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## The Vindication of Good Over Evil: “Futile” Self-Defense

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# The Vindication of Good Over Evil: “Futile” Self-Defense

DOUGLAS HUSAK\*

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### I. A CASE OF FUTILE SELF-DEFENSE

Consider a case in which Wrongful Aggressor (WA) attacks and proceeds to slowly kill Innocent Victim (IV). In the kind of case on which I want to focus, I stipulate that nothing IV is able to do can prevent or even delay WA’s lethal onslaught. Moreover, I stipulate that nothing IV is able to do can prevent WA or anyone else from engaging in wrongful aggression in the future. But suppose IV is able to inflict a minor injury on WA, say, by scratching his arm. Both WA and IV are fully cognizant of all the facts I have specified thus far. In case it is important, I also stipulate that IV’s

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resistance can only make matters worse for IV. If antagonized, WA may proceed to cause *more* pain for IV, but not for others. Thus my only stipulation is that IV's act will produce no reduction in the incidence of wrongful aggression, either on the present occasion or in any future case. I will say that the injury IV is able to inflict on WA is *futile* and will describe the particular case on which I focus as an instance of *futile self-defense*. The issue I propose to examine is how we might be able to defend the judgment that IV is morally permitted to inflict the minor injury on WA.<sup>1</sup>

The burgeoning self-defense literature, like that in most areas of moral and legal philosophy, typically begins with and seeks to rationalize our intuitions.<sup>2</sup> I submit that the intuitive judgment of virtually all respondents, at least initially, is that IV is permitted to exercise her right of self-defense, however futile, and scratch WA. This intuition, I believe, is incredibly powerful and robust; I certainly have it myself. Yet quite a few philosophers and legal theorists contend IV is *not* permitted to employ futile self-defense against WA.<sup>3</sup> Presumably, they believe IV must passively accept her fate without injuring WA.<sup>4</sup> Why hold this counterintuitive judgment? Two possible answers are available. First, contrary to my generalization about what most respondents are likely to believe initially, these philosophers may not share my intuition that IV is permitted to injure WA when resistance is futile. Second, these philosophers might share this intuition initially, but ultimately reject it on theoretical grounds. I find it hard to believe the first answer explains why many philosophers contend that IV's act is impermissible. Virtually all respondents, as I have said, begin with the initial intuition that IV is permitted to scratch WA, although it is hard to know how to respond to those philosophers who disagree.

In what follows, I focus on the second answer, which I regard as more common and plausible. Philosophers who eventually reject their intuition and come around to holding that IV is not permitted to injure WA do so because they are unable to bring their initial judgment into *reflective equilibrium* with other particular judgments and general principles they

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1. I do not address whether WA would be *wronged* or is *liable* to defensive force by IV. It is now widely accepted that judgments that IV's act is permissible do not entail that WA is not wronged by IV's conduct. It is hard for me to believe WA *is* wronged or is *not* liable to the injury inflicted by IV, but these conclusions require further argument, so I do not discuss them here. Nor do I discuss the application of my thoughts to war—the context to which many other moral and legal philosophers apply them.

2. See, e.g., Suzanne Uniacke, *Self-Defence, Just War, and a Reasonable Prospect of Success*, in *HOW WE FIGHT: ETHICS IN WAR* 62, 62 (Helen Frowe & Gerald Lang eds., 2014).

3. See, e.g., *id.* at 66 (“[I]f *B* does not believe at the time of action that the force he uses is capable of fending off *A*'s threat to some extent, then he cannot justify it as self-defence or attempted self-defence.”).

4. See *id.*

hold about self-defense. Of course, nothing is methodologically suspect about a procedure by which initial intuitions are rejected because they fail to withstand the test of reflective equilibrium. Unless *some* such initial intuitions were eventually rejected on this ground, we could simply rely on them without the need to subject them to reflective equilibrium in the first place. Nonetheless, I will try to defend the initial intuition that IV is permitted to employ futile self-defense against WA. I will endeavor to show that our intuition about this case does not really contradict some of the other particular judgments and general principles about self-defense we should hold. This effort, however, is necessarily incomplete. I make no systematic effort to show that this intuition is compatible with the judgments we are likely to make about every case in which self-defense is permissibly exercised.

## II. TWO PRELIMINARIES

Before proceeding further, I make two preliminary observations I believe to be important. First, I readily concede that my case is wholly *unrealistic*. To be sure, nothing is unrealistic about a scenario in which victims of aggression can do nothing to avoid their fate at the hands of determined and powerful wrongdoers. What is unrealistic, I submit, is my stipulation that IV *knows* that nothing she can do will reduce harm, both on the present occasion as well as in the future. Stipulations of omniscience are utterly fanciful, sometimes contributing to the bad name philosophers of self-defense have earned among more practically-minded legal theorists. The latter sometimes scoff at the supposition that much can be learned about the world we inhabit by reflecting on fantastic scenarios in which fat men are pushed down narrow wells on top of victims who happen to possess vaporizing ray guns.<sup>5</sup> On the planet in which we live, I am relatively certain innocent victims would believe, and certainly would hope, there to be a non-trivial chance that some future harm will be averted because of their resistance. Even if IV assigns only a 1% probability to this contingency, would anyone think she should still abstain from scratching WA?

Suppose IV believes there is a miniscule chance that some future harm would be prevented by scratching WA. But suppose further that the facts ultimately prove her to be mistaken; WA turns out not to be slowed in the slightest. On a *prospective* theory of permissibility, IV's act of futile self-

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5. See e.g., Larry Alexander, *The Need to Attend to Probabilities—For Purposes of Self-Defense and Other Preemptive Actions*, 55 SAN DIEGO L. REV. 223, 227 (2018).

defense might well turn out to be justified after all.<sup>6</sup> On the evidence available to her, she may be warranted in holding the belief that makes her conduct permissible. Even on an *objective* theory of permissibility—the omniscient or god’s eye point of view—many of those who pronounce IV’s act of futile self-defense to be wrongful would apply their views about mistaken justification to deem her act to be *excused*.<sup>7</sup> This concession should do little to cheer IV, who in any case has been killed by the villainous WA. I am not primarily interested in determining whether IV should be excused and therefore be blameless, but I present a reason to conclude her act of futile self-defense is *objectively justified*, that is, objectively permissible all-things-considered.

Why is the lack of realism about my case important? Philosophers will respond to the practically-minded legal theorists to whom I referred by insisting a great deal *can* be learned about the principles at stake in debates about self-defense by identifying pure cases, and the purity of these cases is best assured by resorting to stipulation, no matter how fanciful.<sup>8</sup> Of course, they have a point. At the same time, however, intuitions about cases are more likely to become increasingly unreliable as they deviate further and further from reality. I have stipulated that the effort to injure will be futile, but laypersons are bound to express their awareness that this stipulation departs from their experience in the real world by allowing IV to injure WA. Even seasoned philosophers who report intuitions about particular cases should never be supremely confident that their reactions do not reflect their lack of certainty that the case in question conforms to whatever unrealistic facts are stipulated.<sup>9</sup>

Second, despite the title of my paper and the description I have provided to the central case involving IV and WA, I readily concede that this example may literally involve neither self-defense nor futility. It may be hard to agree that IV is *defending* herself when she recognizes all too well that nothing

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6. For an introduction to prospective views, see generally MICHAEL J. ZIMMERMAN, *LIVING WITH UNCERTAINTY: THE MORAL SIGNIFICANCE OF IGNORANCE* (2008).

7. I make the—admittedly controversial—assumption that IV’s mistaken belief about averting present or future harm is reasonable and that reasonable mistakes about justifications constitute excuses.

8. See Alexander, *supra* note 5.

9. I know no one who has actually pushed a fat man from a bridge. I would wager, however, that few attempts to do so would succeed in placing the man directly on the track below so that the oncoming trolley will be derailed and not run over the five innocent victims in its path. I would predict that the more likely outcome would be that the trolley would proceed on its way and the injury to the fat man would be wholly ineffective. If I am correct, intuitive judgments against pushing the fat man may reflect the lack of confidence that the plan will actually work.

she can do will make an iota of difference to whether she will survive.<sup>10</sup> According to Suzanne Uniacke, “a person who acts in self-defence aims to fend off injury or reduce its severity.”<sup>11</sup> I believe it is sensible to say IV has the aim Uniacke mentions; IV may be *trying*—or *aiming*—to fend off injury or reduce its severity even when she knows she cannot possibly succeed.<sup>12</sup> People can and do try to accomplish ends they know are unattainable. But I will not resort to *these* contested grounds to pass judgment on IV. My question is simply whether such an injury is permissibly inflicted; whether we conceptualize its permissibility under the description of trying or within the rubric of self-defense may be important for some purpose but, to me, is immaterial.<sup>13</sup> I do not care whether the rationale for allowing IV to scratch WA falls inside or outside the narrow parameters of self-defense.

Moreover, the term *futile* is ambiguous, and we must be careful to specify what sense applies before we can be clear about whether it pertains to the case at hand. Resistance is futile, in one sense, if it can avert no harm for anyone in the present or future.<sup>14</sup> Resistance is futile in this first sense. But resistance may not be futile in a different sense. Resistance is futile, in a second sense, if it is wholly wanton or pointless. No philosopher of whom I am aware thinks the infliction of an injury can be permissible when it is futile in this second sense.<sup>15</sup> It is an open question, and exactly the point at issue, whether the use of force by IV and the subsequent injury to WA is wanton and pointless. My arguments will attempt to show that such force by IV is *not* futile in this second sense. I endeavor to find a plausible rationale to justify the force.

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10. Some think “a harm must have some chance of averting a threat if it is to count as *defensive*.” HELEN FROWE, DEFENSIVE KILLING 100 (2014).

11. Uniacke, *supra* note 2, at 68.

12. See Uwe Steinhoff, Just War Theory: Self-Defense, Necessity, and the Ethics of Armed Conflicts 4 (2016) (unpublished manuscript) (on file with author). For a discussion of why people might try even when they might not succeed, see CAROL S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS 4, 42 (updated ed. 2016) (“[T]hey didn’t even think they were failing. They thought they were learning.”).

13. See Steinhoff, *supra* note 12 (“[S]elf-defense need not be aimed at averting or mitigating an attack . . .”). Steinhoff therefore concludes that “resistance *is* self-defense.” *Id.* at 9. But he agrees that the ultimate question is whether IV acts justifiably, not whether his act is an instance of self-defense. See *id.* at 20.

14. *Id.* at 12 (introducing a second type of self-defense under the umbrella of futility; this necessarily means futility is ambiguous, and the definition of futility must be specified).

15. *Id.* (differentiating between resistance that is both punitive and self-defensive, and resistance that is purely punitive).

### III. REFLECTIVE DISEQUILIBRIUM

As I have indicated, the great majority of moral and legal philosophers who share but ultimately reject the initial intuition that IV is permitted to inflict a minor injury on WA probably do so because they are unable to bring this judgment into reflective equilibrium with other particular judgments and general principles they hold about self-defense.<sup>16</sup> What *are* these particular judgments and general principles that lead thoughtful philosophers to renounce their earlier intuition? Penal theorists almost universally accept the general principle that harms inflicted in self-defense are permissible only when they are *necessary*.<sup>17</sup> The necessity requirement is widely thought to undermine the supposition that IV's use of futile self-defense, in the first of the foregoing senses, is permissible.<sup>18</sup> How can it be necessary to inflict an injury that is stipulated to achieve no reduction in wrongful aggression, either on the present occasion or in the future?<sup>19</sup> If we are tempted to relax the necessity requirement, as we might be forced to do to retain the intuition in my original case involving futile self-defense, we then seem to encounter difficulties retaining particular judgments we tend to make about other kinds of cases. The most familiar of those cases involve *retreat*. Consider a different example that preserves the stipulation that the minor injury would not slow WA. However, in this new variation IV knows she can retreat with perfect safety, so no one need suffer injury at all. May IV now stand her ground and injure WA, or is retreat required? It may be manifestly *irrational* for IV to remain in place and die after scratching WA, but does IV act impermissibly if she elects to do so? If defensive force can be permissible even when it is unnecessary, why are so many moral and legal philosophers convinced that IV must escape rather than injure WA?

Abandoning the original intuition that IV is permitted to scratch WA in an act of futile self-defense is the easiest way to avoid reflective disequilibrium

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16. See *id.* at n.473.

17. As Steinhoff points out, although the necessity constraint is almost universally accepted, almost no philosopher bothers to defend it. *Id.* at 58.

18. The *necessity requirement* maintains that the defender must only do what is necessary "to advance some valuable aim" to stop the aggression; any further harm is impermissible. *Id.* at 41.

19. More generally, it might be thought that only *desert* can permit a harm that does not produce good consequences in the future. See Fred Feldman & Brad Skow, *Desert*, STAN. ENCYCLOPEDIA PHIL. (Oct. 9, 2015), <https://plato.stanford.edu/entries/desert> [https://perma.cc/8237-2TYQ]. I am skeptical. The reasons generated by deontological considerations might also justify harming that does not increase personal value. See Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA PHIL. (Oct. 17, 2016), <https://plato.stanford.edu/entries/ethics-deontological/> [https://perma.cc/94HX-FPL9]. Suppose, for example, my child was kidnapped. I, or some agent acting on my behalf, might be permitted to inflict minor harms on someone to rescue the child. I *ought* to rescue my child and if inflicting harm is necessary to that end, I am permitted to do so.

between the intuition and our judgments about other specific cases and general principles. Thus some philosophers are reluctantly led to conclude that IV is *not* permitted to scratch WA in what I have stipulated to be an act of futile self-defense.<sup>20</sup> Presumably, IV must resign herself to her fate and make no effort to add to the amount of unnecessary harm in the world by injuring WA. The initial intuition to the contrary might be deemed unreliable on several grounds. Most notably, it might reflect a commitment to an indefensible macho culture.<sup>21</sup> Those who abandon this initial intuition might smugly take themselves to occupy the moral high ground. After all, inflicting injury is a *prima facie* or *pro tanto* wrong, and inflicting an unnecessary injury is a wrong that cannot be justified all things considered.<sup>22</sup> Only Neanderthals who hold a regressive conception of morality would allow IV to add to the quantum of unnecessary harm in the world.<sup>23</sup>

Frankly, I regard my intuition that IV is permitted to inflict a futile injury on WA by scratching him to be at least as strong as the allegedly conflicting intuition that IV is morally required to flee when she knows escape is possible and no one need be injured at all. Admittedly, the strength of given intuitions is hard to quantify. But if our judgments about this pair of examples are truly incompatible so that one must be jettisoned, I am just as prepared to rethink the need for escape as the claim that minor injuries become

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20. This theory is generally based on the foundation of natural rights philosophy. John Locke was a prominent natural rights philosopher and his writings were highly influential to the drafting of the Constitution of the United States of America and, as such, natural law philosophy is foundational to our individualistic, freedom-based society. See Donald L. Doernberg, “*We the People*”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 52 (1985). For a basic explanation of John Locke’s ideas and how the natural rights philosophy operates, see Steven Forde, *John Locke and the Natural Law and Natural Rights Tradition*, NAT’L L., NAT’L RTS., & AM. CONSTITUTIONALISM (2011), <http://www.nlnrac.org/earlymodern/locke> [<https://perma.cc/6X6C-R24D>].

21. For a discussion on how increasing levels of aggression add to a culture of “macho” masculinity, see Thomas Page McBee, *The End of Violent, Simplistic, Macho Masculinity*, ATLANTIC (Nov. 26, 2012), <https://www.theatlantic.com/sexes/archive/2012/11/the-end-of-violent-simplistic-macho-masculinity/265585/> [<https://perma.cc/5DJP-HU2F>].

22. See David Brink, *Mill’s Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Aug. 22, 2014), <https://plato.stanford.edu/entries/mill-moral-political/#HarPri> [<https://perma.cc/KJ7V-LVAT>].

23. See Steinhoff, *supra* note 12, at 15 (discussing German law’s requirement that milder retaliation is only justifiable if it is as effective as harsher retaliation). Steinhoff argues: normative values work to equate permissible infliction of self-defense and the proscriptive, rose-tinted utopian ideal of the “duty to retreat.” *Id.* at 72.

impermissible when they are known to be futile.<sup>24</sup> In short, I am strongly tempted to restore reflective equilibrium by holding that IV is *not* required to retreat rather than standing her ground to scratch WA. The case against the need for retreat is strongest when IV is attacked in her home—the so-called “castle doctrine” that all jurisdictions recognize.<sup>25</sup> But is this judgment really inconsistent with my intuition about the original example in which retreat is unavailable? One might deny that an intuition that permits futile injuring in cases in which IV *can* do something to prevent the harm inflicted by WA—by retreating with perfect safety—has any implications for cases in which IV is able to do *nothing* to prevent WA’s onslaught. Hopefully, my view is not inconsistent with the need for retreat in my modified example.

Is my intuition about my original example at odds with those about other cases? Perhaps. I do not pretend to offer a comprehensive position that yields clear answers to every variation on the example of futile self-defense. Here are two troublesome cases, all too familiar to theorists who are steeped in the self-defense literature. First, what if WA is not culpable for his aggression?<sup>26</sup> He cannot be prevented from killing IV, but he poses a threat only because of duress;<sup>27</sup> a member of his town is held hostage and would be slaughtered unless he agrees to attack a single innocent victim. I admit that the absence of culpability may require a change in some considerations to which I will eventually appeal. Second, what if WA is not even an agent whose aggressive behavior is voluntary?<sup>28</sup> He cannot be prevented from killing IV, but he poses a threat only because he is pushed or shoved into IV. I admit that the absence of agency may also require a change in some considerations to which I will eventually appeal. I am sure many factors play a complex role in a complete theory of self-defense; it is unlikely one master principle will emerge to provide a satisfactory account of all our many nuanced judgments.

At the same time, I hasten to add that the judgment that IV is *not* permitted to inflict a futile but minor injury on WA in my original case is also difficult to bring into reflective equilibrium with what we are likely to believe about other particular cases and general principles. If we renounce the intuitive judgment that IV’s act is permissible, we may be forced to rethink some of these other judgments as well. I mention two more examples. Most of

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24. This position is also accepted by Helen Frowe in her discussion of the thought experiment she calls *Lucky Escape*. Helen Frowe, *Non-Combatant Liability in War*, in *HOW WE FIGHT: ETHICS IN WAR*, *supra* note 2, at 172, 186.

25. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 888 n.32 (2010).

26. See, e.g., Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 *ETHICS* 252, 263–64 (1994).

27. *Id.* at 264.

28. See, e.g., McMahan, *supra* note 26, at 265.

the time, third parties who are aware of all the facts are not permitted to assist a person in a confrontation unless the behavior of the person assisted is permissible. Suppose IV's friend can assist her in scratching WA but is no more able to stop or slow WA than IV. If we reject my intuition and conclude that IV is not permitted to inflict a futile injury, it seemingly follows that her friend can do nothing to assist her in scratching WA. Perhaps this judgment is no more difficult to swallow than the claim that IV herself may not injure WA.

But, I submit, matters get even more counterintuitive when we turn to whether third parties are required to intervene to prevent IA from scratching WA. When the aggressor cannot be stopped or slowed, IV's friend not only may not assist her but also should take WA's side and prevent her from scratching him.<sup>29</sup> Obviously, IV would not be expected to welcome these results. She not only is wrongfully killed by WA but goes to her death feeling betrayed by her friend as well. Why would IV's friend deliberately take the side of evil over good and arguably become complicit with it? These counterintuitive implications can be blocked by refusing to reach any conclusions about the permissibility of third-party assistance or prevention from judgments about what first-parties—namely IV—are permitted to do. But this amounts to an additional normative cost that must be borne by those who continue to insist IV may not inflict a futile injury on WA.

Additional seemingly strange results follow if IV is not permitted to scratch WA. Do wrongdoers such as WA acquire more immunity from defensive harm when they are able to become more impervious to it—by killing under circumstances in which resistance is certain to be futile rather than those in which resistance might be effective in deterring future aggression?<sup>30</sup> The more determined the wrongdoer, the less IV is permitted to do to him. Perhaps this seemingly unacceptable consequence can be blocked as well. Again, however, some ingenuity is required to do so. I certainly do not pretend to have identified or resolved all possibilities of reflective disequilibrium. I simply point out that *some* amount of reflective disequilibrium is likely to be encountered regardless of *what* judgment we ultimately make about the original case involving IV and WA.

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29. See Jeff McMahan, *The Limits of Self-Defense*, in *THE ETHICS OF SELF-DEFENSE* 183, 193–94 (Christian Coons & Michael Weber eds., 2016).

30. See Joanna Mary Firth & Jonathan Quong, *Necessity, Moral Liability and Defensive Harm*, 31 *L. & PHIL.* 673, 688 (2012).

#### IV. EFFORTS TO RESTORE EQUILIBRIUM WHILE PRESERVING THE INITIAL INTUITION

The initial intuition permitting IV to scratch WA should not be abandoned casually; we should not surrender it without making a concerted effort to salvage it. Most theorists try to do so by arguing—as I will do—that it *can* be brought into reflective equilibrium with other specific intuitions and general principles we are inclined to accept.<sup>31</sup> As I have indicated, nearly all philosophers agree that persons who employ self-defense are permitted to inflict an injury only when it is necessary.<sup>32</sup> Because I have stipulated that IV’s scratch of WA will do nothing to prevent present or future aggression, it might seem that IV’s act fails to satisfy the necessity constraint for permissible self-defense. But how exactly should we construe the necessity constraint? Seth Lazar is among the handful of philosophers who have sought to analyze what this principle involves.<sup>33</sup> According to Lazar, a harmful action such as that taken by IV against WA is necessary when it satisfies each of the following three conditions:

1. “The harmful course of action must advance a goal. It must be neither wholly wanton, nor an end in itself.”<sup>34</sup>
2. “No less harmful course of action has equal or better prospects of achieving the goal.”<sup>35</sup>
3. “If there is a less harmful course of action that could achieve the goal, but is less likely to succeed, then the difference in prospects of success—or effectiveness—must be enough to justify the difference in harm inflicted.”<sup>36</sup>

I propose a few modifications of Lazar’s analysis. First, the goal to which he refers in each of these conditions must be *valuable*. Not just *any* goal will show an injury to be necessary. But with this refinement to Lazar’s conditions, along with a second I will discuss in Part V, we should be prepared to entertain the possibility that IV might achieve a valuable goal even though she is unable to avert either present or future harm by WA.<sup>37</sup> In other words, IV’s act may be necessary because it advances a valuable

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31. See, e.g., Daniel Statman, *On the Success Condition for Legitimate Self-Defense*, 118 ETHICS 659, 668–69 (2008).

32. See, e.g., Seth Lazar, *Necessity in Self-Defense and War*, 40 PHIL. & PUB. AFF. 3, 4 (2012).

33. See SETH LAZAR, SPARING CIVILIANS 26 (2015).

34. *Id.*

35. *Id.*

36. *Id.*

37. See Statman, *supra* note 31 (arguing harmful courses of conduct may be justified because they serve utilitarian or non-utilitarian purposes).

goal even though her resistance to WA is futile in the first sense I have specified. The most well-known candidate for such a valuable goal is described by Daniel Statman.<sup>38</sup> According to Statman, the good IV produces by injuring WA consists in the vindication of her “honor.”<sup>39</sup> “Sometimes the goal [of defensive harm] is not to defend the life . . . of the victims but rather their honor.”<sup>40</sup> He continues, “in the eyes of the aggressor, we are just items to be used, mere objects. . . . We feel that we must protect not only our body or our property but our *selves*.”<sup>41</sup> Thus, Statman contends that a victim such as IV faces *two* distinct threats: (1) a direct physical threat to her life; and (2) a secondary threat to her honor.<sup>42</sup> To Statman, IV’s defense of her honor from this secondary threat may render given defensive acts necessary, including the scratch IV inflicts on WA in my original example.<sup>43</sup>

Statman’s account is on the right track. It is tempting to suppose that the fact that IV *goes down fighting* makes her better off. When we ask what kind of life IV led, that is, when we assess the value of her life overall, we want to know what kind of *death* she had. The fact that she did not succumb without a struggle might produce a good for IV herself. Nonetheless, I propose to suggest a somewhat different account—or at least an important and novel way of understanding. Statman’s view has been roundly criticized,<sup>44</sup> and I too am skeptical that *honor* is the best candidate for the valuable goal that is achieved by the futile efforts of IV. In particular, suppose IV is motivated to scratch WA by some consideration other than to maintain her honor, possibly by sheer hatred for WA. Should we then deem her act to be unjustified? Although a few alternatives to Statman’s candidate have been proposed,<sup>45</sup> I make no effort to canvass and assess them here. Instead, I will describe what I hope to be a more original and plausible basis for bringing our intuitions about futile self-defense into reflective equilibrium with our judgments about other specific cases and general principles. I am sure my

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38. *See id.*

39. *Id.* at 668.

40. *Id.*

41. *Id.*

42. *Id.*

43. *See id.* at 668–69.

44. *See generally, e.g.,* Kimberly Kessler Ferzan, *Defending Honor and Beyond: Reconsidering the Relationship Between Seemingly Futile Defense and Permissible Harming*, 15 J. MORAL PHIL. (forthcoming 2018).

45. Firth & Quong, *supra* note 30, at 693; Frowe, *supra* note 24, at 185–86.

endeavor encounters difficulties of its own, but I hope it is the least problematic of the several options to defend the permissibility of IV's scratch of WA.

## V. AVOIDING AXIOLOGY

To my knowledge, a common theme pervades attempts to bring the initial intuition that IV is permitted to scratch WA into reflective equilibrium with other specific cases and general principles: contrary to what we might have supposed by the stipulation that no present or future harm will be averted by IV's scratch, each such attempt contends that she *does* manage to advance a valuable goal or objective by injuring WA after all. However, without preventing present harm or reducing future harm the good that IV allegedly produces by advancing this goal or objective is presumably *intrinsic*; it is not a good that owes its value to its contribution to some other good. Statman's view, as I understand it, attempts to identify such an intrinsic good.<sup>46</sup> Presumably, it is better for IV to die with some modicum of honor than to die without it, and the value of so doing does not owe its goodness to its contribution to any further value.<sup>47</sup> Honor is an intrinsic good—or so the story goes.

Recall I earlier indicated that acts of self-defense are not futile in the second sense distinguished in Part I unless they are utterly pointless and gratuitous.<sup>48</sup> This account of futility may appear to duplicate the first condition of Lazar's analysis of necessity, which specifies that "[t]he harmful course of action must advance a goal. It must [not] be . . . wholly wanton."<sup>49</sup> In fact, however, my condition of non-futility differs in the following crucial respect from Lazar's account. Why should we concede that only the advancement of a *goal* or *objective* that is intrinsically good can show IV's scratch not to be wholly wanton? Why include in a single condition what seem to be two separate requirements: that IV's act is (1) not gratuitous and (2) advances a valuable goal? What is required to show IV's act is not gratuitous or wanton? Is it not the attainment of an end or objective that is intrinsically good, but rather a *reason* that justifies and thus permits IV to injure WA? Not all actions pursuant to justificatory reasons advance goals or objectives. Perhaps we can identify such a justificatory reason in my original case even though IV does not advance a goal or objective of any kind that we would characterize as having value—intrinsic or otherwise.

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46. Statman, *supra* note 31, at 668 (asserting honor is intrinsically valuable because it reaffirms our worth to ourselves and to society).

47. Michael J. Zimmerman, *Intrinsic vs. Extrinsic Value*, STAN. ENCYCLOPEDIA PHIL. (Dec. 24, 2014), <https://plato.stanford.edu/entries/value-intrinsic-extrinsic/> [<https://perma.cc/6UD2-5FV6>].

48. See *supra* Part II.

49. LAZAR, *supra* note 33.

I am generally skeptical that the search for an intrinsic value that is produced by IV's act adds much to the debate. Among other problems, it is notoriously difficult to defend *any* claim about intrinsic value. This difficulty is compounded if we believe intrinsic goods can consist of organic unities, some parts of which are typically bad outside of the wholes of which they are a part.<sup>50</sup> All too often a theorist believes some action is permissible or impermissible and simply alleges that intrinsic value is gained or lost when the permissible or impermissible action is performed. Is paving the Grand Canyon wrong even if a net balance of instrumental goods would be advanced by turning it into a parking lot? Yes—or no—because the Grand Canyon has—or lacks—intrinsic value. Is the destruction of the last member of a species wrong even if a balance of instrumental goods would be achieved by the extinction? Yes—or no—because the preservation of a species has—or lacks—intrinsic value. Similar questions can be raised about the supposed intrinsic value of honor. Unless some independent argument can be provided for any of these claims about intrinsic value, I fear they do no more than restate and thus add nothing new to the first-order judgments they are designed to support.

How do we minimize controversy by my suggested shift from a search for a goal or objective advanced by IV to a search for a reason that justifies IV's act? Are debates not about reasons every bit as intractable as controversies about intrinsic value? Just as importantly, how do we avoid controversies about intrinsic value by my suggested shift? Does conformity with a justifying reason not produce intrinsic value? Perhaps not. The supposition that intrinsic value is produced by conformity with each justifying reason is asserted more often than defended. Presumably, the fact that your child has died is a good reason for you to feel sad. Even more obviously, the fact that you admit to engaging in irritating behavior toward me provides a good reason for me to be irritated. If so, however, it is hardly obvious that a world in which persons are sad or irritated by the appropriate stimuli includes more intrinsic value than a world in which they are not. The claim that greater amounts of sadness or irritation can make the world contain more value seems a bit strange—although I do not regard this oddity as a proof of anything. I simply mention that the supposed intrinsic value of these psychological states seems no less counterintuitive than that of suffering, which foes of *some* axiological defenders of retributivism are fond of

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50. See LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 206 (2006).

labeling as misguided or “barbaric.”<sup>51</sup> My own suspicion, which I am unable to develop here, is that conformity with *some* justifying reasons creates intrinsic value while conformity with others does not. I will not, however, suggest a device by which given reasons can be sorted into one category or the other.

Thus questions about intrinsic value *may* not be involved in my inquiry. Even if intrinsic value is not produced when IV injures WA in an act of futile self-defense, she may still have a reason that justifies her act. If we had the opportunity to subject IV to a dialogue, the following pattern of questions and answers would be perfectly sensible. Suppose we asked IV: “Why, that is, for what good reason did you injure WA?” It would not be surprising for her to answer: “Because he is a wrongful aggressor who threatened me with wrongful harm.” But we should press further and ask IV: “Why does *this* reason justify injuring WA?” This latter question remains unanswered when the injury IV inflicts is futile. We should not assume, however, that IV’s answer must be unintelligible unless she can point to an intrinsically valuable good or objective that is furthered by her act. In what follows, I try to provide a plausible answer to the unanswered question: a reason that is capable of making her act permissible. To this point, I hope only to have raised a doubt that an adequate solution must identify some intrinsically valuable goal or objective IV’s action advances.

## VI. IMPERSONAL VALUE AS A POSSIBLE SOLUTION

To show why IV’s act of scratching WA is permissible, we need to identify a justifying reason. Although conformity with this reason *may* create value, it *need* not do so to provide the needed justification. I try to articulate such a reason here—a reason that exists even if my conjecture in Part V is mistaken. Suppose, in other words, that IV *must* show not only that she has a reason to scratch WA but also that her act of futile self-defense promotes a good or value if she is to succeed in justifying it. Presumably, this good or value must be sufficiently great to outweigh the value of WA’s unscratched arm. What good could IV possibly create? I begin to answer this question by pointing out that the foregoing attempts to identify this value share a *second* common theme: they contend not only that IV *does* produce an intrinsic good by injuring WA, but also that the

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51. See Alec Walen, *Retributive Justice*, STAN. ENCYCLOPEDIA PHIL., June 18, 2014, <https://plato.stanford.edu/entries/justice-retributive> [https://perma.cc/SAB5-4WPU] (quoting VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 63 (2011)).

intrinsic good she produces is a good *for* IV. That is, they contend that the good IV produces is a “personal” good.<sup>52</sup>

Whatever its advantages or disadvantages may be, it is likely Statman’s view that IV is permitted to scratch WA to vindicate her honor involves an attempt to identify a personal good her act achieves.<sup>53</sup> One might well think that maintaining her honor is *good* for IV. I submit, however, that if IV’s reason for scratching WA creates an intrinsic good at all—which I am unsure we should concede—at least *part* of the intrinsic good she creates is better construed as “impersonal,” that is, as a value that is not valuable *for* IV, or indeed for anyone.<sup>54</sup> I take for granted that impersonal goods exist,<sup>55</sup> and the value created by conformity to IV’s reason to injure WA is a plausible candidate to serve as an example. In what does this alleged impersonal value consist? It consists, I believe, in implementing, realizing, or instantiating a moral principle that supports the permissibility of her conduct. Reasonable minds will differ about exactly how this principle should be formulated.<sup>56</sup> My own rough approximation is that the futile force exerted against WA by IV implements, realizes, or instantiates the principle that *good should not capitulate—or yield—to evil*.<sup>57</sup> I suggest implementation of this principle constitutes a great part of the good that justifies IV’s act. If we insist on expressing the implementation of this principle in terms of value, we should say that a world in which this principle is instantiated is a world that contains more value than a world in which it is not. More specifically, we should say that a world in which IV acts as she has reason to do and thus does not capitulate to evil—for example, to WA—contains more value than a world in which she succumbs without resistance.<sup>58</sup>

We are easily misled if we conceptualize the implementation of justificatory principles as goals or objectives that are furthered or promoted; values can be and are created by conformity to principle, even though nothing we should

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52. Statman, *supra* note 31, at 682.

53. *See id.* at 671.

54. Erich Hatala Matthes, *Impersonal Value, Universal Value, and the Scope of Cultural Heritage*, 125 *ETHICS* 999, 1000 (2015).

55. *But see generally* RICHARD KRAUT, *AGAINST ABSOLUTE GOODNESS* (2011). In my judgment, the clearest cases to show the existence of such goods involve *non-identity* problems. Kraut fails to discuss these cases.

56. *Compare id.* at 184, with Statman, *supra* note 31, at 670.

57. Alternatively, *right should not capitulate—or yield—to wrong*.

58. *See* JEFF MCMAHAN, *KILLING IN WAR* 8 (2009); F. M. Kamm, *Self-Defense, Resistance, and Suicide*, in *HOW WE FIGHT: ETHICS IN WAR*, *supra* note 2, at 75, 81.

call a goal is served. Moreover, the good IV creates by instantiating this principle need not be a good *for her* or for anyone. We need not point to some person whose life has improved when we claim that a world in which good does not capitulate to evil is better than a world in which it does not. Somewhat more controversial is the issue of whether the exercise of futile force against WA creates value even if there is a *better* principle she might have instantiated.<sup>59</sup> Those who suspect acts of futile force are *not* justified might insist that IV should instead have furthered the competitive principle *good should not capitulate—or yield—to evil, but only when instrumental value is thereby produced*.<sup>60</sup> Whether this latter principle is indeed superior to its predecessor is one way to capture precisely what is at issue between those who affirm and those who deny that IV is justified to scratch WA. We are again left with intuitions about how the original case should be resolved, and I am aware of no non-question-begging consideration that can move the debate forward.

My formulation of the principle implemented—or realized or instantiated—when IV injures WA is *rough*. By that I mean my candidate is only an approximation of a more nuanced and refined version of the principle we should ultimately endorse. Although we accept some version of the principle that good should not capitulate to evil, that version does not entail IV using any amount of force, under any circumstances, against WA. Most importantly, the principle must be qualified by considerations of proportionality.<sup>61</sup> Because IV attains some amount of impersonal value by not yielding to evil does not entail that she is permitted, as George Fletcher once suggested, to treat WA as having no more moral significance than a fly.<sup>62</sup> But I will not try to identify the additional qualifications or refinements that must be made to the justificatory principle that IV implements when she scratches WA.<sup>63</sup> Any extended attempt to do so would need to establish a new reflective equilibrium with a further set of specific cases and general principles. My main contribution is not to articulate a polished version of this principle and to defend it against all challenges, but to suggest that the permissibility of the injury inflicted by IV on WA can be supported by reference to a deontological consideration, the implementation of which need not produce a personal value for anyone—and perhaps need not be conceptualized to produce a value at all.

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59. See, e.g., Kamm, *supra* note 58, at 79.

60. See MCMAHAN, *supra* note 58, at 9.

61. See Uniacke, *supra* note 2, at 63–64.

62. George P. Fletcher, *The Nature of Justification*, in ACTION AND VALUE IN CRIMINAL LAW 175, 183 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993).

63. I leave open the questions of how these proportionality constraints should be formulated and how they resemble or differ from those that apply to clear cases of self-defense.

I am not the first philosopher to suggest impersonal as well as personal values might be created when persons act in self-defense—futile or otherwise.<sup>64</sup> Jeff McMahan, for example, writes that “harms to which people are liable are bad not only for those who suffer them but also from an impersonal point of view.”<sup>65</sup> However, as this quotation suggests, the values McMahan considers in this context are impersonal *bads*.<sup>66</sup> To be sure, McMahan suggests that *deserved* harms are not impersonally bad.<sup>67</sup> The “harms to which people are liable . . . are never of merely neutral or positive impersonal value, unless of course they are harms that the victim also *deserves* to suffer.”<sup>68</sup> Thus treating a wrongdoer as he deserves does not create an impersonal bad, even if he deserves to be harmed. Why not? Many retributivists on punishment would answer that conformity with principles of desert creates an intrinsic *good*.<sup>69</sup> Many would allege WA *does* deserve the scratch IV is able to inflict—and a whole lot more that is beyond WA’s power.<sup>70</sup> But I hope not to resort to controversial claims about desert to make the case that impersonal value is created when IV scratches WA. That is, we should not suppose that no intrinsic good can be created when IV harms WA unless he deserves to be harmed; conformity with principles of desert need not be the *only* basis on which reasons can justify behavior and intrinsic goods may be created. Implementation of the principle *good should not capitulate—or yield—to evil* might also provide a justificatory reason and create an intrinsic impersonal value.<sup>71</sup> This value could be furthered even if we concede WA does not *deserve* the injury he suffers.

We might be unsure whether to accept the principle that good should not capitulate to evil, but it seems at least as powerful, probably even more

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64. See, e.g., Kamm, *supra* note 58. Frances Kamm suggests that killing in cases she describes as “mere resistance” is justifiable independently of its further useful consequences. *Id.*

65. McMAHAN, *supra* note 58, at 8.

66. See *id.* This interpretation is presupposed by Firth & Quong, *supra* note 30, at 691.

67. See McMAHAN, *supra* note 58, at 8.

68. *Id.*

69. See John Danaher, *Moore on Justifying Retributivism (Part One)*, PHIL. DISQUISITION (Sept. 7, 2011, 12:29 PM), [philosophicaldisquisitions.blogspot.com/2011/09/moore-on-justifying-retributivism-part.html](http://philosophicaldisquisitions.blogspot.com/2011/09/moore-on-justifying-retributivism-part.html) [<https://perma.cc/F9WU-9BYK>].

70. See DEP’T OF POLITICS & INT’L RELATIONS, OXFORD INST. FOR ETHICS, LAW & ARMED CONFLICT, JUSTIFYING PREVENTIVE HARM: RETRIBUTIVE AND DISTRIBUTIVE APPROACHES 1 (2017), [https://www.hf.uio.no/ifikk/english/research/projects/cl/events/conferences/elac-conference-2017\\_justifying-preventive-harm.pdf](https://www.hf.uio.no/ifikk/english/research/projects/cl/events/conferences/elac-conference-2017_justifying-preventive-harm.pdf) [<https://perma.cc/XC99-EH2Y>].

71. See RAYMUND SCHWAGER, *MUST THERE BE SCAPEGOATS? VIOLENCE AND REDEMPTION IN THE BIBLE* 175 (Maria L. Assad trans., 2d ed. 1987).

powerful, than the competitive principle that assesses permissible harming—absent desert—in consequentialist terms. Why should we be so quick to embrace the consequentialist demand that requires IV to further an objective or goal when so many of our actions are governed by deontological constraints that require us not to maximize good consequences?<sup>72</sup> Any number of deontological constraints—for example, the constraint against breaking a solemn deathbed promise—are amenable to a similar analysis.<sup>73</sup> Here, as in many other situations, the good created by conforming to a principle against promise-breaking is not easily represented instrumentally.<sup>74</sup> I contend this value is better depicted both non-consequentially as well as impersonally. I believe that yet another deontological constraint we should include in our moral inventory is that persons are permitted *not* to maximize good consequences when so doing involves a capitulation of good to evil.

My account has at least two advantages. First, if IV is permitted to injure WA because her scratch instantiates the principle that good should not capitulate to evil, it should be clear why our judgment in favor of her act does not permit what Helen Frowe calls “deferred harming.”<sup>75</sup> The injury is permitted only when IV is actually failing to capitulate to WA’s onslaught. If IV’s surviving spouse tracks down WA and wounds him the next day, after IV herself has been killed, some other principle, if any, would have to be produced to justify his act. Perhaps such a principle can be produced—such as the principle that WA deserves to be harmed—but it need not be identical to whatever principle allows IV to injure WA while the attack is ongoing. Second, I asked whether those who believe IV’s scratch is permissible because of a vindication of her honor would withdraw their permission if they learned that IV does not care one whit about her honor and is motivated instead by her revulsion of the villainous WA. As long as IV is aware WA is acting wrongly and thus does capitulate to him, I am tempted to say that she implements a justificatory principle when she inflicts a futile injury on him.<sup>76</sup>

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72. See Alexander & Moore, *supra* note 19.

73. Uwe Steinhoff, Book Review, KENNEDY INST. ETHICS J. (Oct. 20, 2015) (reviewing MATTHEW H. KRAMER, TORTURE AND MORAL INTEGRITY: A PHILOSOPHICAL ENQUIRY (2014)), <https://kiej.georgetown.edu/matthew-h-kramer-torture-and-moral-integrity-a-philosophical-enquiry-oxford-university-press-2014/> [<https://perma.cc/3BN4-5AGZ>].

74. See Allen Habib, *Promises*, STAN. ENCYCLOPEDIA PHIL. (Oct. 10, 2008), <https://plato.stanford.edu/entries/promises/#CriActUti> [<https://perma.cc/Z6NY-Y9CX>].

75. FROWE, *supra* note 10, at 108.

76. I doubt IV implements the justificatory principle I identify *whatever* her motivations may be; sheer sadism does not suffice to render her conduct permissible. Still, I leave open the difficult problem of specifying the exact content of the beliefs or motivations she must have to implement this principle.

If IV produces an impersonal value in scratching WA, we can concede, with McMahan, that the injury she causes to WA is also an intrinsic *disvalue*.<sup>77</sup> Admittedly, a world with more injury contains less personal value—*ceteris paribus*—than a world with less.<sup>78</sup> To that extent, it follows that the world in which IV injures WA includes less value than a world in which IV simply yields. Thus in one respect, the world in which WA is injured is worse. In another respect, however, this world is better. Although this admission may help to explain our ambivalence about what IV is permitted to do to WA, I see no deep paradox here. I do not allege that the injury inflicted on the villainous WA has a different valence than an injury inflicted on persons who lack culpability. I do not claim, in other words, that what is ordinarily and otherwise bad, that is, an injury, becomes good when inflicted on a wrongful aggressor such as WA. Such claims about a change in valence *might* be true, but I hope not to depend on them. Instead, I am perfectly willing to allow that IV's act of futile self-defense in my original case creates at least two values, one negative—the injury to WA—and the other positive—the implementation of the principle that good should not capitulate to evil. The first negative value is personal, whereas the second positive value is, at least partly, impersonal. When two values are created, one bad and the other good, we have little recourse except to balance and weigh them to decide whether more or less value is created all-things-considered.

If I am correct, we must determine whether the positive impersonal value created by conformity with the principle that good should not capitulate to evil outweighs the negative personal value caused by the injury. To make this decision, we would have to decide not only *whether* IV produces an impersonal value, but also *how much* impersonal good she produces. For all I know, the amount of this impersonal good is small or even infinitesimal. Moreover, even if we could quantify the amount of this impersonal good with tolerable precision, we would not have reached any significant insights into how impersonal goods are to be weighed against competing personal goods. I certainly have no formula that shows the positive impersonal value outweighing the negative personal value, so that the good of failing to capitulate to evil outweighs the bad of inflicting an injury. Those who share my initial intuition that the behavior of IV is permissible had better agree that whatever value she creates is greater than the disvalue she creates. But I see no way to prove the balancing comes

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77. See MCMAHAN, *supra* note 58, at 8.

78. See Asa Kasher, *The Principle of Distinction*, 6 J. MIL. ETHICS 152, 154 (2007).

out the way I favor. Competing values and reasons are notoriously hard to weigh,<sup>79</sup> and these difficulties are compounded when one of the competing values is impersonal and the other is personal. Philosophers try hard to construct examples in which *one* of many possible morally relevant factors is isolated, but few cases in the real world correspond to this stipulation.<sup>80</sup> When a particular example involves, for example, an allowing rather than a doing, *and* an instance of foresight rather than intention, *and* a party who bears some fault for the predicament, moral philosophers must give one principle priority over another if they hope to reach an all-things-considered judgment of what conduct is permissible.<sup>81</sup>

Other controversies share the conceptual framework I have constructed about futile self-defense. Consider familiar problems in justifying punishment.<sup>82</sup> Do justified punishments create more intrinsic value than disvalue? For whom is justified punishment good? Sometimes these difficult questions are made easier by alleging that what seems to be a clear instance of the intrinsic disvalue of punishment—namely, the suffering of those who are subjected to it—is no longer bad when suffering is *deserved*.<sup>83</sup> According to this train of thought, desert *cancel*s the badness of the suffering of those who deserve to be punished.<sup>84</sup> Although cancellation may be an acceptable part of a retributivist strategy to justify punishment, it is certainly not a *necessary* part of such a strategy.<sup>85</sup> It is not part of the strategy *I* am inclined to adopt. A retributivist can concede that the suffering inherent in punishment is not cancelled and remains bad, even when it is deserved, without conceding too much to his opponents. Although this suffering may be bad, it is not *as* bad as undeserved suffering; its badness is offset to some extent by the good that is attained by conformity with a principle of retributive justice.<sup>86</sup> Most importantly for present purposes, this good is best construed as impersonal; it need not be good *for* anyone. The impersonal value of retributive justice differentiates it from vengeance, which, if good at all, is presumably good

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79. See generally WEIGHING REASONS (Errol Lord & Barry Maguire eds., 2016) (discussing several alternatives to competing values and reasons).

80. See Henry S. Richardson, *Moral Reasoning*, STAN. ENCYCLOPEDIA PHIL. (Feb. 11, 2013), <https://plato.stanford.edu/entries/reasoning-moral/> [<https://perma.cc/XNA8-8DRZ>].

81. See Alida Liberman & Mark Schroeder, *Commitment: Worth the Weight*, in WEIGHING REASONS, *supra* note 79, at 104, 104.

82. As Michael Moore indicates, “punishing the guilty achieves something good—namely, justice.” MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 111 (1997).

83. See Feldman & Skow, *supra* note 19.

84. See, e.g., *Retributivism*, BLACK’S LAW DICTIONARY (10th ed. 2014).

85. See generally Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258 (2008).

86. *Id.* at 269–70.

for the person who inflicts it.<sup>87</sup> Admittedly, we would have to decide that the impersonal value of conforming to a principle of retributive justice is substantial if it is to outweigh the personal badness of the suffering of those who are punished. And we also may need to decide whether punishing the deserving creates more impersonal good than would be produced by conforming to a more refined principle—*punishing the deserving creates intrinsic value, but only when instrumental value is thereby produced*. As I have indicated, however, it is extraordinarily difficult to move beyond intuitions and decide which exact principle to accept or how to demonstrate that one intrinsic value is weightier than another—especially when one is personal and the other is not.<sup>88</sup>

However much weight we assign to the competing values in my original example, it should be clear this balance is affected when this case is modified in the following way. Suppose the injury IV is able to inflict is futile in its inability to prevent present or future aggression but is quite severe. Instead of merely scratching WA, IV succeeds in breaking both his arms and legs. As so revised, the personal disvalue suffered by WA is far greater than in my original example. Thus more of whatever impersonal good IV attains by not yielding to evil is needed to outweigh it. I have no clear idea whether there is a point at which futile injuries inflicted by IV on WA become too severe to be permissible. Perhaps this point is reached when *many* WAs threaten IV, and she can severely—but futilely—injure each of them. Numbers count in any judgment that requires balancing. In any event, my way of conceptualizing this example allows us to understand why such a point may well exist.

If WA may be injured, and IV is permitted to injure him, I suppose there must be some property or characteristic of WA in virtue of which this injury is permissible. This property or characteristic must allow the infliction of injury, even though it need not make the world a better place. Arguably, this property should be called *liability*: a property that persons come to acquire in virtue of their wrongful aggression. But it does not ultimately matter what this property is *called*; the point is that its possession allows WA to be harmed by IV even though no present or future harm will be

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87. See PHILOSOPHY OF LAW 685–86 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

88. To be clear, I do not allege that what IV does to WA *is* punishment. Instead, I allege only that the normative considerations governing punishment may share a similar conceptual structure to those involving futile self-defense. The permissibility of both may require the introduction of impersonal values.

averted. Many skeptics simply do not believe any such property can or does exist. Their ground for thinking otherwise is, *inter alia*, that any such property would allow harmful conduct that makes the world better for no one. They cannot seem to get their heads around the claim that any such property can exist. I have tried to appeal to impersonal values as a possible explanation of how such a property might exist when IV inflicts a futile injury on WA.

## VII. CONCLUSION

Most respondents initially report the intuition that an innocent victim may inflict an injury on a wrongful aggressor even when she is somehow certain that so doing will prevent wrongful aggression on neither the present nor a future occasion.<sup>89</sup> However, a few philosophers reluctantly abandon this sensible intuition.<sup>90</sup> They do so because they are unable to bring it into reflective equilibrium with a number of judgments they make about other specific cases or general principles. In particular, it is not easy to understand what good acts of futile self-defense might achieve. Further, harmful acts that achieve no good are difficult to justify because they seem to be unnecessary and therefore gratuitous.

The typical way to attempt to salvage the intuition that acts of futile self-defense can be permissible is to contend that they satisfy the necessity constraint by promoting a valuable goal or objective.<sup>91</sup> All previous such efforts, I believe, have contended that IV achieves a *personal* good—a good *for her*—when she inflicts a futile injury on WA. She might, for example, salvage her dignity or self-respect. I have suggested we need not suppose IV furthers an objective when she injures IV. All she needs is a reason that justifies her conduct, and conformity with at least some such justifying reasons need not further a goal or increase a value. More importantly, any value that *is* created by IV's conduct need not be personal. The question of when impersonal value is created and the problem of weighing it against the creation of a personal disvalue—namely, the injury to WA—to reach an all-things-considered judgment of permissibility, is clearly difficult. These matters invite question-begging; one simply reports the balancing comes out to vindicate the intuitive judgments favored by whoever purports to

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89. Steinhoff, for one, endorses this view. See Steinhoff, *supra* note 12, at 62.

90. See, e.g., Joshua Glasgow, *Ethics Discussions at PEA Soup: John Gardner and Francois Tanguay-Renaud's "Desert and Avoidability in Self-Defense" and Jeff McMahan's "Response," with Commentary by Victor Tadros*, PEA SOUP (Jan. 10, 2012, 5:26 PM), <http://peasoup.typepad.com/peasoup/2012/01/ethics-discussions-at-pea-soup-john-gardner-and-fran%C3%A7ois-tanguay-renauds-desert-and-avoidability-in-.html> [https://perma.cc/94Q3-G6GZ].

91. See, e.g., BOAZ SANGERO, SELF-DEFENCE IN CRIMINAL LAW 231–33 (2006).

weigh the competing considerations. The difficulty of these issues helps to explain why many questions about futile self-defense seem intractable.

