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The Need to Attend to Probabilities—For Purposes of Self-Defense and Other Preemptive Actions

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I. INTRODUCTION

I was not certain I was going to write something for this symposium. After all, I had written a lot on the topic of self-defense, so what was there left to say that I had not said before?¹ I have concluded, however, after reading a new generation of literature on self-defense, that most who write on the topic neglect its perhaps most important aspect, namely, that it is a preemptive action. As a preemptive action, self-defense perforce takes place before the attack to which it is a response occurs. This preemptive aspect

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1. See generally, e.g., Larry Alexander, *Recipe for a Theory of Self-Defense: The Ingredients, and Some Cooking Suggestions*, in *THE ETHICS OF SELF-DEFENSE* 20, 20–50 (Christian Coons & Michael Weber eds., 2016).

of self-defense brings with it a nest of theoretical problems to which those who write about self-defense too infrequently advert.²

II. PRELIMINARIES

I will lay out those problems as fully as I can. As a preliminary matter, let me put aside some issues. First, I will not ask whether the defender might be *excused* for acting preemptively.³ To avoid bringing excuse into the analysis, I shall assume the defender is not the potential victim (V) of the feared attack but is rather a third party (TP) coming to V's defense. TP's lack of culpability for preemptive action cannot be based on excuses such as fear for self or family. Only V's lack of culpability for preemptive action can be based on such fears.

Second, having put excuses aside, I also want to point out that *justification* is, as a strict matter, also ruled out. Why? For the simple reason that if TP takes preemptive action and eliminates the possibility of attack, we will never know whether that attack and the harm it portends would have occurred. Justifications are based on the facts. But a harmed potential aggressor and unharmed V do not by themselves create a state of affairs that is necessarily better than the state of affairs that would have occurred had TP not acted.

Nor does throwing in probabilities help here. Probabilities are relative to a person's information and perspectives. Only for God are they objective—one or zero. All we can say is that from TP's perspective, the state of affairs that will exist if TP acts to prevent the feared attack will, TP believes, probably be preferable to the state of affairs that will obtain if TP abstains. At the least, TP believes that there is a high enough probability that, if TP acts, the state of affairs will be preferable to the state of affairs if TP abstains and thus justifies TP's acting. And if that is what TP believes, then TP will not be culpable for acting preemptively. TP's *culpability*—not whether TP is justified—is the proper focus.

As an aside, I should also note that the same analysis may be applied to the so-called lesser evils justification when it prescribes preemptive action. If the preemptive action prevents the course of events from occurring that would have been the greater evil had it occurred, but that course of events was not a certainty in the absence of the preemptive action, then although the actor may not have been culpable for acting preemptively, only God could say whether the actor was justified.

2. For an exception, see generally Vera Bergelson, *Self-Defense and Risks*, in *THE ETHICS OF SELF-DEFENSE* 131, 131–51 (Christian Coons & Michael Weber eds., 2016).

3. Or, if some think it different, whether the defender has an agent-relative permission to do so.

III. PROBABILITIES ALL THE WAY DOWN

Most of the literature on self-defense “[a]ssume[s] a can opener.”⁴ What I mean is that the analysis begins with several stipulations. The putative aggressor (A) *is* culpable, or A *is* innocent. A *will* kill V unless V—or TP—kills A, breaks A’s arm, or does some such thing. In other words, we already *know* things about A and V—or TP—which only God knows for certain.⁵

Don’t get me wrong: The God’s-eye perspective is important. Unless we know what ought and ought not be done when we are certain about the relevant facts, we cannot know what ought and ought not be done when we are less than certain—as we always will be. The God’s-eye perspective is necessary when theorizing about preemptive defense, but it is surely not sufficient and thus not sufficient for assessing the actions of the defender in our case, TP. TP cannot know for certain whether A is culpable or innocent, whether A will actually attack V if not stopped, and whether V will be harmed. Additionally, TP cannot know the extent V will be harmed if A does attack V. Finally, TP cannot know for certain what particular measures will prevent A’s attack and what their consequences will be.

Suppose TP observes A approaching V. Here are the questions TP must answer in deciding whether to take some defensive action against A.

1. Does A presently intend to attack V if not stopped?
2. Or, if A does not presently intend to attack V, will A form such an intent as he approaches V?

4. The can opener is a reference to a joke making light of how economists make their predictions by assuming unlikely or impossible scenarios. The joke goes: a physicist, a chemist, and an economist are stranded on a desert island with nothing but a can of food. The physicist and the chemist devise creative solutions to open the can, but they do not succeed. The economist then says, “Let’s just assume we have a can opener.” Joshua M. Brown, *Assume a Can Opener*, REFORMED BROKER (Nov. 4, 2015), <http://thereformedbroker.com/2015/11/04/assume-a-can-opener/> [<https://perma.cc/9KLS-Y78K>].

5. Uwe Steinhoff’s 227-page discussion of self-defense is representative; I found only three places where he acknowledges that the actors in self-defense scenarios cannot be certain about the predicaments they are in or the consequences of their actions or omissions. Uwe Steinhoff, *Just War Theory: Self-Defense, Necessity, and the Ethics of Armed Conflicts* 53, 71, 96 (2016) (unpublished manuscript) (on file with author). In the overwhelming majority of Steinhoff’s examples, the actors are dealing with certainties regarding self-defense matters.

3. If A intends, or will intend, to attack V, will A actually carry through and do so if not stopped by TP, or will A relent on A's own?
4. If A will attack V, will V be harmed, and to what extent?
5. If A will attack and harm V unless stopped, will A's act nonetheless be justified? That is, are there facts about V that would make harming V justified? If TP believes A will be justified in harming V, then even if A is culpable—perhaps A does not believe the justifying facts exist that TP believes exist—TP would not be acting nonculpably in preventing A's attack.
6. Is A a culpable or an innocent aggressor if A does intend to attack V? A may be an innocent aggressor if A aggresses based on a mistake about the situation, if A is not a morally responsible agent, if A acts under duress, or if A acts in defense of A's spouse or child. If A is a culpable aggressor, A's culpability is not of the type that attaches to acts that have unleashed the risk of harm. Rather, it is the type of culpability that warrants preemptive action but not retributive punishment. It is predicated on the intent to unleash a risk of harm in future circumstances that A does not believe are such that would justify A's unleashing that risk.
7. If TP's beliefs about (1)–(6) lead TP to believe he or she must act preemptively to stop A, TP must then consider:
 - a. What is the likelihood of success of each possible defensive measure?
 - b. How much is A likely to be harmed by each defensive measure?
 - c. What risk or sacrifice does TP incur with each possible defensive measure?
 - d. How much are the probabilities of (a)–(c) affected by the passage of time?

Notice that items (1) and (2) are merely factors for determining the likelihood of (3)—that is, A will attack V. However, someone might argue that although the probabilities of both (2) and (3) are very high, if the probability of (1) is very low, TP will be culpable for preemptively attacking A. For, they might say, if A does not presently harbor an intent to attack V, TP may not attack A—no matter how likely it is that A will attack V, how likely V will suffer serious harm or death, and how unlikely TP will

be able to avert A's attack if TP must wait for A to form the intent to attack V.⁶ What is the right answer here? The extant literature is silent.

Here is another undertheorized issue. Suppose TP believes it highly probable that A *will* attack V. Suppose TP also believes the likelihood of V's suffering serious injury or death as a result of A's attack is very low. May TP preemptively attack V—and, if so, with what severity—in such a situation? For instance, suppose A has a ten-chambered revolver containing one live round and is pointing the revolver at V. TP, per hypothesis, is confident A will pull the trigger but believes the chance of V's suffering death or injury is 10% discounted by the vagaries of A's aim. One might argue that if A would be culpable for pulling the trigger, even a slight chance of V's suffering a serious injury or death would make TP's deadly preemptive defensive attack on A nonculpable. But TP cannot *know* A would be culpable. A might be maliciously playing involuntary Russian roulette on V. On the other hand, A might not realize there is a live bullet in one chamber, or that the gun is a real gun. Or A may believe facts about the situation that, if true, would make his pulling the trigger nonculpable. Thus, for TP to determine whether A is a culpable aggressor, TP would have to assess the likelihoods of these various possibilities. Because TP can never be 100% certain A will be culpable in attacking V, what probability of A's culpability less than 100 percent would make TP's deadly preemptive attack on A nonculpable?

One thing the Russian roulette example above appears to rule out is this: TP can only employ defensive force against A without culpability if TP believes the overall probability that A will harm V unless TP uses force against A is greater than 50%—that is, more likely than not. For even if TP believes the probability that A will pull the trigger—the probability that A will or does intend to pull the trigger times the probability that A will act as he intends—is nearly 100%, the probability of serious harm to V is considerably less than 50%. Yet, most would think TP nonculpable for using force to prevent the Russian roulette attack by A even if the probability that V will be harmed by it is far less than 50%.

Then there are the probabilities referred to in (7).⁷ Suppose TP's culpability for preemptively attacking A turns on matters of proportionality and necessity. Proportionality will itself turn on the probabilities in (4)—whether and to

6. See *supra* Section III(7)(d).

7. See *supra* Section III(7).

what extent A's attack will harm V if not averted.⁸ With respect to necessity, suppose TP can attack A with a revolver in the ballroom, with a high probability of averting A's attack, a high probability of A's suffering death or serious injury, and TP's expending little energy and facing little danger. Alternatively, TP can attack A with the lead pipe in the conservatory, with a moderate probability of averting A's attack, a moderate probability of A's suffering serious injury, and TP's expending a fair amount of energy and facing some danger. Finally, TP can attack A with a candlestick in the dining room, with a still lower but positive probability of averting A's attack, a low probability of seriously injuring A, and an increased probability of TP's suffering serious injury. How are the necessity and proportionality of TP's attack to be determined, given these three variables and the various probabilities attached to them?

IV. CONCLUSION

My object in this short paper is not to provide algorithms for answering the questions I have raised. It is the more modest, but I believe vitally important, task of placing a neglected item on the agenda of those engaged in theorizing self-defense and other preemptive actions. Whatever certainties exist in life, they do not inhabit the realm of preemptive defense. So, theorists who derive their normative conclusions from stipulated certainties will fail to provide answers usable in the real world.⁹

8. See *supra* Section III(4).

9. Suppose that correctly applying the several factors listed above results in a verdict that TP will be culpable if he defends V against A with whatever force he has chosen to employ. For example, TP might have *insufficient credence* that A is attacking V or that A is a culpable aggressor. Alternatively, TP might be culpable because he fails to have the required beliefs about necessity—he may believe that he can effectively avert A's attack with less force than he intends to use and can do so with acceptable levels of safety and effort. So, per hypothesis, TP will be culpable for attacking A as he intends. Suppose now that A is a culpable aggressor. TP will be a culpable aggressor against A, but A is a culpable aggressor against V. And suppose another third party, TP2, believes these things with an appropriately high level of credence. May TP2 nonculpably use force to thwart A or TP, and if so, against which one? Now suppose, in place of TP in our example, it is V who has insufficient credence that A is attacking him and is culpable for doing so; or suppose that V cannot show that, given his beliefs, the force he intends to use to defend against A meets the necessity or retreat requirements. Nor can V show grounds for an excuse. So, V will be culpable for attacking A. But again, suppose that A is a culpable aggressor against V. May a third party who believes these things nonculpably assist either A or V, and if so, which one? In both scenarios, the potential intervener believes both A and TP in the first scenario, and A and V in the second, will be culpable if they act as they intend. Therefore, one might contend the potential intervener should not intervene on either side. On the other hand, although TP in the first scenario and V in the second will be culpable for acting as they intend, they are responding defensively to a would-be culpable attacker, A. So, as between culpable A and culpable TP and V, the equities may seem to favor the

latter. Furthermore, although it might seem perverse for the potential intervener to intervene on the side of A, who, after all, is the attacker not the defender, it might matter *why* A is culpable in attacking and *why* TP or V is culpable in responding.

