against him, and so Carl employs force against Doug, Doug certainly retains a claim right against that harm. I think there is nothing odd about thinking we might conjoin these prior two observations such that one can lose one's rights against intentional defensive force when one has culpably chosen to harm another. In other words, I have rights against being intentionally harmed for defensive reasons. I also have the ability to condition changes in my rights on certain mental states in others. Forfeiture allows that I change my rights such that being intentionally harmed for defensive reasons no longer wrongs me.

What Does One Forfeit? The Puzzle of Suitability

Let us now turn to suitability.⁵⁰ Consider the question within punishment. If Alex throws hot acid in Betty's face, what right has he forfeited? What can be done to him? Goldman argues that we can treat the individual as he has treated others.⁵¹ Is this a matter of *lex talionis*?

One can see why this objection is problematic for punishment. Not so with self-defense. What does the aggressor lose? Claim rights against harms that are intended to repel his attack. The upper limit of these harms will be set by proportionality, which will take into account not just harm threatened but the fact that this is a culpable attack. In addition, in determining what can be done, necessity will have a role to play. If to stop Alex, all that Betty has is acid, then she can throw it. But if she has a gun, she has to shoot him instead. Clearly these points need a more sustained elaboration and defense, but I think it is clear that the suitability objection is not problematic for defensive force because the very liberty that is granted is constrained by what the defender intends. When she intends gratuitous harm or wishes to use the aggressor for other purposes, she no longer acts defensively.

The Duration and Breadth of the Forfeiture

The question of duration and breadth returns us to Thomson's famous critique. She imagines:

Suppose that as Victim raises his anti-tank gun to fire it, Aggressor's tank stalls. Aggressor gets out to examine the engine, but falls and breaks both ankles in the process. Victim (let us suppose) now has time to get away from Aggressor, and is in no danger. I take it you will not think that Victim may all the same go ahead and kill Aggressor. But why not?—if Aggressor really has forfeited his right to not be killed by virtue of his attack on Victim.⁵²

⁵⁰ Martin (1993), p. 282; Lippke (2001), p. 79.

⁵¹ Goldman (1979), p. 45.

⁵² Thomson (1986), p. 34.

I think that everyone agrees that the Aggressor's claim rights are restored. Once the Aggressor ceases to have culpable designs on the Victim, or once the Victim has no basis for defensive intent, then there is no forfeiture.

I take the real objection here to be, not that these things are restored, but rather, whether it is most perspicuous to see this "now you have it, now you don't, now you have it again" process as one of forfeiture. As Lippke argues in the punishment context, "Offenders might be understood to suffer other losses with regard to their rights besides forfeiture. Specifically, their rights might be curtailed or suspended, instead of forfeited. Forfeiture theorists need to show forfeiture, rather than curtailment or suspension, is the best characterization of the losses that are justifiably imposed on offenders."⁵³

Fletcher, too, believes that the underlying approach is normatively acceptable, but then rejects that it is properly seen as forfeiture.⁵⁴ After all, for most rights, what one forfeits one cannot regain. Uniacke's concerns with the meaning of forfeiture prompt her to rely on specification instead of forfeiture. At one point, I objected to this usage as well.⁵⁵

It is perhaps this fear of "forfeiture" that led to the language of liability.⁵⁶ But we might wonder whether liability obscures rather than clarifies the sentiment at stake. Liability, after all, carries its own meaning, a meaning that does not typically entail the normative features at work. Liability as Hohfeldian notion, for instance, is not what we are after.⁵⁷

Moreover, a conclusory usage of liability may mask disparate bases for defensive actions.⁵⁸ A culpable aggressor who has yet to pull the trigger forfeits rights against defensive force. However, in our earlier lifeboat scenario, we saw that E, who culpably created the peril, had a duty to act based on his breach of his previous duty. Invoking forfeiture seems unnecessary.⁵⁹ To label both instances as instances of "liability" may obscure the rights interplays at hand.

Ultimately, perhaps it does not matter what label we pick so long as we agree on what the mechanism is. If we think that individuals have a negative normative power, whereby by their voluntary actions, they alter their rights and others' duties as a "penalty" for their culpable choices, then we understand all we need to understand. We have made substantial progress in justifying acts of self-defense.

⁵³ Lippke (2001), p. 84.

⁵⁴ Fletcher (1979).

⁵⁵ Grabczynska and Ferzan (2009).

⁵⁶ I owe this observation to Saba Bazaragan.

⁵⁷ See Ferzan (2012) for some expressed reservations about using "liability."

⁵⁸ Compare Victor Tadros, "Duty and Liability," 24 *Utilitas* 259-277 (2012)(defining liability broadly to include duties that are not grounded in moral responsibility) with Jeff McMahan, "Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros," 24 *Utilitas* 278-299 (2012) (arguing that liability should be limited to forfeiture so as not to conflate different moral notions).

⁵⁹ McMahan claims that Tadros' duty view does not fully capture the normative terrain because someone with a duty would not be liable to be killed unless the actor failed to do his duty. The failure would then result in forfeiture. McMahan (2012).